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U

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

MAY AND SEPTEMBER
TERMS, 1917

BY
U. G. WHITNEY
REPORTED

VOLUME 180

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1918

Copyright, 1918
By
STATE OF IOWA

JAN 23 1919

JUDGES OF THE SUPREME COURT.

FRANK R. GAYNOR, Chief Justice, Plymouth County.

*HORACE E. DEEMER, Montgomery County.

SCOTT M. LADD, O'Brien County.

SILAS M. WEAVER, Hardin County.

WILLIAM D. EVANS, Franklin County.

BYRON W. PRESTON, Mahaska County.

BENJAMIN I. SALINGER, Carroll County.

†TRUMAN S. STEVENS, Fremont County.

OFFICERS OF THE COURT.

H. M. HAVNER, *Attorney General*, Iowa County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

*Died Feb. 26, 1917.

†Appointed May 1, 1917, to fill the vacancy caused by the death of Horace E. Deemer.

JUDGES OF THE COURTS

during the time of these reports, from which appeals may be taken to the Supreme Court.

(NAMES ARRANGED IN ORDER OF SENIORITY OF SERVICE.)

DISTRICT COURTS.

- First District*, two judges—HENRY BANK, JR., Keokuk; WILLIAM S. HAMILTON, Ft. Madison.
- Second District*, four judges—* F. W. EICHELBERGER, Bloomfield; C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, two judges—HIRAM K. EVANS, Corydon; THOMAS L. MAXWELL, Creston.
- Fourth District*, three judges—† JOHN F. OLIVER, Onawa; † DAVID MOULD, Sioux City; GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Onawa (1915); W. G. SEARS, Sioux City (1916).
- Fifth District*, three judges—J. H. APFLEGATE, Guthrie Center; WILLIAM H. FAHEY (1911), Perry; LORIN N. HAYS (1911), Knoxville.
- Sixth District*, three judges—K. E. WILCOCKSON, Sigourney; JOHN F. TALBOTT, Brooklyn; HENRY SILWOLD, Newton.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport; † LAWRENCE J. HORAN, Muscatine.
- Eighth District*, one judge—RALPH P. HOWELL, Iowa City.
- Ninth District*, five judges—† HUGH BRENNAN, Des Moines; W. H. MC-HENRY, Des Moines; LAWRENCE DE GRAFF, Des Moines; CHARLES A. DUDLEY, Des Moines; WM. S. AYRES, Des Moines; HUBERT UTTERBACK, Des Moines.
- Tenth District*, three judges—† FRANKLIN C. PLATT, Waterloo; GEORGE W. DUNHAM, Manchester; CHAS. W. MULLAN, Waterloo; H. B. BOIES, Waterloo.
- Eleventh District*, three judges—R. M. WRIGHT, Ft. Dodge; † C. G. LEE, Ames; † C. E. ALBROOK, Eldora; H. E. FRY, Boone (1915); EDWARD M. MCCALL, Nevada (1915).
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—A. N. HOBSON, West Union; WILLIAM F. SPRINGER, New Hampton.
- Fourteenth District*, two judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville.
- Fifteenth District*, five judges—A. B. THORNELL, Sidney; ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic.
- Sixteenth District*, two judges—† FRANK M. POWERS, Carroll; M. E. HUTCHINSON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, three judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton.
- Nineteenth District*, two judges—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; W. D. BOIES, Sheldon.

SUPERIOR COURTS.

- Cedar Rapids*—CHARLES B. ROBBINS.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—PAUL G. NORRIS.
- Keokuk*—W. L. MCNAMARA.
- Oelwein*—JOHN R. BANE.
- Perry*—W. W. CARDELL.
- Shenandoah*—GEO. H. CASTLE.

* Died, Oct. 11, 1914.

† Retired, Dec. 31, 1914.

‡ Resigned, April 27, 1914.

TABLE OF CASES REPORTED IN THIS VOLUME

A

Ablson v. High Bridge Coal Co.	302
American Express Co., Rich- ter v.	1037
American Insurance Co., Magarrell v.	1015
Anderson v. Lemker.	167
Anderson v. Standard Oil Co.	1054
Anfenson v. Banks.	1066
Armstrong, Drees v.	29
Armstrong-McClenahan Co. v. Rhoads.	710
Ayres, Cooley v.	740

B

Babcock v. City of Des Moines	1120
Bahrenfuss, Higby v.	316
Bair, Ferrell & Co., Empire Cream Separator Co. v.	376
Banks, Anfenson v.	1066
Barnett, Model Laundry Co. v.	55
Bartemeier v. Central Na- tional Fire Insurance Co.	354
Beck v. Beck Coal & Mining Co.	1
Beck Coal & Mining Co., Beck v.	1
Belle Plaine, City of, Snyder v.	679

Berend, Steffen v.	127
Bishard v. Engelbeck.	1132
Board of Supervisors, Simp- son v.	1330
Bosworth, Coleman v.	975
Braden v. Hollen.	309
Brechwald v. Small.	22
Brickner, Drake v.	1166
Brotherhood of American Yeomen, Murray v.	626
Buchan v. German Ameri- can Land Co.	911
Buckley, Johnson v.	439
Burlingame v. Hardin Coun- ty	919
Burt, Dunning v.	754

C

Calhoun v. Robinson.	538
Campbell v. Davis.	314
Carlisle v. Sells-Floto Shows Co.	549
Carr & Brannon, Ingwersen v.	988
Carter v. City Council of City of Council Bluffs.	227
Case Threshing Machine Co., Kabrick v.	598
Cedar Rapids & Marion City R. Co. v. City of Cedar Rapids	567
Cedar Rapids National Bank v. Weber.	966

Central Credit Rating Agency, Codner v.....	188	Cabbage v. Standard Fire Insurance Co.....	192
Central National Fire Insurance Co., Bartemeler v...	354	D	
Chamberlin, State v.....	685		
Chaney v. Murphy.....	716	Daggy v. Miller.....	1146
Cherokee, City of, McCord v.	448	Dare v. Foy.....	1156
Chicago & Northwestern R. Co., Pierce v.....	1385	Davenport & Muscatine R. Co., Freidli v.....	387
Chicago, Burlington & Quincy R. Co., Erlsman v....	759	Davis, Campbell v.....	314
Chicago, Rock Island & Pacific R. Co., Rothert v...	328	Des Moines, City of, Babcock v.....	1120
Chidester v. Harlan.....	171	Des Moines City R. Co., Stutsman v.....	524
City Council of City of Council Bluffs, Carter v...	227	Des Moines Union R. Co., St. Joseph & Grand Island R. Co. v.....	1292
City of Belle Plaine, Snyder v.	679	Dobson v. City of Waterloo	199
City of Cedar Rapids, Cedar Rapids & Marion City R. Co. v.....	567	Drake v. Brickner.....	1166
City of Cherokee, McCord v.	448	Drees v. Armstrong.....	29
City of Des Moines, Babcock v.	1120	Duffy v. Hardy Auto Co...	745
City of Fort Dodge, Rose v.	331	Dunning v. Burt.....	754
City of Valley Junction v. McCurnin	510	E	
City of Waterloo, Dobson v.	199		
Clark, McCann v.....	274	Empire Cream Separator Co v. Bair, Ferrell & Co....	375
Clark, State v.....	477	Engelbeck, Bishard v.....	1132
Clark Brothers v. Watson..	721	Erickson v. Town of Manson	378
Clermont, Town Council of, Rafferty v.....	1391	Erlsman v. Chicago, Burlington & Quincy R. Co...	759
Codner v. Central Credit Rating Agency.....	188	Estate of Harlan, In re.....	171
Cohen v. Hayden.....	232	Estate of Hoyt, In re.....	1250
Coleman v. Bosworth.....	975	Estate of Meagher, In re...	264
Cooley v. Ayres.....	740	Ewert & Richter Express and Storage Co., Fuehr v.	518
Corn Belt Telephone Co. v. Superior Court of Oelwein	985	F	
Cotnam v. Massachusetts Mutual Life Insurance Co.	1141		
Council Bluffs, City Council of, Carter v.....	227	Farber, Hatcher v.....	1250
Courtright, Graham v.....	394	Farmers Loan & Trust Co., Martin v.....	859
		Fawley v. Sheldon.....	795
		Fidelity & Casualty Co., Hanley v.....	805
		Fish v. White.....	1176

Fontana v. Fort Dodge, Des
Moines & Southern R.
Co.1183
Fort Dodge, City of, Rose v. 331
Fort Dodge, Des Moines &
Southern R. Co., Fontana
v.1183
Foy, Dare v.1156
Francis v. Francis.1191
Franke v. Kelsheimer. 251
Freidli v. Davenport & Mus-
catine R. Co. 387
Fuehr v. Ewert & Richter
Express and Storage Co. 518

G

Gardner, Guilford v.1210
German American Land Co.,
Buchan v. 911
Gibbs, Wilson v. 491
Gludice, State v. 690
Glendy v. National Travelers
Benefit Association. 572
Glynn, Nolan v. 870
Graham v. Courtright. 394
Guilford v. Gardner.1210

H

Haddock v. Meagher. 264
Hanley v. Fidelity & Cas-
ualty Co. 805
Hardin County, Burlingame
v. 919
Hardy Auto Co., Duffy v. ... 745
Harlan, Chidester v. 171
Harlan, In re Estate of. 171
Harris, Waterloo, Cedar
Falls & Northern R. Co. v. 149
Hasek Brothers, Kopecky v. 45
Hatcher v. Farber.1250
Hatfield v. Iowa State Trav-
eling Men's Association.. 39
Hayden, Cohen v. 232
Hein v. Waterloo, Cedar
Falls & Northern R. Co.1225

Higby v. Bahrenfuss. 316
High Bridge Coal Co., Ahl-
son v. 302
Hill v. Victoria. 417
Hogan, Kille v.1263
Hollen, Braden v. 309
Honey Creek Drainage &
Levee District No. 6,
Wood v. 159
Hoopes & Sons v. F. H. Simp-
son Fruit Co. 823
Howe v. Sioux County. 580
Hoyt, In re Estate of.1250
Hume v. Independent School
District of Des Moines...1233
Hunt v. Iowa State Travel-
ing Men's Association... 434
Hutchins, Merrill v.1276

I

Independent School District
of Des Moines, Hume v. ...1233
Ingwersen v. Carr & Bran-
non 988
In re Estate of Harlan. 171
In re Estate of Hoyt.1250
In re Estate of Meagher. 264
Interstate Power Co., Toney
v.1362
Iowa State Traveling Men's
Association, Hatfield v. ... 39
Iowa State Traveling Men's
Association, Hunt v. 434
Iowa State Traveling Men's
Association, Matheson v. ...1019

J

Johnson v. Buckley. 439

K

Kabrick v. Case Threshing
Machine Co. 598
Kathmann, Lynch v. 607
Kelsheimer, Franke v. 251

Kick, Main v.....	50	Michaelson v. Schulke.....	201
Kile v. Hogan.....	1263	Miller, Daggy v.....	1146
Kopecky v. Hasek Brothers	45	Minneapolis & St. Louis R.	
Koppes v. Koppes.....	1268	Co., Taylor v.....	702
L		Minneapolis & St. Louis R.	
Laubscher, Walker v.....	1381	Co., Wood v.....	223
Leinbaugh, Peet v.....	937	Mitchell v. Mutch.....	1281
Lemker, Anderson v.....	167	Model Laundry Co. v. Bar-	
Liddle v. Salter.....	840	nett	55
Lines, Soesbe v.....	943	Monona, Town of, Northern	
Lomax v. Lomax.....	443	Light Lodge, No. 156, I.	
Lynch v. Kathmann.....	607	O. O. F. v.....	62
M		Mullins, Rolfs v.....	472
McCann v. Clark.....	274	Murphy v. Williamson.....	291
McCarthy, Snearly v.....	81	Murphy, Chaney v.....	716
McCord v. City of Cherokee	448	Murray v. Brotherhood of	
McCurnin, City of Valley		American Yeomen.....	626
Junction v.....	510	Mutch, Mitchell v.....	1281
McWilliams v. Robertson..	281	N	
Mable, Mehlisch v.....	450	National Travelers Benefit	
Magarrell v. American In-		Association, Glendy v....	572
surance Co.....	1015	National Travelers' Benefit	
Main v. Kick.....	50	Association, Semmons v...	666
Main v. Main.....	616	National Travelers Benefit	
Manning v. Meade.....	932	Association, Snyder v....	1344
Manson, Town of, Erickson		Nelson, Vandeventer v....	705
v.	378	Nolan v. Glynn.....	870
Marshall County, Payette v.	660	Northern Light Lodge, No.	
Martin v. Farmers Loan &		156, I. O. O. F., v. Town of	
Trust Co.....	859	Monona	62
Massachusetts Mutual Life		Northwestern Trading Co. v.	
Insurance Co., Cotnam v...	1141	Western Live Stock In-	
Matheson v. Iowa State		surance Co.....	878
Traveling Men's Associa-		O	
tion	1019	Ober v. Seegmiller.....	462
Meade, Manning v.....	932	Olsen, State v.....	97
Meagher, Haddock v.....	264	P	
Meagher, In re Estate of..	264	Parnham v. Weeks.....	649
Mehlisch v. Mable.....	450	Payette v. Marshall County	660
Merrill v. Hutchins.....	1276	Peet v. Leinbaugh.....	937
Meyer, State v.....	210	Peregoy & Moore Co., Peter-	
Meyers v. Wonick.....	286	son v.....	325

Peterson v. Perego & Moore Co.	325
Pierce v. Chicago & Northwestern R. Co.....	1385
Powers, State v.....	693

R

Rafferty v. Town Council of Clermont	1391
Raymond Young Men's Christian Association, Schmidt Brothers Construction Co. v.....	1306
Rhoads, Armstrong-McClenahan Co. v.....	710
Richter v. American Express Co.....	1037
Robertson, McWilliams v...	281
Robinson, Calhoun v.....	538
Rolfs v. Mullins.....	472
Rose v. City of Fort Dodge	331
Rothert v. Chicago, Rock Island & Pacific R. Co...	328

S

St. Joseph & Grand Island R. Co. v. Des Moines Union R. Co.	1292
Salter, Liddle v.....	840
Schmidt Brothers Construction Co. v. Raymond Young Men's Christian Association	1306
Schulke, Michaelson v.....	201
Schultz v. Starr.....	1319
Seegmiller, Ober v.....	462
Seegmiller, Solberg v.....	462
Sells-Floto Shows Co., Carlsale v.....	549
Semmons v. National Travelers' Benefit Association	666
Sheldon, Fawley v.....	795
Simpson v. Board of Supervisors	1330

F. H. Simpson Fruit Co., Hoopes & Sons v.....	833
Sioux County, Howe v.....	580
Small, Brechwald v.....	22
Snearly v. McCarthy.....	81
Snyder v. City of Belle Plaine	679
Snyder v. National Travelers Benefit Association..	1344
Soesbe v. Lines.....	943
Solberg v. Seegmiller.....	462
Standard Fire Insurance Co., Cubbage v.....	192
Standard Oil Co., Anderson v.	1054
Starr, Schultz v.....	1319
State v. Chamberlin.....	685
State v. Clark.....	477
State v. Gludice.....	690
State v. Meyer.....	210
State v. Olsen.....	97
State v. Powers	693
State v. Towne.....	339
State v. Wegener.....	102
State ex rel. Woodbury County Anti-Saloon League v. Talbott.....	220
Steffen v. Berend.....	127
Stewart, Wykoff v.....	949
Stutsman v. Des Moines City R. Co.....	524
Superior Court of Oelwein, Corn Belt Telephone Co. v.	985

T

Talbott, State ex rel. Woodbury County Anti-Saloon League v.....	220
Taylor v. Minneapolis & St. Louis R. Co.....	702
Tewksbury v. Title Guaranty & Surety Co.....	1350
Title Guaranty & Surety Co., Tewksbury v.....	1350
Toney v. Interstate Power Co.	1362

Town Council of Clermont,
 Rafferty v.....1391
 Town of Manson, Erickson v. 378
 Town of Monona, Northern
 Light Lodge, No. 156, I.
 O. O. F., v..... 62
 Towne, State v..... 339

V

Valley Junction, City of, v.
 McCurnin 510
 Vandeventer v. Nelson..... 705
 Victora v. Victora..... 417
 Victora, Hill v..... 417
 Voris v. West..... 138

W

Walker v. Laubscher.....1381
 Waterloo, Cedar Falls &
 Northern R. Co. v. Harris 149

Waterloo, Cedar Falls &
 Northern R. Co., Hein v...1225
 Waterloo, City of, Dobson v. 199
 Watrous v. Watrous..... 884
 Watson, Clark Brothers v... 721
 Weber, Cedar Rapids Na-
 tional Bank v..... 966
 Weeks, Parnham v..... 649
 Wegener, State v..... 102
 West, Voris v..... 138
 Western Live Stock Insur-
 ance Co., Northwestern
 Trading Co. v..... 878
 White, Fish v.....1176
 Williamson, Murphy v..... 291
 Wilson v. Gibbs..... 491
 Wonick, Meyers v..... 286
 Wood v. Honey Creek Drain-
 age & Levee District No. 6 159
 Wood v. Minneapolis & St.
 Louis R. Co..... 223
 Wykoff v. Stewart..... 949

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, MAY AND SEPTEMBER TERMS, 1917
AND IN THE SEVENTY-FIRST YEAR OF THE STATE

W. A. BECK, Appellee, v. BECK COAL & MINING COMPANY,
Appellant.

NEGLIGENCE: Proximate Cause—Prior Interrupted Cause—Jury

1 **Question.** Proximate cause of an injury is that cause which is the *nearest, most direct, and immediate* cause, and as to which it may be said that, had such cause not occurred, the injury would not have happened. And such question is ordinarily for the jury.

PRINCIPLE APPLIED: An electric mining machine had a cutter bar several feet long, and around the outer edge thereof ran a chain fitted with cutting teeth. This bar, in cutting its way back under the vein of coal, was guided by an 8-foot, movable, 75-pound angle iron, with 4-inch flanges. After cutting its way back and under the coal, it was so adjusted that it cut laterally. In commencing work, if the teeth were in con-

tact with the coal, it was necessary to "clear" them, in order to secure sufficient speed for the machine. To so clear them, the customary way was to gently start the machine and to almost immediately stop it. In so doing, the teeth would strike the projecting coal and "kick back" the machine. In this operation, the angle iron guide was of no use, but was *immediately* put in position to guide the cutting bar after the "kick-back" was accomplished. Being now ready for cutting, the current was applied by a controller operated on a quadrant having 8 points of contact, the first being neutral and the others, in numerical order, furnishing increasing quantities of current. The jury could have found that the second, third, and fourth points of contact were, to the knowledge of defendant, out of repair; that points 2 and 3 furnished no current, and that point 4 was sunken, partly burned out, and caused the controller to stick. If the contacts worked properly, the machine could be made to move a few inches only. Plaintiff had asked for repairs, but had been told to use the machine anyway. Plaintiff, in "clearing" the teeth, might have set the angle iron guide aside, but he placed it under the wheel along the side of the machine and along the side of the cutter bar. It did not appear whether so placing it was ordinarily dangerous, and, if so, whether plaintiff knew it was dangerous when so placed. Testimony tended to show that the placing of the angle iron guide alongside the machine *before* or *after* the teeth were cleared depended on the condition at the face of the coal. He then moved the controller over contact points 1 and 2 (because they furnished no current), and to point 4. Instantly the machine started with great speed, the controller stuck, thereby preventing the immediate cutting off of the current, and instead of kicking back, it swung to the side and *hit the angle bar guide* and hurled it against plaintiff's ankle, with consequent injury. Action for damages followed.

Plaintiff claimed that the proximate cause of his injury was the defective controller.

Defendant claimed that the proximate cause of the injury was plaintiff's negligent and unnecessary act in placing the angle iron guide along the side of and near the machine.

Held, the record presented a jury question as to the proximate cause, and that the jury was justified in finding in accordance with plaintiff's contention.

MASTER AND SERVANT: Contributory Negligence—Working Ac-
2 **cording to Direction of Master.** It requires a very clear case of danger so imminent or so great that the court will say, as a matter of law, that the servant is chargeable with contributory negligence in operating an instrumentality which he knows is out of repair, when the master, after learning of its defective condition, directs the servant to continue its use.

PRINCIPLE APPLIED: See No. 1.

MASTER AND SERVANT: Contributory Negligence—Evidence—
3 **Custom.** The particular manner in which servants, *other than plaintiff*, did a certain thing, may be admissible, not to bind the master to a negligent custom, but as bearing solely on the question whether the injured servant was guilty of contributory negligence.

MASTER AND SERVANT: Tools, Machinery, Etc.—Defective Con-
4 **dition—Negligence—Evidence of Repairs Subsequent to Injury.** A master who contends that an instrumentality was in good repair before, at the time of, and after, an accident, thereby voluntarily creating an issue as to its condition after the accident, may not complain (a) that the injured servant, for the sole purpose of showing the actual condition at the time of the accident, and *not* for the purpose of showing negligence, was permitted to counter with testimony that the master repaired the said instrumentality on the day following the accident; and (b) that the court specifically instructed the jury to consider such testimony for said purpose of determining the condition of such instrumentality at the time of the accident.

Appeal from Polk District Court.—LAWRENCE DEGRAFF,
Judge.

TUESDAY, MAY 22, 1917.

THIS is an action for damages for personal injuries. There was a trial to a jury, resulting in a verdict and judgment for plaintiff, and the defendant appeals.—*Affirmed.*

Stipp, Perry, Bannister & Starzinger, for appellant.
C. C. Putnam, for appellee.

PLATE II

Sullivan Ironclad Electric Chain Machine, Class "CE-7," Making First or Sumping Out

- | | | | | | | |
|--------------------|----------|----------------|----------------------|---------------------|---------------------|-----------------|
| 2. Reversing Lever | 8. Latch | 10. Latch | 19. Controller Lever | 24. Adjustable Jack | 40. Adjusting Screw | 67. Sumping Bar |
| 7. Short Cable | 9. Pin | 11. Feed Chain | 20. Jack Pipe | 29. Front Sheave | 66. Cap Screws | 68. Grab Hook |

1. NEGLIGENCE: pictures of the electric mining machine
proximate cause: prior which was being operated by plaintiff in
interrupted cause: jury defendant's mine at the time he was hurt,
question. were introduced in evidence and are con-

tained in the abstract. We have selected this one as giving a better idea of the machine than the others.

The machine weighs about three tons. The sumping bar, or angle iron, appears at figure 67 in the cut, and is 8 feet long, with flanges about 4 inches high. It weighs 75 pounds. Its function is to guide the wagon-tongue-looking arrangement in the cut, called the cutter bar. The controller, which it is alleged was out of repair, is shown in the cut under 19. The machine as shown in the cut is in position for sumping. Plaintiff was about to start sumping when he was injured. The cutter bar on the machine is 5½ feet long and 14 inches wide, with a rounded end; around its periphery revolved a continuous cutter chain, to the links or lugs of which were fastened bits or teeth, set at different angles, somewhat like the teeth of a saw. The bits or teeth are about 5 or 6 inches apart. Sumping is driving the cutter bar under the coal, and after that, the cutter bar and saw are run across the room under the coal. It is not necessary to use the sumping bar until the cutter bits are freed from contact with the coal, so that the saw or teeth may get up speed to cut. As soon as this is done, the operator is ready to use the sumping bar and start the machine; then the sumping bar is anchored by jack pipes. At the time plaintiff was hurt, the sumping bar was not anchored with the jack pipes, but appellee contends that it was anchored to some extent by being placed under the wheel, and by its own weight. The machine was operated by means of a hand controller, which was moved back and forth across a quadrant, on which were eight contacts, the first of which was mechanically

dead and used as a slide, but the remaining seven, when the machine was in working condition, transmitted electric current or power. Each of the successive live contacts transmitted more power than the one preceding it; and when the controller was moved over a live contact, the machine would be set in motion and the cutter chain would revolve, the velocity of the movement of the chain depending upon the point of contact upon which the controller would rest.

It is alleged by plaintiff that the contacts 2 and 3 had become defective and would not transmit power, and that contact 4, while alive, was worn down below the level of the others, partly burned out, out of repair and in a defective condition; that defendant had knowledge of this; that, because of the said defective conditions on the day plaintiff was hurt, the controller stuck at the fourth contact so that plaintiff was not able instantly to turn off the power and stop the machine, in consequence of which the cutter bit chain, revolving at high velocity, came in contact with the sumping bar and hurled the same against plaintiff's right ankle, producing the injuries complained of. The testimony, or some of it, in regard to the defect in the fourth contact, is that there was a depression in the fourth contact; that it was lower than the other contacts, and, as one witness puts it:

"When you pushed the controller from the position in which there was no power to the fourth contact, that part of the controller which was operated by the spring pushing down slid over the two prior contacts before it reached the fourth contact, which was lower; the controller would slip into the little hole on the fourth contact."

Defendant answered in general denial, and averred that the injuries complained of were due to plaintiff's own negligence. Appellant's claim is that the proximate cause

of the accident was the negligence of plaintiff in placing the loose sumping bar near the cutter bar and then starting the machine.

The principal grounds relied upon by appellant for a reversal are the alleged contributory negligence of plaintiff, and the claim that the alleged negligence of defendant was not the proximate cause of the injury. Other errors assigned relate to rulings of the court on admission of evidence. The first two propositions were raised by appellant in different ways in the trial court, by motion, offered instructions and exceptions to instructions given.

It will be necessary to set out a little more fully the testimony bearing upon these questions, which we will now do as briefly as may be. The plaintiff testified that, as he placed the sumping bar under the wheel at the side of the machine, there would be about an inch between the sumping bar and the bed of the machine, and a space between the sumping bar and the bits on the bit chain of about 6 inches. The sumping bar was placed in the position it was in just before plaintiff started to clear the bits and kick the machine back. As stated, before starting to sump-in, it was necessary to set the machine and clear the bits; clearing the bits was done by setting the machine close enough to the coal so that the forward end of the cutter bar would be against or nearly against the coal, the face of which is often left uneven. The operator would then kick back the machine until the bits on the chain at the end of the cutter bar cleared the coal. This kicking back would be done by turning the controller on the first live contact and quickly off again, so that the bit chain would revolve just enough for the bits to strike any protruding coal surface and kick the machine back far enough for the bits to clear. The bits stick out about an inch and a half, and, being cleared one at a time, the kick-back is slight.

Appellant places great stress upon the fact that plain-

tiff did kick the machine back, and that he knew about that before he put the sumping bar at the side of the machine, and the argument is that this should defeat the plaintiff on the two questions before referred to, of contributory negligence and proximate cause. What we have just said is perhaps out of order a little at this point, but we think it not improper to say now that counsel for appellant do not distinguish the kick-back of the machine from its swinging out of position sideways. The kick-back is accomplished with a small amount of power applied and quickly taken off, while the swinging sideways with the machine, which plaintiff claimed and the jury found must have been the cause of plaintiff's injury, by hurling the sumping bar against his ankle, was caused by the power's being too great, or because it was left on too long. Indeed, no witness testifies directly that it was the sumping bar that struck plaintiff's foot. Of course, it was dark in the mine and those present had small lamps, and no one claims to have seen the sumping bar strike the plaintiff; but, as some of them put it, there was nothing else that could have done it, and in argument by both parties, it seems to be conceded that the sumping bar's being thrown against plaintiff's leg is what caused the injury. As soon as the power was turned on, the testimony shows that the accident happened very quickly. It is shown by the testimony that plaintiff tried to stop the machine, and that it was not instantly responsive. Plaintiff says he had to shove it over and get it started back before it would go back. Under the testimony, the bits did not clear the coal, and when it was started, the bits striking the coal caused the machine to swing to the side, striking the sumping bar. Clearing the bits by kicking the machine back in the manner indicated was the usual method, as testified to by witnesses on both sides. While the machine was a powerful one, under the testimony,

the operator could control it so long as he could get the power on and off quickly; but appellee's contention is that, if the power was left on too long, or was too great, and the bits were meeting resistance with the coal, while the bit chain was revolving with too great power, the machine would bounce and swing and shift positions, and thus endanger the safety of the operator, so that it seems to us that the condition of the contacts and the controller was important to the safety of the operator.

As before stated, there is testimony from which the jury could have found, although there was a conflict at this point, that the first three contacts were, for several days prior to the accident, out of repair and dead, and that the fourth contact was alive, but worn down as heretofore described, partly burned out and out of repair. There is evidence from which the jury could have found that this condition was known to the defendant, and that plaintiff had requested defendant to repair the controller and the contacts. Plaintiff had used the machine a few days before, but in the meantime had used another machine.

The defendant vigorously denies the alleged defects in the machine, but says that, assuming that they did exist, they were known to the plaintiff. On Monday before the accident which occurred on Thursday, plaintiff was using the same machine, and left it in the entry Monday evening and reported it to be repaired. He says he didn't know exactly what was the matter, but he reported general trouble with the controller. He used machine No. 1 the next morning. At noon Tuesday, he commenced again using machine No. 3, the one he was using when hurt. He says he was told by the machine boss to get it, and says he found it had been worked upon in respect to being repaired; that somebody had been working on the machine. He then took the machine and moved it to the place where he was

told to go, and this is the machine that he was afterward injured upon. He says that Tuesday noon, after he had taken machine No. 3, he found the contacts in practically the same condition he left them in before; that the first three contacts did not transmit any power to the controller; that the fourth contact was alive; and plaintiff testifies that, after he discovered that the contact was still dead, he sent the helper out to find the machine boss; he also had other trouble with the machine; the helper reported that the machine boss would be there after a while, but he did not come to repair the machine that day; that they brought some tools to fix an oil cup. Plaintiff says he used this machine, then, Tuesday afternoon, Wednesday and a part of Thursday, but that, during this time after Tuesday noon, though he noticed that the contacts were practically in the same condition, he did not have any trouble with the controller's sticking upon the fourth contact; says he sumped with it on Wednesday two or three times, and had no trouble with the controller's sticking on any of the contacts on Wednesday; that he sumped once on Thursday morning before dinner and had no trouble with the machine then; that there was nothing that stuck at that time; that he was hurt about 2:30 in the afternoon of Thursday; that, after dinner Thursday, he moved the machine to the room in which he was injured, and on the way down he met the mine foreman, and, as he then found the controller sticking on the fourth contact for the first time, he called the foreman's attention to it, and the foreman took the machine himself and ran it and admitted that it was sticking, but told plaintiff to go ahead and commence cutting with the machine. It should have been said that there is testimony that, if the operator puts the controller on and off quickly enough, there would be no movement of the chain,

and that, if it is left on longer on the first contact that is alive, or the first contact which should be alive, the operator can regulate about how far it will move these bits. One witness says that you can put the power on and it will not move more than 6 inches, and, as stated, the bits are 5 or 6 inches apart. Another witness testifies that, if the machine is in ordinary good working order, you could move the controller on the first contact and then off in such a manner without resistance as to move these bits only 1, 2, 3, 4, 5 or 6 inches, and stop. One witness says that he usually put the sumping bar on top of the machine, but admits that, if the machine jumped to a great extent, it would throw the bar off; and one witness testifies that it was dangerous to place the sumping bar alongside the machine.

It is appellee's contention that, under these circumstances, and in view of the plaintiff's previous experience with the machine, he had reason to believe that, though it was out of repair, he could do the work with it the same as he had before, and that the danger was not imminent.

We have not gone into the testimony as fully as have counsel in the argument, but we think the main facts have been stated substantially in accordance with the testimony,—at least plaintiff's testimony. As said, there was a conflict at some points, but this, of course, was for the determination of the jury.

It is contended by appellant that the nonexistence of a legal connection between the negligence and the injury is predicable whenever, for aught that appears, the accident might have happened even if the defects in question had not existed, or if the precautions which were omitted had been taken; and that the question is whether it was a cause such that, had it not existed, the injury would not have taken place (citing cases); and, as stated, the theory is that, because the sumping bar was placed as it was by

plaintiff, and there was more or less kick-back in starting the machine, the injury would have happened whether the machine was defective as alleged or not. But, under the evidence and the record which we have referred to, the jury could have found that the defect in the controller, because of which the plaintiff was not able to turn the power off quickly enough, was the cause of throwing the machine sideways, as well as back, and against the sumping bar.

Whether a defect is the proximate cause of an injury is ordinarily a question for the jury, and we conclude that, under the record in this case, it was a question for the jury whether the accident would have happened if plaintiff could have used the first live contact, and it was a question for the jury to determine whether the accident would have happened with the controller even on the fourth contact, if plaintiff could have gotten the power off quickly enough. The testimony shows, as before stated, that, by using proper care to start the machine on the second contact, the chain would be made to move but a few inches, and this could be done if the fourth contact was used, had plaintiff been able to get the power off quickly enough. There is another suggestion in regard to the placing of the sumping bar under the wheel before starting to clear the bits: when it was not used for that purpose, it should be borne in mind that it was to be used immediately after the machine was started. All these were circumstances to be considered by the jury. Many cases are cited by both parties upon the question of proximate cause, but we think there is nothing unusual in the facts or circumstances in the case requiring a review of the many cases on proximate cause.

It is contended by appellee that the sumping bar was not the cause: it was a condition of the accident, an instrumentality and agency within the danger zone of the moving cause; and that the test of defendant's liability, as

a matter of law for the court, is to be found in the probable injurious consequences which were to be reasonably anticipated in creating the danger zone, and not in the subsequent events or agencies which might arise to bring such consequences about; and, to the proposition that the proximate cause is the efficient cause, they cite 4 Thompson on Negligence, Secs. 4752 to 4754. They rely on some of our own cases, one of which (*Miller v. Cedar Rapids Sash & Door Co.*, 153 Iowa 735) contains elements of the case at bar, to wit, the alleged contributory negligence of plaintiff, custom, proximate cause, etc. In the *Miller* case the court said:

"It is clear from this recital that the issue was for the jury, and that it might have found, either that moving the lever with the foot, in the contingency in which plaintiff acted when injured, was the usual method, or such as defendant reasonably should have anticipated in guarding the machine. * * * Of course, if the foot had not slipped, the guard would not have fallen off; nor would this have happened had plaintiff moved the lever by hand, instead of attempting to do so with his foot. The slipping of the foot, like the attempt to move the lever with it, however, was the bringing of that portion of the plaintiff's body within the danger zone of defendant's negligence, and could not have intervened between its continuing negligence in operating the belt without a proper guard and the plaintiff's hurt when brought in contact therewith. In other words, the slipping of the foot and consequent pushing of the guard, even though the proximate cause, did not intervene between the negligent operation of the belt and the injury, but, at most, was concurrent therewith, and this would not obviate defendant's liability" (citing *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445; *Walrod v. Webster County*, 110 Iowa 349, and other cases).

See, also, *Balzer v. Warring*, (Ind.) 95 N. E. 257.

It is not shown that plaintiff had knowledge that it

was dangerous to place the sumping bar in the place he did, if it was dangerous, and it was for the jury to say whether, in view of his past experience in so placing it, and in view of the physical facts themselves as to the manner of placing it, and the weight of it, he had reason to believe it was an improper thing to do. As bearing upon this, appellee cites *Plantz v. Kreutzer & Wasem*, 175 Iowa 562; appellant cites *Newman v. Chicago, M. & St. P. R. Co.*, 80 Iowa 672, and like cases. In the *Newman* case, it was held that, although the engineer was negligent in kicking back the cars, when plaintiff, who was familiar with the switches, sidetracks, etc., and had himself set the other cars so close to the adjoining tracks as that there was not room for his body between the moving and the standing cars, took his position in the side of the cars to go by those he had placed too close, he was charged with knowledge that there was not room to pass.

2. MASTER AND SERVANT: contributory negligence: working according to direction of master.

2. We think, too, under the evidence which we have set out, and which will not be repeated at this point, that it was for the jury to say whether plaintiff was guilty of contributory negligence. Much of appellant's argument at this point is that plaintiff

knew the danger he was in, and chose an unsafe method.

Appellee cites a case from Missouri, and says it is the only case where this kind of a machine has been involved, wherein it was said:

"The operator could tell by the hum of the motor the character of the resistance opposed to the cutter and by moving a lever which controlled the power could stop the machine instantly. * * * *Bradley v. Northern Cent. Coal Co.*, (Mo.) 151 S. W. 180.

"There is a vital difference between knowledge of the extent and character of a danger and knowledge of a defect in which lurks a danger, the extent or imminence of

which is not discoverable to the servant by the reasonable use of the opportunities his situation affords."

Ordinarily, of course, as we have said many times, the question as to whether an injured person is guilty of contributory negligence is a question for the jury, and in this case, the fact that plaintiff's work with the machine in question was to some extent dangerous, and so known to plaintiff, does not necessarily charge plaintiff with negligence in trying to perform his duties with it. The plaintiff had informed his superiors of the condition of the machine, and they had directed him to do this work in the manner in which he was doing it, so far as the controller is concerned. This court said, in *Steburg v. Vincent Clay Products Co.*, 173 Iowa 248, 260:

"It requires a very clear case of danger so imminent or so great that the court will say, as a matter of law, that the servant is chargeable with contributory negligence in doing his work according to the order or instructions of his employer."

And so, in the instant case, it is our conclusion, without further discussion of the evidence or the authorities, that it was a question for the jury. See, also, *Murray v. Swanwood Coal Co.*, 159 Iowa 1, 7.

3. It is next contended by appellant that the court erred in permitting the witness Thomas Beck to testify as to an alleged custom of placing the sumping bar near the cutter bar before clearing the cutter bits, and erred in not withdrawing said testimony from the jury, as requested by defendant. The contention is, and authorities are cited in support of the proposition (among them *Contri v. Hollingsworth Coal Co.*, 143 Iowa 115, 119, 120; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357), that the doing of a dangerous and needless act by other persons cannot make the act right. The testimony is substantially this:

3. MASTER AND
SERVANT: CON-
tributory negli-
gence: evi-
dence. custom.

"Q. State whether or not, at the time of this accident and prior thereto, it was the custom or usage, in getting ready to sump, to place the sumping bar under the wheel on the machine, and then see whether or not the bits would clear, and then afterwards, when the bits had cleared, to place the jack pipes in position for sumping."

The objection was, among others, that a negligent custom would not excuse an act of negligence. The court said:

"First, was there any custom at all in the use of this sumping bar as to its use when this preliminary test was being made? Was there any custom or use regarding the sumping bar? A. Each runner had his own way sometimes. (Same objection.) Court: The answer may stand. Court: How much observation have you made of the operation of this machine in the hands of others? A. I have worked with nearly all the men down there. You get ideas, pick up ideas from them, and you give them your own ideas, and in this way one person might sump the machine in one way and another person might sump it in another, but practically in all ways the setting of the machine is the same, pull it off the trucks over to the corner, square your machine, get ready to sump, clear your bits and start with the sumping cut."

Counsel for plaintiff then renewed the former question as to what was the usual and customary way of getting ready to sump with respect to placing the sumping bar under the wheel, and over objection, witness said:

"A. In getting the machine ready to sump, pull it off the trucks up to the face of the coal and to the corner of the room and square your machine around and sometimes it is necessary to kick your machine back with the bits before you put the sumping bar down; *other times you*

put the sumping bar down and kick her back; clear the machine and get ready to sump; set your jacks."

Defendant moved to strike out the part of the answer in *Italic*, and thereupon, counsel for plaintiff stated, in resistance to the motion, that the question is asked for the purpose of showing plaintiff's freedom from contributory negligence, and that he was in the exercise of ordinary care for his own safety. The trial court, in ruling, was of the opinion that the testimony did not show custom or usage, because each man handled the machine in his own way; and overruled the motion. It is not contended by appellant here, as we understand it, that the testimony did not in fact establish the existence of a negligent custom, but that the evidence was prejudicial, and that it should have been stricken or withdrawn under appellant's offered instruction. There is other testimony on the question as to how the work was usually done. There is testimony that whether the machine is kicked back with the bits before the sumping bar is down, or whether they put the sumping bar down and then kick her back, as before set out, depends upon the condition at the face of the coal; and there is evidence that the character of the coal, whether hard or otherwise, would have something to do with the extent of the kick-back. This is undisputed, and we do not discover any evidence that the condition of the coal did not demand or permit it to be done in the manner employed by plaintiff. The foreman, although denying the custom, said that the sumping bar is generally set aside until they get ready to sump, and there is other evidence bearing on this. But taking the record together, we think there was no prejudicial error against the defendant. The evidence tended to show the usual way, under certain circumstances, of handling the sumping bar, and was offered for the purpose of showing that plaintiff was not guilty of negligence in adopting the particular course he did in performing his duty. Plaintiff

testifies that neither the foreman nor machine boss had given him any instructions as to the operation of the machine. There is some evidence that he was instructed by another person, and plaintiff sought to show by this person that he was getting ready to sump in the way he had been taught; but because of the form of the question, an objection was sustained. It does not appear from the record that we are able to find that, from the only instruction plaintiff did receive, he was not doing it in the same manner in which he had been instructed. Appellant cites again *Miller v. Cedar Rapids Sash & Door Co.*, 153 Iowa 742, a part of which we have before quoted and will not now repeat. In *Cashman v. Du Pont de Nemours Powder Co.*, 169 Iowa 306, the question was as to whether plaintiff was doing his work in the customary way under instruction from the foreman, and it was held that it was a question for the jury whether plaintiff was using reasonable care, himself. In the instant case, the evidence was offered, not for the purpose of proving a binding custom upon defendant, but to show that plaintiff was not guilty of negligence in adopting the particular course he did in performing his duty. In the absence of express direction or rule prescribing the particular course he should pursue under the circumstances, he was required to choose between the two courses, and if, in making that choice, he adopted the course usually followed under similar circumstances, the fact would have an important bearing upon the question whether he exercised due care in making the choice. This is not the exact language, but the substance of it, used by this court in *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa 150. See, also, *Pierson v. Chicago & N. W. R. Co.*, 127 Iowa 18, 23; *Branz v. Omaha & C. B. R. & B. Co.*, 120 Iowa 406; 2 Bailey on Personal Injuries, Sec. 480.

We think there was no error at this point.

4. **MASTER AND SERVANT: tools, machinery, etc.: defective condition: negligence.**

4. Finally, it is contended that the court erred in permitting witness Campbell to testify as to subsequent repairs, and in regard to this, complaint is made of Instruction No. 9, as well as of the ruling on the objection to the testimony. A number of authorities are cited by appellant.

Taking the whole record, we think the evidence was properly admitted. As before stated, the testimony of appellant was emphatic on the important issue as to whether in fact the contacts were defective at all, and in defendant's testimony, they go beyond the point of proving that the contacts were in good repair at the time of the accident, and attempt to show that the contacts were in good repair after the accident. Counsel for both sides quote from the testimony at some length, but we shall set out only enough to show the situation in a general way. Plaintiff testified that the contacts were out of repair and were defective, and he was in a position to know. He testifies that he had the lid off. Before any questions had been asked or any evidence offered of subsequent repairs, the defendant's machine boss testified:

"The first two live contacts were working in first class shape, were in reasonably good condition and needed no repair."

He says also that the second contact did transmit power, and that the third contact transmitted power, and says that he started the machine on the second contact that afternoon, also on the third and fourth, and he denies that plaintiff ever complained to him that the contacts were defective. The mine foreman testifies that the machine operated all right after plaintiff was hurt; that he observed it that afternoon and the next day working, and that nothing had been done to it; that the contacts were all right—they would transmit power; that the second, third and

fourth contacts were all transmitting power, and that the second and third contacts worked after the accident; says that he knows the second and third points of contact on the machine worked after the accident; that it cut all that day and all the next day. True, as claimed by appellant, this witness Campbell testified that a controller brush and some contacts were replaced and the slate part was taken out the day following the accident to plaintiff, and he testifies that he didn't observe the contacts which were taken off, didn't pay much attention to them.

Appellee's contention is that this evidence was admissible to prove the actual condition of the contacts at the time of the injury, and as a matter of rebuttal and contradiction of defendant's witnesses. The record shows that this testimony was offered for the one purpose of showing the actual condition of the defects at the time of the injury, and not for the purpose of showing negligence. Counsel for plaintiff so stated in open court. It is quite clear to us that there is no error at this point, and we shall not take the time to discuss the question at length, but cite the following authorities as bearing upon the point: *Scagel v. Chicago, M. & St. P. R. Co.*, 83 Iowa 380; *Parker v. City of Ottumwa*, 113 Iowa 649; *State v. Helm*, 97 Iowa 378.

The instruction complained of is quite broad, and covers more than a page and a half of the printed abstract. It starts out:

"It is for you to determine, under all the facts and circumstances as disclosed by the evidence in this case, whether the defendant company was negligent as charged by the plaintiff; that is, in failing to provide reasonably safe appliances and instrumentalities with which to work. The specific negligence alleged by the plaintiff against the defendant company is, first, that the defendant company failed to exercise ordinary care to keep certain contacts alive with electric current, and, second, that the defendant

company did not exercise ordinary care to keep the fourth contact on said machine in reasonable repair and in a safe condition."

And then the instruction goes on in the last paragraph and states:

"Whether or not at and immediately after the accident in question the electric machine was repaired."

This, it seems to us, was proper to consider, under Paragraph 2 just referred to, for the purpose of ascertaining whether defendant did keep the contacts alive. Then the instruction goes on:

"And all other facts and circumstances shown upon the trial establishing or tending to establish the actual condition of the appliances and instrumentalities in question."

The instruction, of course, must be considered in the light of the record and the testimony, and we think that it shows that the evidence was not offered for the purpose of showing negligence, but the actual condition of the appliances at the time of the injury. Appellant offered no instruction on this subject as to the alleged subsequent repairs. Appellant makes the further point that the instruction submits two specifications of negligence, neither of which was the proximate cause of the injury; but this has been referred to before. By Instruction No. 5, the court instructed in regard to the question of proximate cause and contributory negligence. As we understand it, no complaint is made of this instruction, but it is thought by appellant that the verdict is contrary thereto. We think what has been said before disposes of this question.

There may be other incidental matters, but those decided are controlling. It is our conclusion that there is no prejudicial error, and the judgment is therefore—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

A. P. BRECHWALD, Appellant, v. R. W. SMALL et al., Appellees.

FRAUD: Liability for Fraud—Reliance on Representations—Necessity. One may not rescind a contract of sale or exchange on the grounds of fraud when he did not rely thereon, but did rely on his own personal judgment and examination.

EXCHANGE OF PROPERTY: Rescission—Fraud—Diligence. The right to rescind a sale or exchange may be precluded by lack of diligence in asserting the right.

CONTRACTS: Rescission—Indivisible Contract. There may not be a partial rescission of an indivisible contract.

Appeal from Humboldt District Court.—N. J. LEE, Judge.

SATURDAY, JANUARY 20, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

ACTION in equity, to set aside an exchange of lands because of fraud and misrepresentation of the defendants, and to restore to plaintiff the property he conveyed to the defendants, and for other relief. Defendants filed separate answers, Hayden admitting that his codefendant was the owner of the property which was conveyed to plaintiff, he, Hayden, having sold the same to Small, and denying each and every allegation of the petition. Defendant Small denied all allegations of fraud, and admitted that he was the owner of the property which was conveyed to plaintiff. This defendant also averred that plaintiff acted upon his judgment in making the exchanges, examined the land given him, and was satisfied therewith. He also pleaded that plaintiff ratified the exchange after full knowledge of all the facts, and that he has been guilty of such laches as that he should not be heard to complain. Other issues were tendered, which will be noticed as we proceed. The case

was tried to the court, resulting in a decree dismissing plaintiff's petition, and he appeals.—*Affirmed.*

Healy & Thomas and Robert Healy, for appellant.

Maurice O'Connor, for appellees.

DEEMER, J.—Plaintiff was the owner of a small opera house, with the lot upon which it was built, located in Gilmore City, Iowa. Plaintiff and defendant Small both lived in that town, and defendant Hayden, Small's father-in-law, lived at Ruthven, also in this state. Prior to the transaction in question, plaintiff and Small had had some dealings with each other, Brechwald having transferred to Small a restaurant business in Gilmore, theretofore conducted by Brechwald, and a year's lease on the opera house property, the rental of which was estimated at \$10 per month. Shortly thereafter, negotiations were had for a trade of the opera house property, by plaintiff to Small, for some land in North Dakota and Minnesota. It seems that Hayden then owned the lands, but that he soon entered into a contract to sell them to Small. Plaintiff dealt with Small as if he were the owner, and, although Hayden deeded the farm lands directly to plaintiff, he (Hayden), save as hereinafter noted, had nothing to do with the exchange. All parties were familiar with the opera house property, but plaintiff had never seen the Dakota or Minnesota lands. Small had never seen the Dakota lands, and claims that he never saw the Minnesota lands, although there is a dispute in the testimony regarding a statement said to have been made by him to the effect that he had seen them. Both the opera house property and the lands were encumbered, the lands being heavily mortgaged, so that nothing but "equities" were the subjects of exchange. There were 160 acres of the North Dakota land, subject to a mortgage amounting to \$10 per acre. There were 80 acres of land in Sherburne

County, Minnesota, mortgaged for \$20 per acre, and another tract, of 40 acres, in Mille Lacs County, Minnesota, carrying a mortgage of \$20 per acre. The opera house property was encumbered by a mortgage in the sum of \$3,500. The 280 acres of farm land were encumbered by mortgages approximating \$4,000. By the terms of the agreement, as finally consummated, plaintiff was to convey the opera house to defendant Small and to assume the \$4,000 on the farm lands, and defendant (or defendants) was to pay the mortgage upon the opera house, convey the farm lands to plaintiff, and also to give him \$1,500 in cash.

There is a sharp dispute in the testimony regarding the actual value of each and every piece of property. As already stated, Hayden owned the land when the negotiations began. Small said that he did not know much about this North Dakota land, and that he would write and find out about it. It is claimed that, some little time thereafter, Small produced a letter which he claimed to have secured from Hayden, and that in this letter Hayden represented that "there was a house, granary and other buildings, and that there were between 60 and 70 acres in crop of wheat." Plaintiff's testimony regarding Small's statements as to the Minnesota land was substantially as follows:

"About the Minnesota property, he said that he had 120 acres of land in Minnesota that was worth about \$40 or \$45 an acre, and that there was a little broke on it that probably hadn't been worked lately. He said that there was a mortgage of \$20 an acre on it. He said there were no improvements on it. He said that it was worth \$40 or \$45 an acre. He said that he had seen the Minnesota land."

Defendant Hayden denied that he ever wrote any letters to Small, or to anyone else, about the land, and none were produced upon the trial. But plaintiff says that Small gave him a letter which purported to come from Hayden,

but that he (plaintiff) lost it. Hayden and Small admit that they talked about the Dakota land at one time while Small was at Ruthven, and that Hayden then said he had never seen the land, but gave Small some information which came to him from others, stating that he knew nothing about it himself. It is not claimed that Small made any statements as of his knowledge, concerning this North Dakota land.

As to the Minnesota land, it is not claimed that any misrepresentations were made regarding the improvements thereon. The charge here is that Small said it was worth from \$40 to \$45 per acre. Plaintiff testified that Small said he had seen the land, but this is denied by Small. Small was corroborated by two witnesses, each of whom said that they heard Small tell plaintiff that he had not seen either the Minnesota or Dakota lands. As to the North Dakota land, there is no direct testimony that either defendant represented that it was worth \$40 to \$45 per acre, or any other sum. The strongest testimony with reference to this is that he (Small) priced the land to plaintiff at \$40 to \$45 per acre. Small says that he priced it at \$25 per acre. The statements relied upon by plaintiff, regarding this land, related to the improvements on the land, and to the number of acres in cultivation. The testimony tends to show that this Dakota land was not improved as plaintiff says it was represented to be, and that the number of acres cultivated, or in wheat, was much smaller than is stated by Hayden and Small. There are also statements to the effect that this Dakota land, when traded, was worth from \$1,600 to \$1,700. As to the Minnesota land, the claimed representations were as to its value; that is, that it was worth \$40 to \$45 per acre. The testimony tends to show that the lands in Mille Lacs County were worth \$12 to \$13 per acre, and that the land in Sherbourne County was worth: one 40, \$10 to \$12 per acre; and the other, from \$5 to \$15 per acre. The Da-

kota land carried a mortgage of \$10 per acre, and the Minnesota land mortgages amounted to \$20 per acre. In making the exchange, it is evident that fictitious values were placed upon all of the property. It was stated in the agreement of exchange that the opera house property was put in at \$18,000, although the testimony shows that, even for trading purposes, the opera house was put in at \$7,200, the defendant assuming a mortgage thereon of \$3,500, making a total value of \$10,700. The testimony regarding its actual value at that time is very conflicting. Some of the witnesses say it was not worth, unincumbered, more than \$6,000 or \$6,500, while others say it was worth from \$15,000 to \$16,000. It will be observed, from what has already been stated, that defendant was to pay plaintiff \$1,500 in cash, which, as we understand it, was paid. Small was to have possession of the opera house under the lease he then held, without paying any rent to plaintiff, and defendant Small also assumed and agreed to pay the mortgage upon the property.

If the case stood alone upon the issue of fraud and deceit, we would have some difficulty in finding any actionable fraud on the part of either defendant. Neither had seen the lands, and there is some doubt as to whether Hayden ever wrote a letter such as is claimed by plaintiff. Hayden and Small did talk over the matter, and Hayden repeated to Small what he had heard from others regarding the lands, their value and the improvements thereon. We are in considerable doubt, under this record, as to whether Small did more than repeat to plaintiff what Hayden told him, at the same time saying that this was a second-hand report, based upon information received from Hayden, he (Hayden) having no knowledge as to the facts; but, as we are of opinion that the case must be made to turn on another proposition, we should dismiss the claim of fraud and de-

ceit as to either parcel of land and go directly to what we regard the turning point in the case.

For some reason, and doubtless because none of the parties connected with the transaction had ever seen either the Dakota or Minnesota land, the written papers executed to evidence the transaction were left with a banker at Gilmore, and it was agreed that they should not become effective until plaintiff had an opportunity to examine the farm land. The great preponderance of the testimony shows that the papers were left with the banker, plaintiff reserving the right to go and look at these lands before proceeding further, and if, on inspection, he concluded not to accept the same, he had the right to cancel the deal and reject the proposition. Pursuant to this agreement, plaintiff went to Minnesota and examined at least one of the tracts. After returning, he said the lands were satisfactory to him, doubtless referring to the Minnesota lands, for he did not go to look at the Dakota land. His reason for not doing this was that at one time he had lived in Canada, at a place some 80 miles north of the land he was getting in exchange; knew in a general way as to its location, and was content to accept it without examination. This latter proposition is denied by plaintiff, who says that he relied upon Small's representations regarding that land, and did not go to see it because he was short of funds. We need not settle this dispute. It is enough to refer to plaintiff's conduct with reference to the lands after the agreement for the exchange was made. While in Minnesota, and after seeing one of the tracts, he rented some of the hay land on one of these farms and received the rent therefor. After seeing the Minnesota lands and expressing satisfaction therewith, he permitted the deal to go through and had some of the deeds recorded. After the final closing of the deal, plaintiff con-

1. FRAUD: Liability for fraud: reliance on representations: necessity.

tracted to sell the Dakota land to one Webber. He received his deeds in July, 1912, and never questioned the deal until September 23, 1913. After plaintiff expressed satisfaction with the deal, defendant Small paid the balance in cash which he agreed to pay, and also paid some liens upon the opera house building, amounting to \$750. Plaintiff also borrowed from Small enough to make his total obligations \$1,350.

About a year after closing the transaction, plaintiff tried to sell the Minnesota land to strangers. It is quite apparent from this record that, even if defendants were guilty of fraud and deceit, plaintiff was content to rely upon his knowledge and information received regarding the lands, or, after receiving information regarding the Minnesota land, he chose to ratify the deal, or rather, failed to exercise the diligence required of one who claims to have been defrauded. In such cases, the defrauded party is required to act with promptness, and to disaffirm the contract because of the fraud practiced upon him.

To justify rescission of a contract obtained by fraud, the party injured must, as
**2. EXCHANGE OF PROPERTY: re-
scission: fraud:
diligence.** soon as he discovers the deceit, or at least within a reasonable time thereafter, disaffirm the contract and demand back his property. The remedy here sought is rescission, and not damages for the fraud; and in all cases of rescission, the party defrauded must act with reasonable promptness after discovering the fraud. The rule is somewhat different in actions to recover damages. Again, this being an action to rescind for fraud, the proof must be clear, satisfactory and convincing. In law actions for fraud, nothing more than a preponderance of the testimony is required. Again, plaintiff could not rescind as to part of the land and hold the other

2. **CONTRACTS:**
rescission:
indivisible con-
tract.

part. The contract must stand or fall as a whole. This much is said because of plaintiff's claim that he saw but one tract of farm land, and his expression of satisfaction therewith should not bar him of his right to rescind as to the other tract of land, or the entire contract because of fraud as to one of the tracts. Under the testimony, there can be no doubt that plaintiff has ratified the fraud, if there was one, as to part of the Minnesota land. This being true, he cannot say: "Well, I may have to hold this, but I may still recover the opera house property and rescind the deal by deeding back the other farm lands." The propositions on which the decision is made to turn are well established by authority. See, as sustaining the conclusion reached, *Moffitt v. Cressler*, 8 Iowa 122; also cases cited in 20 Cyc. 92, 93 and 94; *Barnes v. Century Savings Bank*, 165 Iowa 141; *State Bank v. Brown*, 142 Iowa 190; *Rawson v. Harger*, 48 Iowa 269; *Evans v. Montgomery*, 50 Iowa 325.

We are satisfied with the decree of the trial court, and, in view of the decided conflict in the testimony, we feel that some weight should be given to the opinion of the trial court, which had all the witnesses before it. The decree must be, and it is,—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

B. H. DREES, Appellant, v. ALEXANDER ARMSTRONG, Appellee.

BANKRUPTCY: Right of Bankrupt—Exemptions—Jurisdiction of
1 **Bankruptcy Court.** Principle recognized that a court of bankruptcy has jurisdiction to pass upon the question whether certain property of the debtor is exempt under the state law.

BANKRUPTCY: Discharge of Bankrupt—Staying Discharge in Or-
2 **der to Test Question of Exemption.** A creditor who files his claim in bankruptcy court must secure an order staying the

entry of "discharge of the bankrupt from provable debts," *provided he wishes to test in the state court his right to proceed against the debtor's exempt property.* So held where, after discharge, the creditor claimed that, by reason of the nature of his debt, he might proceed in the state courts against the debtor's homestead.

BANKRUPTCY : Discharge of Bankrupt—Subsequent Attempt to
3 Proceed Against Homestead. While the bankruptcy court can do nothing to relieve the debtor's exempt property from subsequent attack in the state court, yet the final order discharging the bankrupt from provable debts *terminates the relation of debtor and creditors*, and thereby carries down not only the creditor's claim, but necessarily the creditor's right to subject exempt property (a homestead) to the satisfaction of the claim.

ESTOPPEL: Equitable Estoppel—Non-change of Position. A
4 "change of position" is an essential element of an estoppel. So held where attempt was made to base an estoppel on a party's inconsistent conduct in the bankruptcy and state courts.

Appeal from Carroll District Court.—M. E. HUTCHISON,
Judge.

SATURDAY, JANUARY 20, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

A sufficient statement of the case will be found in the opinion.—*Affirmed.*

L. H. Salinger, for appellant.

Lee & Robb, for appellee.

WEAVER, J.—On July 27, 1904, Alexander Armstrong, being indebted to plaintiff upon certain promissory notes, filed his petition in voluntary bankruptcy in the District Court of the United States for the Southern District of Iowa. On August 5, 1904, Armstrong was by said court duly adjudged a bankrupt. The bankrupt properly listed the plaintiff as one of his creditors. He also scheduled his

property and assets, including his homestead, for which he claimed exemption. On August 15, 1904, plaintiff appeared in said proceedings and filed and proved his claim as a creditor entitled to share in the distribution of the bankrupt estate. On September 30, 1904, the trustee in bankruptcy reported to the court, allowing the bankrupt's claim of exemption for his homestead, and setting it off as not being subject to sale for the benefit of creditors. On October 7, 1904, the plaintiff again appeared in the bankruptcy proceedings and filed exceptions to the report of the trustee, setting off the exempt property, on the ground that the debt to plaintiff was contracted prior to the acquirement of the homestead by Armstrong, and that such homestead was, therefore, not exempt from liability for the payment of his claim, and asked that a hearing and argument be allowed upon his objection. Notwithstanding this exception, the bankruptcy court proceeded, on October 28, 1904, to enter its order and judgment finding that Armstrong has conformed to all the requirements of law in such cases and discharging him from all debts and claims provable against his estate and existing on the date of the filing of the petition in bankruptcy. Thereafter, on November 10, 1904, Armstrong, in resistance to the plaintiff's application for further hearing on the question of homestead exemption, set up the order and judgment of final discharge from the claims of his creditors, including plaintiff's claim, also alleging that the bankruptcy court had no jurisdiction over the property so set off to him as exempt, and that, "if plaintiff has any right or claim thereto or therein, the same must be presented in the courts of the state of Iowa." In this state of the record in the Federal court, the plaintiff, on November 22, 1904, began this present action at law to recover from Armstrong the amount alleged to be unpaid on the same promissory notes which had been made the basis of his claim in the bankruptcy proceedings. In aid of such

action, he sued out a writ of attachment, and caused it to be levied upon the homestead property. Thereafter, on December 31, 1904, and while this action was pending in the state court, plaintiff again appeared in the bankruptcy court and amended his objections to the report of the trustee, which set off Armstrong's homestead as exempt, stating more specifically the grounds for denying the exempt character of such homestead as against plaintiff's claim, and asking an order to the effect that such property was not exempt from payment of said claim, and that the deficiency remaining unpaid after the settlement of the bankrupt estate may be satisfied from said homestead "in any proceeding had in the state court where the same is situated and over which property said court has jurisdiction." Thereafter, on the same day, the referee in bankruptcy entered an order overruling plaintiff's objections to the report of the trustee and setting aside such homestead as exempt. This order seems to have terminated all proceedings in the matter in the Federal court.

Turning once more to the record in the present case, we find that defendant appeared and answered plaintiff's petition, admitting the execution and delivery of the notes. He also admits his ownership of the attached property, and pleads its exemption against the plaintiff's demands, and denies that he is in any manner indebted to plaintiff on account of such notes. He further pleads his discharge in bankruptcy as a complete defense to the claim sued upon, and also sets up the proceedings and orders in the bankruptcy court sustaining his claim of homestead exemption. In reply, plaintiff admits all the proceedings in the bankruptcy court substantially as pleaded by the defendant, but avers, in substance, that said court did not attempt to pass upon or adjudicate the merits of plaintiff's claim of right to subject the homestead to payment of the debt due him, but declined to assume or exercise jurisdic-

tion for that purpose. He further pleads, by way of estoppel, that defendant cannot be heard to rely upon the alleged adjudication of the Federal court, or to deny the right or authority of the state court to subject the homestead to the payment of his claim. The ground of the alleged estoppel, stated in the language of the pleader, is as follows:

"Such estoppel arises and is created by the fact that, in said bankruptcy proceedings, this defendant claimed and asserted to and before said bankruptcy court that it had no jurisdiction to determine the very matters now presented for adjudication to this court, and that defendant prevailed upon said claim and contention, and thereby induced said bankruptcy court to refrain from entering said controversy, and from administering upon said real estate, and Drees from applying for a stay of said discharge pending proceedings in the appropriate state court, and induced plaintiff to abandon all further proceedings in said bankruptcy court, and to bring this suit in state court. And plaintiff avers that defendant, having been successful, and inducing by said means to have a bankruptcy court thus act, and refrain from acting, and to have plaintiff thus act and refrain from acting, and having thus induced this by the claim that the courts of the state of Iowa had jurisdiction, and that said bankruptcy court did not have it, defendant is now estopped from saying to this court that said bankruptcy court did have, and this court does not have, jurisdiction to determine this controversy."

To this reply the defendant demurred, stating many grounds therefor, which may perhaps be condensed into the following:

(1) That the reply in no manner attacks or impeaches the binding force or effect of defendant's discharge in bankruptcy, which is in itself a complete answer to plaintiff's alleged right of action.

(2) That it appears upon the face of the admitted record that defendant had been discharged in bankruptcy long before plaintiff attempted to invoke the jurisdiction of the state court.

(3) That it affirmatively appears that plaintiff never made any application to the bankruptcy court to stay the final discharge of the bankrupt to enable the plaintiff to pursue his remedy, if any he had, in the state courts; and that such discharge operated to release him from the claims asserted by plaintiff in the same manner and to the full extent in which he was released from the claims of his other creditors.

(4) That, plaintiff having admitted that he had no lien on the homestead to secure payment of his claim, such claim gave him no preferred standing in the bankruptcy proceedings, and, after he had filed and proved his claim in those proceedings and obtained the benefit thereof, the discharge of the bankrupt necessarily operated to take away any right to pursue the debtor or his property in any other court.

(5) That the pleadings or resistance filed to plaintiff's objection to the trustee's report (which pleading was filed after the judgment of final discharge of the bankrupt was entered) properly raised the question whether such court could then withdraw from the defendant his right of homestead exemption, and it does not appear that the position there taken by the defendant operated in any manner to deceive plaintiff, or to induce him to refrain from asking or procuring a stay of the proceedings in that court in order to permit this present action to be tried out.

The district court sustained the demurrer, and, the plaintiff refusing to amend his reply and electing to stand thereon, the court entered judgment for the defendant, and plaintiff appeals.

The case appears to have remained in a comatose con-

dition for some ten years after the final order in the bankruptcy proceedings. It has thus survived the defendant, who has since deceased. The widow and heirs at law have been substituted as defendants, but we have not thought it essential to change the caption of the case as found in the printed record.

I. The first and fundamental proposition argued by counsel for appellant is that the trustee in bankruptcy acquired no title to the exempt property, and that the act of the trustee, or of bankruptcy court, sustaining the defendant's claim of exemption for his homestead, had no effect to deprive plaintiff of his right to pursue such property in the state court for the collection of his claim. That the trustee did not take title to the exempt property, as he did to the property of the bankrupt estate generally, is to be admitted. Bankruptcy Act of 1898, Sec. 70-a; *Lockwood v. Exchange Bank*, 190 U. S. 294. But the bankruptcy court did acquire jurisdiction to pass upon the debtor's claim of exemption. Act of 1898, Chap. 2, Sec. 2. This jurisdiction the court did exercise, and found the property exempt, and thereafter, with such order standing unchanged, and there being no motion or request to stay the discharge of the bankrupt to enable plaintiff to pursue any remedy he might have in another forum, the court confirmed the proceedings had in the premises, and entered its judgment granting the defendant a final and complete discharge. The setting apart of that property and the judgment discharging the debtor would, therefore, seem to be a final and complete adjudication against the plaintiff to have such property subjected to his claim in that court. It may be conceded that the setting off of the exempt property had no effect to determine its exempt character as against any creditor suing in a state court; but this, as we shall see, is by no means decisive of the question brought up by this

1. BANKRUPTCY:
right of bank-
rupt: exemp-
tions: jurisdic-
tion of bank-
ruptcy court.

appeal. The paramount consideration, as we view the case, is not so much the operation or effect of the order of the bankruptcy court sustaining defendant's claim of exemption as it is the effectiveness and conclusiveness of the final judgment discharging the debtor.

2. **BANKRUPTCY:** discharge of bankrupt: staying discharge in order to test question of exemption. May a creditor, filing and proving a debt against a bankrupt, knowing that he is claiming a valuable item of property as exempt, stand by when such claim of exemption is sustained, and, without asking or moving to have the entry of final discharge stayed or suspended to enable him to pursue his alleged remedy in the state courts, permit such judgment and order of discharge to be entered, and then, without seeking in any manner to set aside the judgment or to have the same reviewed on appeal or otherwise, make the debt from which his debtor was discharged by the bankruptcy court the basis for a new recovery in the state courts? In our judgment this cannot be done. Counsel concedes that it was open to him to obtain an order suspending the entry of the judgment of discharge, and that this is a usual and approved practice in such cases. *In re Brumbaugh*, 128 Fed. 971; *In re Downing*, 148 Fed. 120; *In re Wells*, 105 Fed. 762; *In re Tiffany*, 147 Fed. 314, 317; *Roden Grocery Co. v. Bacon*, 133 Fed. 515; *In re Maher*, 169 Fed. 997; *In re Castleberry*, 143 Fed. 1018. Appellant cannot claim to have been the victim of any surprise or misconception of the exact situation. He was apparently represented by counsel at every stage of the proceedings. The defendant's claim of exemption was disclosed in the schedule filed at the outset, and the report of the trustee had been on file nearly 30 days when the final discharge of the debtor was entered. Counsel could not have been unaware that he was faced by the necessity of permitting the entry of such discharge and accepting its necessary consequences, or obtaining a stay

of such entry, affording him an opportunity to test his alleged rights in the state court. Since he failed to take the latter course, we think he cannot be heard to question the effectiveness of the discharge. There would be no necessity, and indeed no propriety, in the practice approved in the cases last above cited, if, without such stay of the order of discharge, the creditor could ignore the order and proceed in the state court just as if no discharge had been granted.

8. **BANKRUPTCY:**
discharge of
bankrupt:
subsequent at-
tempt to pro-
ceed against
homestead.

II. We are next asked to hold that, assuming the order of discharge to be entirely regular and effective for all the purposes contemplated by the Bankruptcy Act, it does not preclude the maintenance of this action. To this we cannot agree. The clear

implication and effect of the several decisions hereinbefore cited are opposed to appellant's position in this respect. The exceptions to the effectiveness of a discharge which are enumerated in the Bankruptcy Act do not include such a case as this, and it is not within the province of the court to enlarge or add to the list of exceptions. But counsel says:

"It is too clear for argument, whatever deductions may be drawn from the premise clearly established, that the bankruptcy court can give no one any rights in the exempt property of the bankrupt, even though the court has power to determine what shall be set aside, and to set that aside. The question is whether it follows that, therefore, the bankruptcy court can do nothing by a discharge which gives the bankrupt the right to retain exempt property against subsequent attack in state court, and can do nothing by the discharge which affects the right a creditor may have under state law to enforce his debt against the exempt property, set aside. The exact question is whether the use of language in the order of discharge, broad enough to protect

the bankrupt from the enforcement against him of all claims against all property remaining in the bankrupt, must not be limited so as to be operative only upon such retained property as was within the jurisdiction of the bankruptcy court when the order of discharge was entered. Can the bankruptcy court make any order which will affect dealing with property that in contemplation of law was never in its possession, and as to which it is conceded it could confer no rights upon any creditor?"

The argument is adroitly stated, but it overlooks the very essential element that, while the bankruptcy court can do nothing to relieve the debtor's exempt property against subsequent attack in the state court, or do anything which affects the right a creditor may have under state law to enforce his debt against exempt property, yet it is just as manifestly true that the party who makes such attack or attempts to enforce such a claim must be a creditor; he must have a debt or claim which the courts will recognize and enforce; and, if the very debt or claim so asserted has been wiped away in a valid bankruptcy proceeding, he can never reach the point where the question of exemptions becomes at all material. The adjudication of bankruptcy and the debtor's discharge cannot affect the subsequent status of property claimed to be exempt, but it does affect the question whether any legal relation of debtor and creditor survives between plaintiff and defendant as to any claim which was proved and allowed in such proceedings, and against the effect of which there is no claim of lien or charge of fraud.

III. The plea of estoppel has no substantial foundation. The paper in which the defendant questioned the jurisdiction of the court to consider plaintiff's objections to the report of the referee was not filed until after the discharge of the bankrupt had been en-

4. ESTOPPEL:
equitable es-
toppel. non-
change of
position.

tered, and could, therefore, have had no effect or influence upon plaintiff's action in failing to ask that the entry of such order be stayed. Moreover, we may, for the purposes of this case, assume that the bankruptcy court, after the entry of the discharge, did refuse to entertain further jurisdiction in the premises. Indeed, the defendant himself contends that said court had no such jurisdiction, and in this counsel for appellant seem to agree; but neither denies the jurisdiction of that court to make or enter the order of final discharge, and this, as we have already stated, must be held to have released the defendant from all further legal liability on the debt.

The judgment of the district court is—*Affirmed*.

GAYNOR, C. J., EVANS and PRESTON, JJ., concur.

EDITH S. HATFIELD, Appellee, v. IOWA STATE TRAVELING
MEN'S ASSOCIATION, Appellant.

APPEAL AND ERROR: Parties Entitled to Allege Error—Invited

- 1 **Error—Requesting Instructions—Effect.** Requesting instructions on disputed questions of fact precludes subsequent contention, by the one requesting, that the evidence is insufficient to support the verdict returned.

INSURANCE: Accident Insurance—Death from Accident (?) or

- 2 **Disease (?)—Evidence.** Evidence reviewed on the sharply defined issue whether deceased died (a) from disease, or (b) from accident alone, and held to present a jury question, notwithstanding defendant's greater number of witnesses.

INSURANCE: Accident Insurance—Cause of Death—Direct Versus

- 3 **Expert Testimony.** Evidence reviewed, and held that the manner in which one was injured, and what happened to the injured party immediately thereafter, as described by an interested eyewitness, made a prima-facie showing of death from accident, which was not overcome, as a matter of law, by a strong array of adverse expert testimony tending to show death from disease.

INSURANCE: Accident Insurance—"Accident" Defined. An "accident," within the meaning of accident insurance, is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and unexpected to the person to whom it happened. Evidence reviewed, and held to show an accident.

APPEAL AND ERROR: Harmless Error—Rejected Testimony Otherwise Received. Error in improperly excluding testimony is rendered harmless by the subsequent reception of the same.

Appeal from Polk District Court.—WM. H. McHENRY and CHARLES A. DUDLEY, Judges.

SATURDAY, JANUARY 20, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

ACTION at law to recover on a policy or benefit certificate insuring William J. Hatfield, while a member of said association in good standing, against injury through external, violent and accidental means, which injury shall, "independently of all other causes, result in death within 90 days from said injury." The defendant contested the claim, and on trial to a jury there was a verdict for plaintiff. From the judgment rendered on the verdict, the defendant appeals.—*Affirmed.*

Sullivan & Sullivan, for appellant.

Dowell, McLennon & Zeuch, T. B. Hanley and Parker, Parrish & Miller, for appellee.

WEAVER, J.—William J. Hatfield, a resident of Portland, Oregon, died at that place on June 14, 1913. At the time of his death, he held three several policies or certificates of accident insurance, issued respectively by the Iowa State Traveling Men's Association (defendant herein), The Fidelity & Casualty Company of New York, and Travelers Protective Association of America. The widow of Hatfield, in her own right and as administrator of her husband's estate, made claim against each of these three

companies or associations upon their several contracts of insurance, on the theory that his death was occasioned by accidental means, within the terms of such contracts. These claims being denied, separate suits were brought in the district court of Polk County for their collection. In each case, the plaintiff recovered judgment, and in each, an appeal was taken to this court. The cases have been prosecuted and defended by the same counsel throughout, and, subject to some minor exceptions, the issues presented are identical. The principal defense relied upon in all of them is that the death of Hatfield was not caused by accidental means, within the terms of the contract, but that he died from disease or bodily infirmity. We have at this term considered the appeal in the case against the Fidelity & Casualty Company, and reached a conclusion affirming the judgment of the trial court. In that opinion we have stated, as far as seems to be necessary, the substance of the testimony and of the record of the trial, and shall not extend this opinion for their repetition. We have also there given consideration to the several legal propositions advanced by counsel, and, so far as the same questions are raised in this case, that opinion must be considered as governing the result in this. Other features not common to the cases against the Fidelity & Casualty Company and against this defendant will now be noted.

- I. In the case at bar, defendant admitted the membership of Hatfield in good standing at the date of his death, that plaintiff is his beneficiary, and that due notice and proofs of loss were given, thus in effect limiting the dispute between the parties to the actual cause of death of the insured. Appellant did not ask or submit special findings for answer by the jury, but in other respects, the conduct of the defense was like that to which we have referred in disposing of the case first

1. APPEAL AND RE-
BOR: parties en-
titled to allege er-
ror: invited er-
ror: requesting
instructions:
effect.

mentioned. Counsel for the defense did, however, present and ask to have submitted to the jury some fifteen different instructions upon the law applicable to the issues of fact, and many of the propositions so stated were, in words or in substance, incorporated into the charge given by the court, and, this being so, we think appellant is not at liberty to say that the questions which it thus aided in submitting as matters of fact for the jury are, nevertheless, matters of law, and should be so considered on this appeal.

We will also say, as suggested in the
 2. INSURANCE: ACCIDENT INSURANCE: death from accident (?) or disease (?): evidence. opinion referred to, that, independently of the rule just applied, we think the testimony concerning the death of the insured and

the cause thereof was such as to make necessary its submission to the jury. In addition to the testimony concerning the autopsy which was offered in each case, both parties on this trial introduced additional medical witnesses, who expressed their opinions founded upon hypothetical questions embodying an assumption of facts claimed to have been developed from other sources of evidence, or facts admitted or proved. As is not unusual, the experts offered by the defendant express their conviction that the disclosures made by the autopsy and the statements made in the hypothesis submitted to them indicate death from disease or abnormal internal conditions, while plaintiff's experts are no less certain, not only that a fall by insured upon the handle of the screwdriver, as described by Mrs. Hatfield, could produce death, but also that, if the fall occurred in the manner described, it did in fact cause the death. It is true that the greater number of experts support the defendant's theory, but it is not within the province of the court to hold that the preponderance of the evidence is with the greater number of witnesses.

3. INSURANCE: accident insurance: cause of death: direct versus expert testimony.

It must not be overlooked that the proof of the cause of death in these cases does not rest solely on the opinion of experts. The wife was an eyewitness to the occurrences to which she testifies. Though interested in the result, she was a competent witness, and the jury were entitled to give full weight and credit to her testimony if they found it credible. Had no expert testimony been produced, her evidence alone would have been sufficient to sustain a verdict in her favor that her husband died from injury produced by external, violent and accidental means, independent of all other causes. Whether such a prima-facie case has been successfully met and overcome by the volume of opinion evidence offered, is a question of fact to be submitted to the jury, with appropriate instructions.

4. INSURANCE: accident insurance: "accident" defined.

The case does not, as counsel argue, fall within the rule applied in *Lehman v. Great Western Acc. Assn.*, 155 Iowa 737; *Feder v. Iowa S. T. M. Assn.*, 107 Iowa 538; *Smouse v. Iowa S. T. M. Assn.*, 118 Iowa 436; and others of that class. Had the evidence shown simply that Hatfield died suddenly while using the screwdriver in the ordinary way, or that, while so occupied in the ordinary way, he suddenly collapsed without any intervening unlooked-for or unexpected cause bringing it about, then these cases could well be cited as having an important bearing upon the issue. But such is not the showing here made. In support of the verdict, we must give the testimony in plaintiff's favor the most favorable construction of which it is reasonably capable. The jury could have found that, on the day in question, Hatfield was in good health, was actively engaged in the care of his home and family, moving about both in and out of doors. He had brought the material and tools to attach a board or bottom upon a small box standing on the floor, and was using a ratchet

screwdriver for that purpose. Leaning over the box, and grasping the screwdriver with both hands, he pressed it downwards with considerable force, when the box tipped, with the result that the driver slipped from the screw head, causing him to fall forward in such a manner that, as the point of the driver struck the floor, his breast came down with the full weight of his body upon the upper end or handle of the tool. He instantly gave evidence of being very seriously injured, and died within a few hours. Here was clearly an intervening cause which differentiates this case from those referred to. He intended to use the screwdriver and did attempt its use, but he did not intend that the box should tip over, or that he should thereby lose his balance and fall. It was not his voluntary act which caused his disaster, but the mishap, the mischance, the unexpected and unintended fall, bringing his body down upon the upright implement in his hands. This distinction is carefully pointed out in the cases cited by appellant. For example, in the *Lehman* case, the court distinctly calls attention to the fact that the record shows "no evidence whatever of any slipping or falling or of any strain of the muscles other than the intentional strain put upon them in the voluntary and intentional act of bowling." So, in the *Feder* case, the court again is careful to note that "there is no evidence that he fell, slipped, lost his balance * * * or that anything was done or occurred which he had not foreseen and planned, except the rupture of the artery." This distinction, which counsel wholly overlook, makes all the difference between a case for the jury and one which is not. There is here the evidence of a slip, a fall, a loss of balance, an unforeseen occurrence, which comes within every definition of accident known to the books.

II. Counsel complain of an alleged

5. APPEAL AND ERROR: harmless error: rejected testimony otherwise received. error in the ruling of the trial court excluding a certain affidavit by the attending physician of the insured. It appears, how-

ever, that the physician was called by the defendant on its own behalf, and fully examined concerning not only what he learned or knew from his treatment of the insured, but also concerning the autopsy in which he took part. Appellant thus had the benefit of the witness's knowledge, as well as his expert opinion, and the ruling was without prejudice. Moreover, the evidence as offered was, to say the least, of very doubtful competency.

III. All other points made in argument are sufficiently covered by what we have said in the case against the Fidelity & Casualty Company.

No reversible error has been shown, and the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., EVANS and PRESTON, JJ., concur.

MARY A. KOPECKY, Appellant, v. HASSEK BROTHERS et al.,
Appellees.

PHYSICIANS AND SURGEONS: Negligence—Abnormal Result of Treatment—Justifiable Inference. Injurious results following treatment by a physician when such results do not, as a rule, follow ordinarily careful and skillful treatment, may, in the absence of explanation, justify the jury in finding negligence, even though there be no direct evidence that the physician departed, in the treatment, from the standards of his profession. So held in an action against a dentist for negligently breaking through the wall of the root of a tooth and filling the tooth in that condition, with resulting infection.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

TUESDAY, MAY 22, 1917.

Action at law to recover damages. The material facts are stated in the opinion. There was a directed verdict and judgment for defendants, and the plaintiff appeals.—*Reversed and Remanded*.

F. L. Anderson and Frank F. Messer, for appellant.

Heald & Lockwood and Redmond & Stewart, for appellees.

PHYSICIANS AND
SURGEONS: negli-
gence: abnormal
result of treat-
ment: justifiable
inference.

WEAVER, J.—The defendants are engaged as partners in the practice of dentistry at Cedar Rapids. During the year 1912, they undertook to treat and fill one of the plaintiff's teeth, and continued such treatment from time to time for a period of about two months. In her petition in this action, plaintiff alleges that said treatment was administered and the work of filling the tooth was performed in a careless and negligent manner; that, in drilling and preparing the tooth to receive the filling, the operator negligently punctured or broke through the wall of the root of said tooth, but concealed the fact from plaintiff, and thereafter proceeded to insert the filling, doing the same in such manner as to cause or allow the filling to extend through the puncture and irritate and inflame the tissues and membranes surrounding the tooth, causing abscesses and other abnormal conditions in the parts adjacent thereto. She further alleges that, by reason of such negligent and improper treatment, she was made to suffer much physical pain and mental anguish, and was compelled to submit to other dental, medical and surgical treatment, thereby incurring great expense and suffering much pain, as well as other damage in loss of time and permanent impairment of her health.

The defendants admit that they are practicing dentists, and hold themselves out to the public as possessing the ordinary skill of members of the profession in Cedar Rapids and vicinity, and admit that as such dentists they did treat the plaintiff. They further aver that, in the course of the treatment, they removed a filling from plaintiff's tooth, treated and refilled it, and that all the service so performed for her was done in a skillful and proper manner, and deny each and every charge of negligence made in the petition.

A jury was empanelled to try the issues of fact thus

joined, and, at the close of the testimony, the court, upon motion of the defendants, directed a verdict in their favor. From this order, and from the judgment entered on the directed verdict, the plaintiff appeals.

As will be noted from this statement, the vital question in the case is whether the evidence was such as to justify its submission to the jury. The tooth treated by defendants was subsequently extracted by another dentist, and was introduced in evidence on the trial. It shows a cavity extending from the grinding surface into the root, and a puncture or opening through the wall or shell of the root. The evidence of witnesses further tended to show that the dentist who first treated plaintiff after the defendants ceased giving the tooth attention, discovered the puncture and found pus around the tooth. This dentist further testifies that such opening through the root as he there found could "scarcely be caused by anything except mechanical work in the removal of the nerve. By that I mean a dentist working with an instrument about the tooth." This witness further testifies that, in proper treatment, the nerve should be killed without puncturing the root, because, when such an opening is made, infection is liable to enter through it. He also gives it as his opinion that the puncture was made from the inside of the root; that punctures are not common occurrences and are not frequently made by dentists. This expert testimony was corroborated or supported by the evidence of other witnesses. The plaintiff, testifying in her own behalf, says that, until she went to the defendants for treatment, the tooth had never been treated or filled by any other dentist, and that, upon examining the tooth, defendants told her it was not necessary to extract it, and it was a fit tooth to be filled. The dentist then put medicine in the tooth, and, having sealed it, told her to return the next week. When she returned as directed, the treatment was repeated, and she was again

asked to return later, which she did. On this occasion, the operator professed to have removed the nerve, and did some grinding or excavating in the cavity or root. On her next visit, he undertook to drill in the tooth, when she felt a hurt or pain, of which she complained, but he told her there was no trouble, and again applied medicine, and dismissed her until the next week. On her return, she complained to the operator of a discharge from the tooth, and he told her the discharge did not come from that source, and that, if she suffered from any pain, it was from an ingrowing tooth which was missing in that jaw. He then filled the tooth. Later, she returned to the defendants, complaining of severe pains apparently proceeding from that tooth, and they assured her there was nothing wrong with it, saying also they would take the tooth out if she said so, but it was not necessary. Thereafter, still suffering in the same manner for a period of several months, she applied to other dentists and physicians, who removed the tooth. In the course of the treatment, she was twice subjected to other surgical operations upon the bones or structure of the jaw and face, above and adjacent to the tooth. She was in the hospital at Iowa City under such treatment, for several weeks. Prior to the experience of which she complains, she appears to have been a woman in sound health, able, and accustomed to the labor of housekeeping on a farm, and she says that, by reason of her injury from the improper treatment at the hands of the defendants, she was rendered unable to perform her work for a period of nearly two years.

The defendants offered no evidence on their part, but, at the close of plaintiff's case, presented their motion for a directed verdict, which was sustained. The ground of the motion, briefly stated, was that the evidence was insufficient to find that the defendants were negligent as charged in the petition.

We are of the opinion that the court should have denied this motion. Of course, this is not saying as a matter of law that the defendants were negligent, but giving, as we must on a record of this kind, that construction to the testimony which is most favorable to the appellant, we are very clear that we cannot say as a matter of law that there is an entire failure of evidence to support the charge made in the petition. If the expert witnesses are to be credited, the jury could properly find that the puncture in the tooth was made from the inside, and that the only reasonable theory of its existence is that it was made by the dentist's instruments in preparing the tooth for filling, and that this result does not ordinarily follow such treatment by a skillful practitioner. It could further properly be found that such puncture was made before the tooth was examined by the dentists who followed defendants in treating the plaintiff, and that defendants were the only dentists who, up to this time, had treated this tooth. We think it also reasonably clear from the evidence that the injury resulted in infection of the parts surrounding the tooth, and that plaintiff's subsequent pain and suffering and the necessity for the other treatment had by her were caused thereby.

Counsel's argument in support of the judgment below is confidently based upon the proposition that the evidence fails to show any negligence or lack of ordinary skill on the part of defendants, and this seems to be based on the theory that, in order to recover, there must be direct testimony that they in some way departed from the "recognized rules and standards of their profession." But this is not the rule. Negligence may be found from facts and circumstances from which the want of due care is a reasonable inference, as well as from direct evidence by experts or others. If an injurious result is shown to have followed

the treatment, such result as does not ordinarily attend or follow when due care and skill have been exercised by a competent operator, an inference of negligence is justified, in the absence of explanation, and if a jury so finds from such a showing, its verdict thereon is not without support. We had occasion to discuss this subject in the recent case of *Erans v. Roberts*, 172 Iowa 653, where the rule above stated was applied. See also *Reynolds v. Smith*, 148 Iowa 264. We are content to reaffirm the principles upheld in those cases, as well as in numerous precedents of like import which we will not prolong this opinion to cite or discuss.

It follows of necessity that the judgment of the district court must be reversed and the cause remanded for a new trial.—*Reversed and Remanded.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

W. F. MAIN, Appellee, v. H. M. KICK, Appellant.

JUDGMENT: Conclusiveness—Pendency of Motion to Set Aside—

- 1 **Effect.** It is futile to attempt to rely on a judgment as a final adjudication so long as direct proceedings are pending to set it aside. So held where, in an action to quiet title, a claimant relied on a judgment and sale thereunder in partition, while a motion was pending to set aside the judgment and grant a new trial.

PROCESS: Original Notice—Defendant as Resident of County—

- 2 **Service by Publication—Effect.** Publication service on a defendant who is openly a resident of the county where action is brought, is a nullity.

PROCESS: Original Notice—Service by Publication—Affidavit—

- 3 **Sufficiency.** An affidavit for service by publication which fails to state that service cannot be made on defendant "*within this state,*" is fatally defective. Section 3534, Code, 1897.

TAXATION: Tax Deed—Insufficient Notice to Redeem—Effect. A

4 tax deed issued on insufficient notice of expiration of right of redemption is a nullity, redemption having been made subsequent to the issuance of the deed.

Appeal from Johnson District Court.—R. P. HOWELL, Judge.

THURSDAY, MARCH 15, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

Action in equity to quiet title to a lot in Iowa City, Iowa. Decree for plaintiff, and defendant appeals.—*Affirmed.*

Baldwin & Baldwin, for appellant.

O. A. Byington, for appellee.

WEAVER, J.—Plaintiff, being the owner
1. JUDGMENT: con- of the lot in controversy, sold and conveyed
clusiveness: it, in the year 1898, to one Wencel Wesley.
pendency of
motion to set
aside: effect. In the year 1915, Wesley reconveyed the property to plaintiff, who thereafter began this action to quiet his title against alleged adverse claims of the defendant. Answering the petition, defendant denied plaintiff's claim of ownership, and alleged in general terms ownership in himself, but did not state how or from whom it had been acquired.

On the trial, it was conceded that, in 1898, plaintiff was the owner of the lot, and conveyed the same to Wencel Wesley. The plaintiff then identified and introduced in evidence the later conveyance from Wesley back to himself, and, having testified that he was still the owner, rested his case. The evidence offered by the defendant consisted of the files and records in an action purporting to have been brought and disposed of in the district court of Johnson County, in which action the defendant herein was named as plaintiff, and Wencel Wesley and wife as de-

fendants. The petition alleged the plaintiff (defendant herein) to be the owner of an undivided one fourth of the lot in question, and the defendant Wencel Wesley to be owner of the other three fourths thereof, and prayed a decree of partition. In that action, it appears that there was an alleged service of original notice by publication, and a decree obtained by default under date of April 23, 1915. Pursuant to the decree, the property was sold by a referee to the plaintiff (defendant herein) for \$100—barely sufficient to pay the costs of the proceeding—and a referee's deed was made, approved and delivered. Later, and during the same year, Wencel Wesley and wife entered their appearance in said partition proceedings, making a showing that, at the time of the alleged publication of original notice, they were and ever since have been living and residing in Johnson County; that they had no knowledge or information of the alleged service of notice upon them by publication; and that they had a good defense to the cause of action stated against them. On this showing they moved to set aside the decree and default, and that a retrial be ordered, at which the merits of their defense could be heard. Without any further evidence or showing as to what disposition was made of the motion for retrial, the defendant herein (Kick) called plaintiff's counsel to the stand, and showed by him that, upon being employed by plaintiff to look after his interests in this case, he investigated the title records and learned of the partition proceedings and deed, and that he communicated that information to his client. With this showing and no more, the defendant rested.

It will be seen that, when plaintiff rested his case in chief and the defendant had rested his defense, plaintiff had clearly made a prima-facie showing of title, and that the partition proceedings constituting the sole defense thus far disclosed were incomplete and undetermined, and for

that reason, the record offered constituted no proof of title in defendant. It is said in argument (though not so shown in the record) that, when the partition proceedings had reached this stage of development, Wesley made his conveyance to the plaintiff, who thereupon instituted this separate or independent action to quiet his title. Whether this be true or not, it is apparent that when, upon the trial below, plaintiff and defendant had rested their case in chief, the prima-facie showing of title in the former had not been overcome, and a decree for plaintiff was inevitable. But, for some reason not clearly visible, plaintiff in rebuttal called as a witness the county treasurer and county auditor, by whom there was identified and offered in evidence a certain "tax claimant's notice," on which it was said a "certain tax deed" had been executed. The notice was directed to Wencel Wesley, and described the property in controversy. To this notice was attached an affidavit of newspaper publication and the affidavit of the defendant that he had caused such service to be made. The tax list was also put in evidence, showing the property taxed at the time of sale to Wencel Wesley. The auditor's record also seems to show a redemption from such sale subsequent to the date of the deed, and before this action was begun. The defendant finally put in evidence the evidence of a treasurer's deed to himself for one fourth of the lot in question, bearing date June 17, 1914.

2. Process: original notice: defendant as resident of county: service by publication: effect.

In submitting the case in this court, appellant first contends that the partition deed made to him is sufficient proof of his title to the property; that the decree in that proceeding is conclusive upon the parties and upon this court, until it has been set aside in some manner by direct attack. It is perhaps a sufficient answer to this proposition that appellant's own showing discloses a direct attack made upon the decree, pending which such decree

cannot be given effect as a final adjudication. Furthermore, it is shown without dispute that, when the publication of original notice was procured, Wencel Wesley and his wife were residents of Johnson County and living therein, and no good reason appears or is suggested why they were not personally served. Still further, the affidavit on which

the publication of notice was procured, is
 3. Process: original notice served by publication: affidavit: sufficiency. clearly defective. The statute, Code Section 3534, provides that the affidavit shall state

that "personal service cannot be made on the defendant *within this state*." The affidavit filed states no more than that "said unknown spouses and unknown heirs and Wencel Wesley are nonresidents of the state of Iowa, and their residences are unknown to plaintiff, and that personal service cannot be made on them or either of them." It will be seen that the affidavit does not state, as the statute requires that personal service could not be made upon the defendants "within this state." The published service was, therefore, ineffectual both as a matter of form in the failure to observe the statute, and in the admitted fact that Wesley was not a nonresident, but openly living in the county, where personal service could have been had upon him at any time. In our judgment, the trial court acquired no jurisdiction to entertain the partition proceedings against Wesley, and the latter, or his grantee, is not bound in a collateral proceeding by a judgment so procured. *Carnes v. Mitchell*, 82 Iowa 601; *Schaller v. Marker*, 136 Iowa 575; *Hawk v. Day*, 148 Iowa 47; *Oziah v. Howard*, 149 Iowa 199; *McGahen v. Carr*, 6 Iowa 331.

Just what figure the tax deed should cut
 4. Taxation: tax deed: insufficient notice to redeem: effect. in the disposal of the case is a somewhat doubtful question. The defendant set up no claim thereon in his answer, and rested his defense without any evidence whatever on that subject; but

in argument here, he strenuously insists that, in any event, the title to one fourth of the property should be decreed to him on the strength of such conveyance. We are inclined to the view that, under the state of the issues and of the record of the trial, defendant is in no position to assert the validity of that deed in this action. Moreover, were the tax deed directly in issue, we should have to hold that there was insufficient service of the notice of expiration of the time for redemption to cut off the owner's right to redeem, and, redemption having admittedly been made, the deed cannot avail to defeat or reverse the decree entered in plaintiff's favor.

The conclusion reached by the trial court is fully sustained by the record, the result is equitable, and it is therefore—*Affirmed*.

GAYNOR, C. J., LADD, EVANS and PRESTON, JJ., concur.

MODEL LAUNDRY COMPANY, Appellee, v. E. F. BARNETT et al.,
Appellants.

COURTS: Municipal Courts—Pleadings—Original Notice—Sufficiency. The Municipal Court Act does not require written petitions in Class B actions, to wit, those wherein the amount in controversy is \$100 or less. Sec. 694-c21, Code Supplemental Supp., 1915. Of necessity, it follows that that part of Sec. 694-c22, Code Supplemental Supp., 1915, requiring the original notice of suit to state "the date * * * the petition will be filed," has no reference to said Class B actions.

Appeal from Des Moines Municipal Court.—J. E. MERSHON,
Judge.

TUESDAY, MAY 22, 1917.

The opinion sufficiently states the case.—*Affirmed*.

E. P. Hudson, for appellants.

Paul Hewitt, for appellee.

Creates: municipal court; pleadings: original notice; sufficiency. **WEAVER, J.**—On April 17, 1916, the appellee procured service upon the defendants of an original notice reading as follows:

“In the Municipal Court of the City of Des Moines, Polk County, Iowa. Model Laundry, Plaintiff, v. E. F. Barnett and Mrs. E. F. Barnett. Defendants. Original Notice Class ‘B’ Case.

“To the above named defendants: You are hereby notified that the plaintiff above named claims of you the sum of \$44.80 as justly due from you, with 6 per cent interest thereon from the 17th day of April, 1916, also legal attorney's fee, on account of work and labor furnished at your instance and request on laundry furnished by said defendant, E. F. Barnett, and that unless you appear in said court on the 25th day of April, 1916, at 9 o'clock in the forenoon of that day, and make defense to said claim, judgment will be rendered against you for that amount.

“Dated at Des Moines, Iowa, April 17, 1916.

“Paul Hewitt, Attorney for Plaintiff.”

No formal petition was filed in the case; but, on April 24th, one day before the return day named in the notice, plaintiff, in compliance with a rule of the court, filed the notice with proof of service, together with an informal statement of a claim against defendants for laundry work alleged to have been done by it for the defendants, as shown by an accompanying itemized bill. Defendants made no appearance to the action, and, on May 15, 1916, they were called and defaulted, and, upon the showing made by plaintiff, a judgment was entered in its favor against them. On May 17, 1916, defendants entered a special appearance, for the purpose of questioning the jurisdiction of the court to enter said judgment, and moved to vacate it and to set aside the default, on grounds the substance of which is as follows:

First, because the original notice wholly omits to state the time on or before which the petition of the plaintiff will be filed in the office of the clerk of said court; and

Second, because, although the notice by its terms is made returnable on April 25, 1916, no petition or statement of claim was filed by the plaintiff until April 24, 1916, less than five days preceding the designated return day.

The motion was denied, and from this ruling, the defendants have appealed.

The one controlling question raised by this appeal, the jurisdiction of the trial court to enter the judgment complained of, depends entirely upon the construction to be given certain provisions of the statute under and by authority of which the municipal court of the city of Des Moines is organized. As the statute is of recent enactment and the municipal court but newly organized, no precedent in point is to be found in our decisions. A careful reading of the statute, however, will not, in our opinion, leave any material doubt as to the legislative intent thereby expressed. The ultimate purpose of the enactment appears to have been, first, to relieve the district court of the burden of many cases of minor importance, and second, to furnish a substitute for justices' courts in our most populous counties, where that ancient system has proved ill adapted to modern public needs. See Municipal Court Act, Section 694-c19 *et seq.*, Code Supplemental Supplement, 1915. That it was equally the legislative purpose to preserve in the new court, so far as it superseded courts of the justices of the peace, a large measure of the informal and nontechnical procedure which for generations has characterized that tribunal, is very manifest from the following provisions, which we quote at large:

"Sec. 694-c19. Causes of action in the municipal court shall be divided in the following classes:

"Class 'A' shall include all equitable actions and all

ordinary actions, when the amount in controversy exceeds one hundred dollars, and all special actions of which this court has jurisdiction.

"Class 'B' shall include all ordinary actions when the amount in controversy is one hundred dollars or less.

"Class 'C' shall include the trial of all public offenses of which this court has jurisdiction other than for the violation of the city ordinances.

"Class 'D' shall include all criminal actions for the violation of city ordinances.

"Sec. 694-c21. All pleadings in Class 'A' cases shall be in writing and in substantially the same form as in the district court, and the petition must be filed with the clerk of the municipal court not less than five days before the date set in the original notice for the appearance of the defendant. The time for filing all subsequent pleadings shall be the same as in the district court unless a different time is prescribed by the judge or judges of the municipal court in the rules thereof. The pleadings in Class 'B' cases shall be the same as is now or may hereafter be provided for the trial of civil cases in justice of the peace courts, except as otherwise provided for herein.

"Sec. 694-c22. Civil actions in municipal court are commenced by voluntary appearance or by written notice. If by notice, the same shall be addressed to the defendant or defendants by name, but if his name is unknown, a description of him will be sufficient. It must be subscribed by the plaintiff or his attorney. The notice must state the amount for which the plaintiff will take judgment if the defendant does not appear and answer at the time and place stated in the original notice, which shall be not less than five nor more than fifteen days after the service thereof. It must further state the date on or before which the petition will be filed with the clerk of the municipal court, and unless the petition is filed with the clerk of the municipal court

on or before such date, which shall be at least five days before the return day, the defendant or defendants shall not be held to appear and answer."

Section 694-c28 also provides that, in cases of Class A, witness fees shall be taxed as in the district court; but in cases of Class B, they are to be taxed as in courts of justices of the peace.

It is conceded by the parties that the action in this case falls within the B' class.

The proposition of the appellant is that, as Section 694-c22 provides for the commencement of actions in the municipal court by service of an original notice, and the notice must state the date on or before which the petition will be filed, and unless so filed, at least five days before the return day, the defendant shall not be required to appear or answer, and as this section makes no mention of any distinction in this respect between actions of Class A and those of Class B, but is general in its terms, the requirement is equally imperative in both classes.

If we were to construe or interpret this section without reference to other provisions of the statute, the conclusion reached by counsel would be inevitable. But, upon familiar principles, it is the duty of the court to so read and interpret a statute as to give life and effect to all its provisions, unless there be found in its terms such clear and invincible repugnancy that some or all of them must be held void. To give this particular section the sweeping effect claimed for it on behalf of the appellant is to take away or hold meaningless the distinction which Section 694-c21 makes between proceedings in Class A and Class B. As will be seen from the language of the act already quoted, in all Class A actions, the pleadings must, as to form and time of filing, be such as are required in the district court. In that court, oral pleadings are unknown, and each assertion of claim, counterclaim or defense must be made in

writing and filed within the prescribed time limit. In courts of justices of the peace, unless the case be of some special kind in which the petition or other pleading is expressly required to be in writing, written pleadings are the exception, and not the rule. The original notice ordinarily is sufficient to inform the defendant of the nature of the claim made against him, and in practical effect answers the purpose of a petition. If more is needed, the plaintiff on the return day makes to the justice a brief and informal statement of his claim, or presents an itemized account or promissory note or such other documentary evidence, if any, as he may rely upon as a basis of recovery, and the defendant, if he appears, responds with like absence of technical form or nicety of pleading. It follows of necessity that, if the clearly expressed idea of Section 694-c21 is not to be ignored, and "pleadings in Class B cases" are to be "the same as is now or may hereafter be provided for the trial of civil cases in justice of the peace courts," then oral pleadings, which are confessedly allowable under the system of practice prevailing in justices' courts, are equally allowable in Class B cases in the municipal court. Such being the case, it is the reasonable and necessary conclusion that the legislature did not intend in the very next section to obliterate the distinction it had just made between the two classes of cases. If Section 694-c22 were to be given the effect contended for by defendant, it would seem to be a marked departure from the spirit of the other provisions concerning cases of the B class, which, as we have seen, give clear evidence of a purpose to preserve in the municipal court, so far as these cases are concerned, the distinction which the justice court had enjoyed of being the court of the common people, where controversies coming within its jurisdiction could be heard and disposed of in a comparatively brief and summary way, without the delays and free from the pitfalls which beset more formal litigation. The sole trou-

ble in this case is found in the fact that Section 694-c22, after providing that actions may be begun by voluntary appearance of the parties, or by service of original notice stating the general nature of the plaintiff's claim and the time when the defendant is required to appear and defend, proceeds to say, in the language on which appellant relies, that the notice must state the date on or before which the petition will be filed, and that failure to file the petition within the time named, and not less than five days before the return day, relieves the defendant from any obligation to appear or answer. It is true that the language of the section is general, and no express mention is there made of the several classes previously provided for; but, reading the two sections together, and keeping in mind the classification made in the first, by which, in cases of the B class, no formal written petition is required, while in the A class, under the rules of pleading and practice borrowed from the district court, a petition is necessary, the conclusion is not only natural but unavoidable that the requirement in the next section, that the original notice must state the date on or before which the petition will be filed, and that such date must be not less than five days before the return day, has reference only to cases of the A class and other cases in which the statute expressly requires such pleading, as, for example, in attachment and replevin cases. Such seems to have been the practical construction put upon the statute by the municipal courts, and their code of rules has been framed accordingly. Such construction is, of course, not controlling upon this court; but, in the absence of any authoritative precedent, the interpretation which has been given a statute by the officers and constituted authorities charged with its execution and administration, is always to be considered when the question arises for final judicial settlement.

In addition to what he considers to be the necessary effect of the language which we have quoted from Section 694-c22, Code Supplemental Supplement, 1915, the argument by counsel for appellant suggests only that the construction placed upon it by the trial court renders it possible for a plaintiff or claimant to abuse the jurisdiction and process of the municipal court by serving an original notice with no real intent to prosecute the case if a defense be offered, and that a defendant so served with notice may be put to the trouble and expense of appearing on the return day, only to find that the notice and proof of service have never been filed; that the plaintiff makes no appearance to prosecute his claim; and that the case has never been docketed. That such disreputable practice is possible may be admitted, but it is likewise possible in some degree under any system of practice and procedure where a party in person or by counsel may institute an action in court by a simple notice. If such abuses develop, they may be largely obviated by an appropriate amendment to the statute, or by rules of court.

For reasons stated, it is our opinion that the trial court correctly construed and applied the law, and the ruling appealed from is therefore—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

NORTHERN LIGHT LODGE, No. 156, I. O. O. F., Appellee, v.
TOWN OF MONONA et al., Appellants.

MUNICIPAL CORPORATIONS: Public Improvements—Permanent
1 **Sidewalks—Procedure.** A permanent sidewalk, constructed under Section 779, Code Supplement, 1913, is not a "public improvement" within the meaning of Section 792 et seq. (Title V, Chap. 7), Code, 1897, governing the construction of paving, sewers, etc. It follows that such sidewalks may be constructed

and valid assessments for the cost thereof made without pursuing the procedure provided for the construction of paving, sewers, etc.

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
2 ments—What Constitutes Abutting Property.** A tract of land "abuts" upon a street only where such property and street have a boundary line in common; and, where a tract of land has been lawfully platted into smaller lots for reasonable and proper purposes, only such lots as have one of their boundary lines in common with the line of the street can be said "to abut" on such street. So held as to a tract of land divided into cemetery lots, the occasion of the holding being an attempt to assess the entire tract for the cost of a permanent sidewalk. See Section 779, Code Supplement, 1913.

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
3 ments—"Abutting" and "In Front of" as Synonymous.** Principle recognized that, in the assessment of property for public improvements, the terms "abutting" and "in front of" are synonymous.

CEMETERIES: Title of Lot Owner—Assessment for Sidewalks. It
4 may not be said that, owing to the nature of cemetery lots, the sale thereof to divers persons does not break the integrity of the original tract out of which the lots have been carved, and that an assessment for the cost of a sidewalk may be levied against the tract as a whole, irrespective of such sales.

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
5 ments—Injunction to Restrain Collection.** Injunction to restrain the collection of a special assessment for the cost of a public improvement will lie *when there is a total lack of jurisdiction to levy any assessment.*

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
6 ments—Assessments Against Cemeteries.** Whether cemeteries are impliedly exempt from special assessments for public improvements, *quaere.*

Appeal from Clayton District Court.—A. N. HOBSON, Judge.

SATURDAY, JANUARY 20, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

THE opinion states the issues and the material facts.—
Affirmed.

D. D. Murphy & Son, for appellants.

E. W. Cutting, for appellee.

WEAVER, J.—The appellee brought this action in equity to enjoin the collection of a special assessment levied to pay the cost of constructing a sidewalk. Few, if any, of the material facts are in dispute. The plaintiff is a local lodge of an order commonly known as The Odd Fellows. Many years before this controversy arose, the lodge became the owner of about four acres of land. This land is within the town limits, and, as we understand the record, it fronts on Iowa Street, adjoining the principal town cemetery. Having acquired the title, the lodge proceeded to plat the land (except a small strip hereinafter mentioned) into blocks, drives and alleys, for cemetery purposes. The space left between the nearest range of burial lots and the street line was 20 feet wide. Of this width, 16 feet was platted as a cemetery street or drive, and the remaining 4 feet, to use the language of the witnesses, was “thrown into Iowa Street.” By this we understand that the front fence of the cemetery property was set 4 feet inside of the true line of the property owned by the lodge, and that the strip outside of the fence became, for all practical purposes, a part of the public street. The first sidewalk on this side of the street was built by public subscription and laid along the fence upon this strip. When the time came to renew or replace the walk with the one involved in this litigation, the city caused it to be placed along the line of Iowa Street as originally laid out, leaving vacant the 4-foot strip to which we have referred. The premises were platted into ranges of burial lots and blocks parallel with Iowa Street, the ranges being separated by streets or drives 16 feet in

width. The plat as a whole consisted of 203 whole and 23 fractional lots, and these, with the intersecting drives and alleys, occupied the entire premises enclosed and used for burial purposes. It does not appear that the cemetery was provided for or dedicated to the exclusive use of the lodge or its members, but the lots were sold and conveyed to members of the public generally. At the time of the trial below, 140 full lots and 17 fractional lots had been sold, at prices ranging from \$10 to \$15 each. Conveyances were made to the purchasers by warranty deed, some without any qualification, while others contained the clause: "Always reserving all rights granted by law to cemetery associations," or "Subject to all rights granted by law to cemetery associations." When the assessment complained of was made, all the lots in the range of blocks nearest to Iowa Street had been sold and conveyed to individual purchasers, and the nearest lot still owned by the lodge was 126 feet distant from the line of that street. Not to exceed 14 of the unsold lots were within the limit of 300 feet of Iowa Street. It should also be said that, apparently without any express contract or understanding, the plaintiff has allowed the general management and control of the cemetery grounds to pass into the hands of a voluntary cemetery association, and it has so remained for a period of about 15 years.

With this explanation of the situation, we will now take up the history of the proceedings leading up to the special assessment, enforcement of which is sought to be enjoined.

In the year 1906, the town council of Monona enacted a general ordinance that, where the grade of a street "has been or shall hereafter be established and the bed thereof brought to grade, there shall be constructed * * * permanent sidewalks of cement of the width as defined by ordinance and within the time as fixed by resolution of the council ordering and directing the construction of the same."

By another section of the same ordinance, it was provided that, when the council shall determine that such walk shall be built, "they shall by resolution order the improvement to be made, stating therein the time in which the same shall be done, and cause a copy of the same to be served on the property owner affected," and that, upon failure of the owner to construct such walk, then the town shall cause the work to be done and "assess the cost thereof on the parcels of land in front of which the same is constructed." By a later ordinance, the width of all sidewalks in that section of town which includes the property in question, is fixed at 4 feet. On August 3, 1914, the council passed a resolution that a cement walk 4 feet wide be constructed on the south side of Iowa Street, and that the work be done within 30 days. It is conceded, subject to defendant's exception as to its materiality, that no other resolution of necessity was passed; that no notice was given or served of the time when such resolution was to be considered; that the contract to build the walk was not let on competitive bids; that the contractor was not required to give bonds; and that no notice was given fixing a time within which property owners might appear and make objection to special assessments for the expense of such construction. It does appear, however, that, after the resolution was passed, a copy thereof was served upon the lodge, which responded with a written refusal to build the walk, stating that the lodge had disposed of all the property abutting on Iowa Street. It also appears that, at the time the construction of this walk was ordered, there was an existing contract between the city and a third person by which the latter had undertaken to construct all cement walks ordered by the council at a stated price, which is shown to have been somewhat less than the current rate for such work, and the work now in question was done in pursuance of such contract. After the walk had been constructed, but before any assessment was made, the

lodge served written notice on the town council, objecting to the levy of any special assessment therefor upon the cemetery property owned by it. The grounds stated for such objection are numerous. We shall not attempt to state them all, but it may be said in a general way that they include the claim that their property does not abut on Iowa Street; that the portion of the cemetery so abutting has been sold and conveyed; and that the statutory requirements were not observed in ordering and constructing the work. Thereafter, the town council by resolution found the expense of constructing the walk in front of the cemetery to be \$127.80, and ordered said sum to be assessed upon the entire cemetery property, describing it as a single parcel or tract of land. It is to enjoin the collection of this assessment and have the same adjudged and declared void that this action was brought.

The foregoing statement renders unnecessary any special reference to the pleadings. In so far as the issues are not made apparent from the recitation of facts here set forth, they will be made clear in discussing the legal propositions advanced by counsel. The trial court, having heard the evidence, found for the plaintiffs generally, and defendants appeal.

I. The briefs of counsel give much prominence to the question whether the assessment should be declared void because of the failure of the town council to observe the statutory conditions to the acquirement of jurisdiction to order the construction of the walk. As the trial court's decree is stated in general terms only, and is accompanied by no written opinion or special findings, it is not shown whether this objection by the plaintiff was thought to be good. It is the contention of appellee's counsel that the construction of a sidewalk is a "street improvement," within the meaning of Chapter

1. MUNICIPAL CORPORATIONS: public improvements: permanent sidewalks: procedure.

7, Title 5, of the Code and its amendments. With this as a premise, it is argued that, to acquire jurisdiction to order the construction of this sidewalk on Iowa Street, the town council should have first adopted a resolution of necessity, after due publication of notice, as provided in Section 810, Code Supplement, 1913, and Code Section 811; that a written contract should have been made and filed before the work was begun (Code Section 812); that the contract should have been let only upon sealed proposals and newspaper publication of notice (Code Section 813); that a contractor's bond should have been exacted (Code Sections 814, 815); that a plat of the property and a schedule of assessments should have been prepared and filed for public inspection (Code Section 821); and that ten days' notice by newspaper publication should have preceded the levy of assessments.

If this objection be held good, we would need go no further to affirm the judgment below, but, after considerable reflection, we think it cannot be sustained. It is doubtless true, generally speaking, that a sidewalk upon a public street is a "street improvement," and, if there were nothing in the statute indicating a different intention, we might well hold with the appellee that, in ordering the construction of such walks, the procedure prescribed in Chapter 7, Title V, of the Code must be pursued with substantial fidelity. It is manifest, however, that, in the very nature of the situation, there is practical need of distinction's being made and recognized between the formalities to be observed and safeguards to be thrown around transactions involving large public expenditure and placing heavy burdens upon the public treasury or upon private property, and those minor expenditures the need of which is arising daily, or minor improvements pertaining particularly to the convenience of restricted localities. A paving project or a system of sewerage contemplates, as a rule, large cost and

heavy burdens upon the property. They are improvements of a permanent character, rendering it quite impracticable to remove them if found unsatisfactory. Their proper construction calls for the exercise of more or less technical skill by the contractor who does the work and the engineer who plans and supervises it, matters upon which the average property owner or observer has little ability to pass critical judgment. It is, of course, quite essential to guard, so far as possible, against extravagance, incompetence, waste and graft, by keeping the exercise of the taxing or assessing power within well defined limits and maintaining intact effective safeguards of public interests. In our cities, and especially in our smaller cities and towns, the ordering and constructing of a sidewalk is often a matter affecting no more than a single lot or block, and it is but seldom that it is a matter of general interest. It is a work which the property owner himself may perform if he so desires, though in practice the municipality can do it cheaper and better than he can. He can give it his personal oversight and attention. It is, in nearly all cases, an improvement of comparatively little cost, and, in so far as it promotes public convenience, the sooner the work is done and the walk opened to travel, the better. Moreover, it is important to note that the expense of publishing the various notices and complying with the various formalities specified in the chapter on public improvements necessarily amounts to a very considerable aggregate, which, in the matter of paving and sewerage, is distributed over many pieces of property, imposing but a slight expense on each, but, in the matter of a small sidewalk job, would materially increase the lot owner's assessment. Then, too, there seems to be no apparent reason why any ordinary sidewalk improvement may not be initiated and completed with all due protection to public and private interests, while the ponderous, slow-moving machinery of municipal legislation is dragging its way through

the initiatory steps to the letting of a contract for an improvement of the other class. Whether for these or other reasons, we cannot say, but it is nevertheless true, as we read the statute, that the legislature has in fact recognized this distinction. The authority of the city or town to provide for the building of sidewalks is specifically mentioned only in Chapter 6 of Title V of the Code, and it is not, in express terms, to be found anywhere in Chapter 7, upon which appellee relies. In Chapter 6, Section 777, Code Supplement, 1913, a town is authorized to provide for laying temporary plank walks, and to assess the cost, not to exceed 40 cents a lineal foot, on abutting property. By Section 779 in the same chapter, Code Supplement, 1913, authority is given to provide for the construction of permanent sidewalks on streets brought to grade, and to assess the cost on abutting property. By Code Sections 780 and 781 of the same chapter, authority is also given to repair, maintain and clean such walks. In Section 791-a, still in the same chapter, is a provision that all objections to the cost of construction must be made to the council before the day fixed for levying the assessment, and in the same connection are provisions enabling the property owner to pay such assessments in installments, if he so desires.

Passing, then, to Chapter 7, on which appellee relies, we find it entitled, "Of Street Improvements, Sewers and Special Assessments." The title does not get us very far, but the initial section, Code Supplement, Section 792, starts with the proposition that cities have the power to improve any street "by grading, parking, curbing, paving, graveling, macadamizing and guttering the same * * * and to assess the costs on abutting property." Then follows a provision, Code Section 794, giving power to provide for construction of sewers. Section 810, Code Supplement, 1913, requiring a preliminary resolution of necessity by the city council, is expressly limited to street improvements or sew-

ere "authorized in this chapter," and this recognition that this chapter has special application to a line of street improvements not elsewhere sufficiently provided for, is clearly visible throughout the provisions as an entirety. Add to this the fact, which we have already noted, that nowhere in Chapter 7 is there any mention of sidewalks, and that such subject can be brought within its scope only as we may say that the phrase "street improvements" is broad enough to include sidewalks, and the further fact that the subject of sidewalks is specifically included in Chapter 6, which provides in terms the authority for their construction and the procedure by which such authority may be exercised, and we think it becomes clear that the legislative machinery and the more or less intricate procedure specified in Chapter 7 were not intended to govern the exercise of municipal authority with reference to sidewalks.

The legislative recognition of this distinction is elsewhere very apparent. For example, Chapter 7 contains a provision by which the property owner may obtain the privilege of paying his special assessment in installments, and, if the appellee's theory be correct, it needed no additional legislation to give the same privilege to the man whose property was assessed for a sidewalk; yet it was found, or at least thought, necessary, in order to accomplish that purpose, to amend Chapter 6. See Code Supplement, 1913, Sections 791-b to 791-e, inclusive. Again, the distinct character of the two chapters is clearly shown in Section 779, Code Supplement, 1913, found in Chapter 6, where, after giving authority to construct permanent sidewalks and assess the cost thereof on abutting property, it adds:

"Towns shall have the power to make the street improvements provided for in chapter seven of this title, and pay for the same, or any part thereof, out of the general fund, or to assess, levy and collect special taxes for the

cost, or any part thereof, against the abutting property, in the manner provided in the said chapter."

Is it not clear that the legislature believed that the procedure prescribed in Chapter 7 was not applicable to the construction of sidewalks, and that this special provision was necessary to make the manner of assessment there provided available for such an improvement?

It is said in argument that, in the case of *Clifton Land Co. v. City of Des Moines*, 144 Iowa 625, we held explicitly that the procedure provided for in Chapter 7 is to be followed in the construction of sidewalks; but this is a mistake. The matter of the distinction to be drawn between Chapters 6 and 7 of Title V of the Code was not there considered or passed upon. The plaintiff in that case had himself instituted the proceedings to build the walks. The city, whether by one chapter or the other of the Code, or by both chapters, had jurisdiction of the subject matter; plaintiff had invoked it, and the proceedings so instituted had resulted in the construction of the improvement; and we held him estopped to raise the objection that the city had no authority to order the improvement, and, in so far as he sought to raise objection to the manner in which the work was done, we further held that his remedy was by appeal and not by injunction.

It is enough to say, in conclusion upon this branch of the case, that, in our judgment, the appellee's position, that the preliminary steps which the statute makes necessary to the jurisdiction of the city council to proceed with a paving improvement or the construction of a sewer must be likewise observed to authorize the construction of a sidewalk, cannot be sustained. This conclusion does not in any manner negative the idea that, while the preliminaries to the exercise of the council's jurisdiction to order the construction of a pavement or sewer are not necessary to its jurisdiction to order a sidewalk, yet the provisions of Chap-

ter 7 as to the manner and method of making the assessment and levy may govern in both cases. That such will be the rule, at least under some circumstances, appears to be indicated by Section 792-c, Code Supplement, 1913, which provides:

"So far as applicable, Sections 821, 822, 823, 824, 829, and 839 * * * shall govern all special assessments made in cities and towns unless otherwise specially provided."

The same section seems also to preserve the right of appeal in all cases.

II. If the property in this case was liable to the assessment, except for some irregularity in the proceedings by which the improvement was authorized, or some defect in the execution or quality of the work done, we should then be met by the proposition whether plaintiff had a remedy by appeal, and, if it had, then an action to enjoin would not lie. We are of the opinion, however, that the case hinges upon the more fundamental question whether the council had, or could under any circumstances have, acquired jurisdiction to levy this assessment. If this is to be answered in the negative, as we think it must, the judgment below must be affirmed. The statute which authorizes the building of the walk provides that the cost of permanent sidewalks may be assessed upon "the lots or parcels of land in front of which the same shall be constructed." Section 779, Code Supplement, 1913. The assessments provided in Chapter 7 of Title V, Section 792, Code Supplement, 1913, are to be laid upon "abutting property." The general ordinance No. 61 of the city, relied upon by the defendant, provides that the cost thus incurred shall be laid on the property in front of which the walk is con-

2. MUNICIPAL CORPORATIONS: public improvements: assessments: what constitutes abutting property.

3. MUNICIPAL CORPORATIONS: public improvements: assessments: "abutting" and "in front of" as synonymous.

structed, and the notice which the city served upon plaintiff of its order to build makes use of the same language. The inquiry then arises whether the property assessed is, within the meaning of the law, "abutting property," or property "in front of which" the walk is laid. We are of opinion that there is no essential difference in the legal effect of the two forms of expression. The question as to what is abutting property, within the terms of the statutes authorizing special assessments, is not a new one in this court. In *Millan v. City of Chariton*, 145 Iowa 648, 650, it is defined in general terms as being that property between which and the improvement there is no other land. In *Kneebbs v. City of Sioux City*, 156 Iowa 607, we repeat that definition. Stating it in other words, we there said that the term applies to "properties lying contiguous to the street improved, whether specifically outlined upon a plat or not." Further noting the limits of its application, we quoted approvingly the following:

"If a platted lot has been divided in actual use into two distinct tracts, one of which is separated from the street by the other, the one in the rear is not regarded as abutting on the improvement." 1 Page & Jones' *Taxation by Assessment*, Sec. 620.

In an earlier case, *Smith v. City of Des Moines*, 106 Iowa 590, we held that a lot separated from the street by another platted lot or strip of land could not be assessed for a street improvement even though the several lots were both owned by the same person, and in practical use constituted part of the same dooryard or lawn. The opinion in that case was written by Robinson, J., who did not agree with that view, and his entire argument is opposed to that result, but closes with the brief but important statement that the majority of the court was against him, and that the judgment of the trial court, which he believed to be correct, was reversed. In the *Kneebbs* case, a city lot had been

platted with a width of 52 feet and a length of 150 feet, and was bordered on one side by Riverside Avenue. A railway company appropriated as a part of its right of way a strip from 10 to 16 feet wide from the side of the lot next to the avenue. Plaintiff was the owner of the remainder of the lot. The city, having caused the avenue to be paved, sought to extend a special assessment therefor over the plaintiff's property, but we held that the appropriation of the right of way so separated or segregated the rest of the lot from the street that the property assessed did not abut thereon, and the assessment was annulled. According to the consensus of authorities, we think it must be held that a tract of land, large or small, abuts upon a street only where such property and street have a boundary in common, and that, where a tract of land has been lawfully platted into smaller lots or parcels for reasonable and proper purposes, only such lots and parcels as bound upon the street can be said to abut thereon. When the word is used with respect to street improvements, it does not necessarily mean that the property must actually be in contact with the work or structure by which the street is improved, but it does mean that the street improved and the property to be charged with the cost of the improvement shall touch or meet upon a common line.

Now, that plaintiff, as the owner of the 4-acre tract, had the right to dedicate it to use as a cemetery, no one will deny. To that end, it was entirely proper for it to plat the tract into blocks of burial lots, separated by convenient streets or driveways and alleys. And, when the land was thus platted and set apart for such use, we can conceive no good reason why, under the law to which we have already referred, the authority of the city or town, if any it has, to levy the cost of the sidewalk upon abutting property, is not limited to that part of the property, if any there be, which borders or abuts upon the street improved. This, we think,

would be the case had no lots yet been sold, and for still stronger reason it must apply where the lots have been conveyed to other persons to such an extent that the property left unsold has no contact whatever with the street.

In avoidance of this objection, the appellant argues with much earnestness that, notwithstanding the conveyance of a large majority of the lots to other persons, many of whom have doubtless used them for the burial of their dead, and perhaps have expended much labor and money in improving and decorating them, yet there is such an underlying title and proprietorship remaining in the plaintiff that the city may consider the entire cemetery as a single lot or parcel of land and treat the plaintiff as its owner, for the purpose of levying and collecting a special assessment, not upon the lots severally, but upon the cemetery as a whole. So far as this question of title is concerned, appellant places much reliance upon the decision of this court in *Anderson v. Acheson*, 132 Iowa 744. The cemetery there considered was one of a public character, provided, owned and platted by a city. A city ordinance provided that the burial lots should be used by the purchaser only, should remain indivisible, and, except it be to the city, should not be conveyed to anyone but a member of the purchaser's family. It also provided that proprietors of burial lots should not allow any interment upon such lots for a remuneration, nor make any disinterment without the permission of the mayor. A lot was purchased by the members of the family of one Whaley, the deed being made to the father and a son. The father and mother were afterward buried on the lot, and, later, the son undertook to sell the lot to Acheson and move the bodies of the parents to another part of the cemetery. To this, other members of the family objected, and suit was brought to enjoin any disturbance of the bodies of the dead, and this relief was granted by the trial

4. CEMETERIES:
title of lot owner:
assessment for sidewalks.

court and affirmed by this court. It will be seen at once that there is no likeness or analogy between the issues in that case and those in the case at bar, but counsel find in the arguments used or doctrines approved in the discussion of the cited case, statements and propositions which are thought to have a legitimate application here. Counsel fail, however, to notice that said case deals only with a *public* cemetery, in which the conveyance of a lot was made subject to so many conditions and restrictions as to vest the purchaser with little, if anything, more than a mere family privilege or right of burial; and the effect of our decision was that, when a burial was rightfully made on such lot, a court of equity would protect the grave from desecration, on the complaint of any member of the family of the deceased. Counsel quote the court as there saying:

"The courts quite generally hold that the purchaser of a lot in a cemetery, though the deed be absolute in form, does not take any title thereto. The mere privilege or license to make interments in the lot so purchased, exclusive of all others, is all that is acquired thereunder."

Such was not the language of the opinion. What we did say was expressly limited to a "public" cemetery, and, when thus read, shows that the distinction of which we speak was not overlooked. It would certainly be strange if the owner of land by perfect title, were he so disposed, could not plat it as a cemetery and give, sell or convey to a grantee a title as full, complete and absolute as his own. It is said, however, that the deeds given by plaintiff were not absolute. The evidence shows, as we have before stated, that some of the conveyances to lot purchasers were made by warranty deed without any qualification, while others made use of the expression, "Subject to all rights granted by law to cemetery associations." A search of the statute discloses no rights conferred upon cemetery associations which would have the effect to reduce the title conveyed to

the purchaser of a lot to anything less than a fee. By Code Section 587, the officers or directors having control or management of a cemetery may adopt rules governing its care, ornamentation and improvement, but on no fair interpretation can this be given the effect claimed for it by counsel. The restrictions upon the right of a lot owner go only to the manner of his use of the property, and not to the quality of his title. The deed gives more than a mere license or privilege—it conveys the property. Many deeds of land are made subject to building restrictions and other limitations upon the use of the property, but such stipulations do not render the grantee's interest thereby acquired anything less than a fee. The one cited precedent which, at first blush, seems to afford support to appellant's position at this point, is *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 503, where a special assessment upon the property of a cemetery association was sustained. But, on turning to the statute of New York under which that association was organized, and upon which that decision was based, we find it to be quite identical with the city ordinance we had to consider in the *Anderson* case, and that, because of the many restrictions imposed by that statute, the conveyances to purchasers did "no more than to confer on the holder of a lot a right to use it for the purposes of interment," and that no such estate was thereby granted "as to exclude the general proprietorship of the association." We have in this state no such statute. In the *Anderson* case, as we have already seen, the cemetery was owned by the city, which, by its ordinances and deeds of conveyance, vested the purchaser with no more than a perpetual license to use the lot for burial purposes. Here, however, as we have already said, is no restriction or condition imposed upon the purchaser which is inconsistent with a conveyance to him of the general ownership. The necessary result of this situation is that, as none of the unsold lots

abut upon Iowa Avenue, the town was without authority to lay a special assessment upon the plaintiff's property. The provisions of Code Supplement, 1913, Section 792-g, by which the council may properly assess the cost of an improvement not only on abutting property, but on an enlarged area extending from the street one half way to the next street, not exceeding 300 feet, are by the terms of the law limited to such improvements as provided for by Section 792 of the Code and amendments thereto and supplementary thereof. This section, as we have seen, is found in Chapter 7 of Title V of the Code, and has no application to the construction of sidewalks.

The town being without authority in any event to levy the assessment upon or sell the plaintiff's property under the circumstances shown, the courts will entertain a suit in equity to have such assessment vacated and its collection restrained. The objection to the assessment does not go to the mere questions of regularity in the proceedings where the remedy would doubtless be by appeal, but to the point that the city has no power, under any form of procedure, to impose an assessment on this property for the construction of the walk.

III. Whether any of the lots in the plat constitute abutting property within the meaning of the law, we are not here called upon to decide, as none of the owners holding lots in the range of blocks nearest the street are parties to this action. Even these lots are separated from the street by a cemetery street, or drive, 16 feet wide. The sale of the lots in accordance with the plat doubtless operated as a dedication of the streets and alleys of such plat to the general use of the lot owners, if not of the public generally, as a means of access to the various parts of the grounds. Between the 16-foot strip or drive in front of the first range of blocks and the line of Iowa Street, is the strip 4 feet

5. MUNICIPAL
CORPORATIONS:
public improve-
ments - assess-
ments: injunc-
tion to restrain
collection.

wide, which seems to be no part of the platted cemetery. The fence which encloses the cemetery leaves this strip on the outside, while the sidewalk in question follows the street line. Between the fence and the walk stretches this unplatted remnant of land, extending along the entire front. This is undoubtedly abutting property, and, if appellant deems it of sufficient value to justify the levying of an assessment thereon, this decision will not prevent such action on its part.

IV. In view of the somewhat unusual and interesting character of this case, we have avoided any consideration of the effect of the statute which exempts cemeteries from taxation, preferring to let that question pass until a case arises where its decision is necessary and full argument has been had. We are aware of the well-established rule that, ordinarily, exemption from general taxation does not include exemption from special assessment, but the inquiry still remains whether cemeteries are not in a class by themselves, and whether, under the established principles of the common law and the usages of all civilized peoples, ground set apart for the burial of the dead is not impliedly exempted from the burdens imposed by law upon property in general, unless it be where the legislature has otherwise clearly and unmistakably provided.

If it shall finally be held that such property is liable to special assessment of this kind, it will then be worth while to consider just how the town or city may enforce the assessment when made. May it sell the property? Will the purchaser thereby acquire a title to the lots entitling him to deny right of burial therein and authorizing him to obliterate the graves, destroy the monuments there erected, disinter and remove the dead, and make use or sale of the premises for residence or business purposes?

6. MUNICIPAL COR-
PORATIONS pub-
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ments against
cemeteries.

That the state, in the exercise of its sovereign power, by legislative enactment can thus violate the sanctity with which burial grounds have been clothed by all Christendom from time immemorial, may be admitted, but such unnatural intent should not be left to mere inference.

Finding then, as we do, that the right of the town to levy special assessments for the construction of sidewalks is limited to the property abutting on the street so improved, and that the cemetery property owned by the plaintiff does not abut on the street for the improvement of which the assessment is laid, the finding and conclusion of the trial court that such assessment should be held void and its enforcement be perpetually enjoined must be sustained, and the decree appealed from is therefore—*Affirmed*.

GAYNOR, C. J., EVANS and PRESTON, JJ., concur.

L. C. SNEARLY, Appellant, v. WILTON MCCARTHY, Appellee.

NEGLIGENCE: Pleading—Enumerating Grounds of Negligence—

1, 4 Effect. One who enumerates specific grounds of negligence must stand or fall thereon. So held where, in an action for malpractice, plaintiff alleged specifically wherein defendant was negligent, and was properly refused the right to show negligence in not giving "constitutional" treatment, because such negligence was not pleaded.

PHYSICIANS AND SURGEONS: Malpractice—Inference from Re-

2 sults of Treatment—Expert Testimony. A jury may not draw the conclusion of unskillfulness solely from proof of the result of the treatment (except perhaps in rare cases of exceptional and gross negligence). In other words, plaintiff may not stop at showing the *treatment* and the *results*, and then have the jury turned loose to set up their own standard as nonexperts as to what is and what is not proper and reasonable method of treatment. *The only recognized standard is essentially within the domain of expert testimony.*

PHYSICIANS AND SURGEONS: Malpractice—Essentials of Re-

3 covery. In an action for malpractice, it is essential to show:

1. The treatment or lack of treatment.
2. That such treatment or lack of treatment is not regarded

as proper by those skilled in the profession of medicine or surgery.

3. That injury resulted as the proximate result of such treatment or lack of treatment.

Evidence reviewed in the case of the reduction of a fractured limb, resulting in long delayed union and shortening of the limb, and held insufficient to establish said essentials.

NEGLIGENCE: Pleading—Enumerating Grounds of Negligence—
1, 4 Effect.

EVIDENCE: Relevancy, Materiality and Competency—Similar
5 **Transactions—Malpractice.** On the issue whether long delayed union of a broken limb was the result of negligent treatment, evidence is inadmissible that plaintiff, some years prior, had suffered a dissimilar fracture which readily united.

Appeal from Polk District Court.—W. S. AYRES, Judge.

SATURDAY, JANUARY 20, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

ACTION against defendant, who is a physician and surgeon, for malpractice in reducing a fracture to the femur of plaintiff's right leg. The defendant denied all negligence in the treatment of the case. On the issues joined, the case was tried to a jury, and, at the conclusion of the testimony offered for plaintiff, the trial court, on motion, directed a verdict for defendant, and plaintiff appeals.—*Affirmed.*

A. D. Pugh, for appellant.

Dutcher, Davis & Hambrecht, and *Parsons & Mills*, for appellee.

DEEMER, J.—I. On April 22, 1912, plaintiff, while riding a motorcycle in the city of Des Moines, collided with an automobile, resulting in a simple oblique fracture of the femur of his right leg. He was immediately taken to one of the hospitals in the city, and a Dr. Losh was called. Plaintiff had a brother in the city who had at one time

practiced medicine and surgery, and he, too, was called. The two doctors, upon consultation, agreed to call the defendant, and he responded to the call. Plaintiff was immediately taken to the operating room of the hospital, and an anesthetic was administered, the fracture reduced, and the patient taken back to his room. While still under the influence of the anesthetic, dressings and sandbags and extension straps were applied. Within twelve hours, weights were added, and these were followed by splints, and matters apparently progressed as usual for two or three weeks, when plaintiff discovered, or thought he discovered, a shortening of the injured limb. He called his brother's attention to the matter, and the latter measured it and found it to be almost two inches shorter than the other one. During the interim, plaintiff was visited every day or so by four other physicians aside from defendant, although but one of these seemed to have charge of the case—that one being an interne at the hospital or an assistant to the defendant.

Defendant was informed of the shortage, visited the plaintiff, and prescribed additional weight to the extension, which was then added. After being in bed five or six weeks, plaintiff was allowed to sit in a chair for about two weeks, and then to get around on crutches for about three weeks. Before this, however, Dr. Losh put on what is called an ambulatory splint, for the purpose of adding to the extension. After that, a plaster of Paris cast was put on, and this extended from just below the hip to a point just below the knee. At the end of seven weeks, and while the cast was still on, Dr. Losh and the defendant concluded that plaintiff might leave the hospital, and he did so leave. The doctors told him that he might by degrees bear some weight upon the injured member. Some of the cast was cut away, so as to free the action of the knee joint. In observing the directions of the physicians, plaintiff noticed some trouble with the injured leg, as if the bones were

slipping past each other, and reported the same to Dr. Losh, and also called Dr. Welpton's attention to the matter. Dr. Losh had plaintiff taken to another hospital, and there some X-ray pictures were taken. Dr. Welpton and a Dr. Habenicht also took some pictures. Thereupon, plaintiff called defendant's attention to the matter, and defendant, upon examination, found that there had been no union of the fractured parts. Such being the situation, defendant recommended an operation, and the use of what is known as a Lane plate. Accordingly, plaintiff was again taken to a hospital, the leg was cut open, the bones scraped, and the plate applied. The wound was left open and the limb bandaged and dressings changed daily thereafter for several weeks, when another plaster cast was put upon the limb, this cast extending the full length of the leg. This remained on for about six weeks. At that time, a shorter cast was put on, which remained for several weeks, and then what is known as a cylinder cast was applied, and this was left on until plaintiff left the hospital, about December 17, 1912. He left because he saw no signs of improvement. Before leaving the hospital, and while defendant was still treating him, plaintiff's brother, the doctor, called a doctor friend from Chicago to see the patient, and this doctor recommended that plaintiff be taken to Chicago for future surgical work. Upon leaving the hospital in December, plaintiff went to Chicago and consulted Dr. John B. Murphy. Murphy had an X-ray taken, and concluded therefrom that another operation was necessary. This was performed, another plate was put on, and also what is known as a travoid splint. Four months afterward, Dr. Murphy discovered that there was still no union. Another operation was then had, and a plaster of Paris cast was put on, extending from the waist line to the toes. About four and a half months after this second operation, it was discovered that there was still no union, and, on September 5,

1913, a third operation was performed by Dr. Murphy, which resulted in a union, and plaintiff was finally discharged about January 14, 1914. Plaintiff's injured limb is now considerably reduced in size, and is about one and a half inches shorter than the other one.

Many grounds of negligence are charged, and these are made quite specific. As we gather from the petition, it is claimed that defendant was negligent in not using an X-ray machine in diagnosing the case before he did anything toward reducing the fracture; negligent in not using it both before and after he performed the operation; that he was negligent in not properly bandaging the limb and applying splints and methods for extension before plaintiff came out from under the influence of the anesthetic given just after he received his injuries; that defendant was negligent in failing to discover the shortening of plaintiff's limb and the nonunion of the bone, and applying proper methods to correct the difficulty; that proper extension was not applied at a suitable time or times, and that the application of splints, bandages and supports was negligently delayed and applied when the limb was swollen, and when the inflammation subsided, they were not sufficient to reduce the fracture or to hold the bones in apposition; that the Lane plate was not properly put on, in that it did not have a sufficient number of screws, was not put on straight or sufficiently secured to hold the broken bones in place; that the delayed union was due to defendant's failure to properly hold the broken bones in apposition so that they might reunite, or to constitutional causes which were preventable; and that defendant did nothing to remove these conditions.

It is claimed that in all these respects defendant failed to follow the usual and customary practice of physicians and surgeons in his locality, both in the diagnosis and treatment of the case.

On the other hand, defendant insists that there is no

testimony whatever that he did not treat the plaintiff according to the usual and proper methods; that there was no evidence of any neglect on his part, either in discovering or treating the injuries; and that the difficulties with plaintiff's case arose out of the fact that there was a nonunion of the bones, due to no fault of his, but to nature's failure to throw out the necessary material to unite the broken bones.

For appellee, it is insisted that plaintiff produced no testimony tending to show any malpractice on his part; that the testimony shows nothing but the fact of nonunion for an unusual length of time and a shortening and a reduction in the size of the injured limb, all of which is accounted for by natural causes, or unusual ones, for which defendant was in no manner responsible.

At the outset of the discussion, we may say that plaintiff selected the grounds of negligence upon which he would stand, stating them with great particularity, and that nowhere does he claim that defendant failed to give plaintiff the necessary constitutional treatment to aid nature in throwing out the callous or bony substance which cements the ends of broken bones together; so that this proposition must be eliminated from the case.

Again, while the method of treatment adopted by defendant is fully pointed out and described in the testimony, no witness was called by plaintiff to show that this was not regarded as proper practice by the profession in the locality where defendant practiced. If there be any such testimony, it is to be inferred from what defendant did or failed to do, viewed from the standpoint of a nonexpert, or deduced from what some of the medical experts said while on the stand. As a general rule, it may be safely affirmed that, in matters requiring special skill and

1. NEGLIGENCE: pleading; enumerating grounds of negligence: effect.

2. PHYSICIANS AND SURGEONS: malpractice: inference from results of treatment: expert testimony.

training, it is not permissible for laymen as nonexperts to set up any artificial standards as to methods of treatment. This is especially true in surgery; for in that field neither courts nor juries are presumed to know more regarding methods of treatment than ordinary laymen, and that is practically nothing. After hearing the theories, deductions and scientific facts from experts, both judge and jury must often oppose one set of opinions against another and determine which is the more reasonable, but they cannot, without some guide, presume to fix any standard upon which to determine the correctness of any kind of treatment. This is pointed out in many cases from other jurisdictions. *Ewing v. Goode*, 78 Fed. 442; *Getchell v. Hill*, 21 Minn. 464; *Tefft v. Wilcox*, 6 Kans. 46; *Farrell v. Haze*, (Mich.) 122 N. W. 197. We have adhered to that doctrine in *Morrow v. National Mas. Acc. Assn.*, 125 Iowa 633.

In *Pettigrew v. Lewis*, 46 Kans. 78, the Supreme Court of that state said:

"To maintain her action, the plaintiff should have offered the evidence of skilled witnesses to show that the present condition of her eyes was the result of the operation, and that it was unskillfully and negligently performed. 'This evidence must, from the very nature of the case, come from experts, as other witnesses are not competent to give it, nor are juries supposed to be conversant with what is peculiar with the science and practice of the professions of medicine and surgery to that degree which will enable them to dispense with all explanations.' *Tefft v. Wilcox*, supra. 'The question whether a surgical operation has been unskillfully performed or not is one of science, and is to be determined by the testimony of skillful surgeons as to their opinion, founded either wholly on an examination of the part operated upon, or partly on such examination and partly on information derived from the patient; or partly on such examination, partly on such information, and part-

ly on facts conceded or proved at the trial.' * * * It would have been easy for the patient to have submitted to an examination by an experienced physician or oculist capable of determining whether the condition of her eyes was the result of the operation, and whether that operation was performed with reasonable skill and care. Cases may arise where there is such gross negligence and want of skill in performing an operation as to dispense with the testimony of professional witnesses, but not so in the present case."

Going back to the facts as disclosed by the record: While it is claimed that defendant was negligent in not using the X-ray before he did anything toward reducing the fracture, the testimony shows that it is entirely optional with physicians and surgeons whether to use the X-ray or not in the first instance. The purpose, of course, in using the X-ray is to diagnose the case, and if this may properly be done without the use of this modern appliance, then no negligence is to be inferred from failure to use one. Moreover, the record here shows that the nature of the fracture was discovered when defendant was first called; hence an X-ray examination would have added nothing.

8. PHYSICIANS AND SURGEONS: mal-practice: essentials of recovery.

The immediate administration of an anesthetic is not complained of, but suggestion is made that the limb was not properly bandaged and supported before the patient came out from under the influence thereof, and extension was not provided until about twelve hours after the injury. These are almost wholly scientific surgical questions, upon which we have little or no light from the testimony. Such as we do have indicates that proper bandages and sandbags were used, and that it is not unusual to delay the use of the extension for a longer time than defendant did in this case. The same may be said regarding the use of

splints and other permanent bandages, depending upon the amount of inflammation and swelling, the condition of the patient's mind, etc.

Plaintiff was visited by many physicians before the shortening of the limb was discovered, and none of these say they observed anything wrong. It may be that the shortening should have been discovered by defendant, or his assistant, before it was; but when it was discovered, which was within two weeks, there is no claim that the added weight put upon the extension was not the proper treatment. There is no testimony to the effect that it was proper or usual at such a time to use an X-ray to discover whether the bones were then in apposition. The use of the plaster casts is not complained of, and no suggestion is made in argument that, before applying the casts, a skiagraph should have been taken. As we understand the record, skillful treatment of a fracture during the first few weeks demands that the injured member be handled as little as possible. Down until expiration of the usual period for a fracture to knit, there is no suggestion of any improper treatment, and nothing to indicate any trouble, save the shortening of the limb, and that was sought to be corrected by the usual methods. After the discovery of non-union of the bones, and after plaintiff was instructed to bear some weight upon the limb, skiagraphs were taken under the direction of two doctors, but it does not appear that defendant had any taken. Whether he was advised of the results shown by those made under the direction of the other doctors does not appear; but it is agreed by all that there was a nonunion of the bones after six weeks and more of treatment, and it is practically agreed that the skiagraph would have shown nothing more, save the presence, perhaps, of something between the broken ends which prevented nature from doing her work. But this seems to have been immaterial, because, whatever the immediate

cause, it is not shown to have been due to any fault of defendant, and all agree that an operation was necessary, and that the kind of operation which defendant undertook to perform at that time was the one demanded. The use of the Lane plate is not complained of, but it is said the defendant was negligent in applying it: First, because he did not use enough screws; and, second, because it was not put on straight. The only testimony in support of either contention comes from plaintiff's brother, who, it seems, witnessed the operation, and from the skiagraph taken under the direction of Dr. Murphy at Chicago, some months afterwards. As to the latter, taken about December 17, 1912, it shows that the bones were not in apposition, and that the plate had either been improperly put on in the first instance, or had been forced out of position after being properly attached to the bones. We here reproduce this skiagraph, in order that the situation may be better understood.

Of course, it is not necessarily to be inferred from this that the plate was not properly put on in the first instance, but it may be considered as bearing upon that proposition. The direct testimony from the plaintiff's brother with reference to this was substantially as follows:

"I was present at the operation. Dr. McCarthy performed it, assisted by the interne—I think it was Dr. Martin. He was put on the operating table, and given an anesthetic, and the right thigh on the outer surface cut down 9 or 10 inches to the bone, and the parts of the bone were denuded, and one of the ends was cut off probably a half an inch, and an attempt was made to bring the two denuded ends together by means of screws and a Lane plate, and the wound was closed and he was put back to bed. It was a pretty bloody operation. From where I stood, I could not accurately describe the steps of the operation, but from what I could see, there was quite a quantity of

May 1917]

SNEARLY v. MCCARTHY.

91

callous scraped away by Dr. McCarthy about the bone ends. Before the operation, when they cut down on the exposed bone, the lower fragment was on top of the upper fragment. By upper fragment, I mean that next to the body; that part was on top of the lower fragment, lapping, I should judge, a half or three quarters of an inch, and I do not think the broken surfaces were together. Dr. McCarthy first attempted to grasp and bring the fragments into position and hold them there by ordinary heavy forceps, but it kept slipping off for him, and he finally used his hands to hold them in position as near as he could until he could drill the holes and put on the plate. It was simply a single clamp forceps. As I understand, there is some appliance especially made for that purpose. It has a clamp for each bone end held rigidly together. The purpose of that is to secure the different parts of the bone while the plate is being made substantial. It holds them firm. That appliance was not used by Dr. McCarthy in this case. After the plate was attached, the position of the fragments would be pretty hard to say, because there was so much blood and tissue in the wound, but I recollect that it looked to me like the plate wasn't on good, wasn't on straight. The bones were not straight, as I remember it, and I thought to myself that they didn't look very good; but he had already slept an hour and forty minutes, and there wasn't much else to do but let him go."

As this witness' testimony was practically all having any bearing upon the alleged negligence of the defendant, we deem it our duty to set forth some of his cross-examination:

"The incision was something like 9 or 10 inches long, and to the bone, and the lips of the wound are spread apart. I stood on the right side of the table and about 6 or 8 feet away, during most of the operation. I was not right up to the table at any time. Did not get nearer than 3 or 4

feet from the table. The surgeon and his assistant stood on the same side of the table. The nurses stood around there where they were needed. The doctor was working down in the leg an inch and a half or two inches deep, and the wound was spread 4 or 5 inches apart by retractors, and the bone at the bottom and the blood was sponged out every second or two with gauze sponges. I think there were no splints or bandages on the limb after they began to give him the anesthetic. I did not see the cast taken off. He was lifted from the cart to the operating table. The cast was not on when they operated. I don't know whether it was taken off before or after the anesthetic was given. The sponges were thrown in a receptacle, some of them. The part of the bone was scraped and curetted away. I suppose I was 5 or 6 feet from the wound some of the time. It was covered with blood most of the time, or part of the time. I never at any time went over to this wound and examined it or looked in it. All I know is what I observed in standing 5 or 6 feet away. I had a perfect view. The operating table was about $3\frac{1}{2}$ feet high and level, and the patient was rolled over slightly to the left and sandbags put under limb and hip, and patient's head was to the north, and I was on the right side of the table. The operator stood or sat on the right side of the table. He did not stand all the time; part of the time he sat. I was on the same side of the table behind the operator, and 5 or 6 feet from the wound. The operator's body did not extend above the top of the table and cover the patient. I may have the distance wrong there. I don't know how high the table or stool was. As I remember it, I could see over his shoulder. That is all I remember. The wound did not open in the opposite direction from me. It was not tipped that much, or the doctor could not have operated. The incision was made on the outside of the limb, the long way of the

limb. There is always more or less danger to a patient who is under an anesthetic, and the longer the time, the worse; so the surgeon should release the patient and get him out from under it as soon as he can."

No other witness speaks of anything unusual or out of the ordinary in defendant's treatment, save that there is a suggestion that, early in the treatment, plaintiff's limb should have had some kind of support on the bottom. Recurring again to the operation performed by defendant, no one of the many doctors examined as witnesses pretended to say that, from the radiograph or skiagraph, taken in Chicago, the one which we have reproduced in this opinion, any conclusion could be drawn as to how the defendant applied or left the Lane plate when he operated. It appears that some of the screw holes were not filled, and the inference is that but four were used, two at each end, and that, as there were four holes in each end of the plate, four should have been used. But it is generally agreed by the experts that but two in each end were necessary. There is also some testimony to the effect that one or both bones had decayed to some extent, and that this accounts for the plate's not holding. Under the testimony, we are compelled to eliminate this skiagraph as inconclusive testimony in the case. As already indicated, no testimony was taken for defendant, and, while plaintiff had many doctors on the stand, none of them was asked by him to say whether or not the treatment given the fracture was according to the usual and customary methods of physicians and surgeons at the time it was given, in the locality where defendant practiced. We can readily understand how, without the aid of expert testimony, both court and jury might find that the Lane plate was not properly applied. Its purpose and objects being understood, and the operation being almost entirely mechanical, we can easily understand that, if the plate was originally applied as it shows

in the skiagraph attached, it would indicate negligence on the part of the operator. But, aside from the testimony of the plaintiff's brother, which we have hitherto set out, there is nothing whatever to show that the plate was not properly applied, save that there was no proper union of the fractured bone. Here, again, the experts agree that often there is nonunion through no fault of the operator. Again, it is in the record that there may be nonunion for a year or two without anyone's being at fault, and that thereafter nature reasserts itself and throws out the necessary material to produce a perfect union.

It should also be stated that many of plaintiff's expert witnesses, on cross-examination, in answer to hypothetical questions, testified that defendant's treatment was in accordance with the usual and customary methods of reducing fractures at the time the different operations were performed, and in the city of Des Moines. Indeed, under the record, we see no reason for criticizing it, save, perhaps, for the defendant's delay in discovering the nonunion, the shortening of the leg, and perhaps in not using the skiagraph sooner than he did. It should be remembered in this connection that Dr. Losh assisted defendant in the treatment of the case, and that he discovered no shortening until his attention was called to the matter by the patient. Several X-ray pictures were taken of plaintiff's limb under the directions of Dr. Losh, and two other physicians had others taken. The results of these are not shown in the testimony, nor does it appear whether these results were ever communicated to the defendant. If they were, it is in evidence that defendant's treatment, after he discovered the shortening, was proper, and that, after discovering the nonunion, he performed the necessary operation, and that this was timely. If plaintiff has any case at all, it is due to defendant's negligence in applying the Lane plate, and the only direct testimony on the point comes from plain-

tiff's brother. We have set out the substance of all of this, and are constrained to hold that it is so unsatisfactory, and so general in character, and the witness' opportunity for inspection and investigation so meager, that a verdict, if returned thereon, could not be sustained. The description the witness gives of the plate and of the methods of the operator is so general that it would not do to found a verdict thereon. This, as we think, is the pivotal point in the case. There was a nonunion of the bones for some reason which the experts fail to explain, except to say that nature fails sometimes to make the necessary union, without any fault's being attributed to the operator. This theory is fortified by the further fact that, after plaintiff was taken to Chicago and placed in the hands of one of the most skillful operators in the country, he, too, had to resort to three operations before he secured a union, and the shortening of the limb resulted after Dr. Murphy took the case in charge. It does not appear that this final shortening of the limb was due to anything which defendant did or neglected to do. It might be true, of course, that defendant should be held liable for delayed union, or for pain and suffering and loss of time, although not held responsible for the permanent shortening of the limb; but to hold him liable for this, it must be shown that these things resulted proximately from defendant's lack of care in handling the case. There were not, we think, sufficient grounds to justify a verdict for plaintiff on this theory, and the court did not err in directing a verdict for defendant.

II. Some complaints are made of rul-

4. NEGLIGENCE: pleading enu-
merating grounds
of negligence:
effect.
- ings on the rejection of testimony. Few of these need be noted. Generally speaking, the errors were cured, and the testimony admitted in response to other interrogatories. We have already disposed of one of these matters; that is to say, plaintiff's right to show that defendant did not administer con-

stitutional treatment to assist nature in the formation of material necessary to a union of the bones. This was properly denied, because no such issue was tendered by the pleadings.

Plaintiff was permitted to show that, some years before the accident in question, he had suffered another fracture, this time of the bone below the knee. He was denied the right to show how long he was disabled by reason of this fracture. As the fractures were not similar in kind or nature, there was no error here. We suppose the evidence was offered to show that there was a union at that time within the usual period, but no such claim was made when the testimony was offered.

No error appears which would justify a reversal, and the judgment must be, and it is,—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. O. C. OLSEN, Appellant.

CRIMINAL LAW: Appeal and Error—Appellate Jurisdiction—

Void Judgment—Time Limit. Even though a judgment in a criminal cause be void, no jurisdiction is conferred upon the appellate court by a so-called appeal taken after the expiration of the six months allowed for an appeal. From *final* judgments only may appeals be taken in criminal causes, and overruling a motion for new trial is not a *final* judgment. Section 5448, Code Supplement, 1913.

Appeal from Winneshiek District Court.—W. J. SPRINGER, Judge.

TUESDAY, MAY 22, 1917.

DEFENDANT appeals from a judgment of conviction
Vol. 180 Ia.—7

founded upon a charge of the practice of medicine without a license.—*Appeal Dismissed.*

E. W. Cutting and Goheen & Goheen, for appellant.

H. M. Harner, Attorney General, *H. H. Carter*, Assistant Attorney General, and *C. N. Houck*, County Attorney, for appellee.

CRIMINAL LAW:
appeal and error:
appellate jurisdiction:
void judgment:
time limit

GAYNOR, C. J.—On the 21st day of October, 1913, the grand jury of Winneshiek County, Iowa, returned an indictment against the appellant, charging him with unlawfully assuming the duties of a physician without having obtained a certificate as required by law.

On the 1st day of November, 1913, appellant filed his motion for a continuance, alleging that he was unable to attend court without serious injury to his health. On the same day, the State filed its resistance to the motion, and asked that a commission of physicians be appointed to examine him. By consent of parties, a commission was appointed, and on the 12th day of November, reported that, in its opinion, the defendant could attend court without detriment to his health. The record does not disclose any ruling on this motion.

On November 22, 1913, by consent of attorneys for appellant and the State, the presiding judge, together with one of the attorneys for appellant, the sheriff and the county attorney, went to the home of the appellant at Calmar, Iowa. (Calmar was not the county seat.) There the appellant announced that he pleaded guilty to the charge made against him. The court accepted the plea, and, having his calendar with him, thereupon made the following entry, which was afterwards spread upon the records of the court:

"Court met at Calmar, Iowa. The defendant appears in open court with his attorney. Says he is rightly named in the indictment and is duly arraigned. The defendant

also in person and by his attorney pleads that he is guilty of the charge made in the indictment, to wit, practicing as a physician without first having obtained a license. Judgment upon plea that the defendant is guilty of practicing as a physician without first having obtained a license. Defendant waives time for judgment. It is ordered and adjudged that defendant pay a fine of \$300 and costs of this action, and that, in default of payment thereof, that the defendant be confined in the jail at Winneshiek County, Iowa, until said fine is paid, not exceeding at the rate of \$3 $\frac{1}{8}$ per day for each day's confinement. Bail on appeal fixed at \$1,000."

Nothing further was done until the 22d day of November, 1914, at which time the defendant filed a motion for a new trial, in which he alleged his physical condition and said that, in view of the prejudiced position in which he was placed by the unfair and biased report of the examining physicians, his counsel recommended that he plead guilty, rather than to further endanger his life by being brought into court; that he was strongly urged by his counsel to plead guilty; that he maintained, and still maintains, that he did not violate the law and was not guilty, and was forced to plead guilty, and he asked that the records of the court made in the cause be set aside; that the verdict of guilty and the judgment thereon be set aside, and the cause stand as if no proceedings had been had or made of record therein, and the defendant given an opportunity to defend against said indictment. The State filed a resistance to this. Afterwards, on the 23d day of September, 1915, this motion for a new trial was overruled.

On the 20th day of March, 1916, the defendant served and filed his notice of appeal. The right of appeal is purely statutory. To invoke the appellate jurisdiction of this court, the statute must be followed. Section 5448 of the Code Supplement, 1913, provides:

"The mode of reviewing in the supreme court any judgment, action or decision of the district court in a criminal case is by appeal. An appeal can only be taken from the final judgment, and within six months thereafter."

The appeal from the judgment in this case, heretofore set out, was not taken within six months after the final judgment. It is claimed that the appeal is from this judgment. The appellate action of this court is invoked, and we are asked to review that judgment. It makes no difference whether the judgment be void or voidable. Appeal may be taken from an absolutely void judgment. See *Petty v. Durall*, 4 G. Greene 120, in which it is said:

"The right to appeal is by no means limited to legal judgments. The great object of an appeal is to show that the judgment is not legal."

The judgment appealed from was entered in 1913, and appeal was not taken until 1916. The State has challenged the jurisdiction of this court, and in so doing has followed the requirements of Section 4139 of the Code Supplement, 1913, which reads as follows:

"All objections to the jurisdiction of the court to entertain an appeal must be made in printed form stating specifically the ground thereof and served upon the appellant or his attorney of record not less than ten days before the date assigned for the submission of the cause."

We are without jurisdiction to entertain the appeal from the original judgment, whether that judgment be valid or otherwise. We are not permitted to determine the validity of the judgment, for the reason that we have no jurisdiction to do so. The statute limits the time in which a party may invoke the appellate jurisdiction of this court. The right to secure appellate review must be found in the statute, and must be invoked within the time limit placed by the statute.

It is contended, however, that this was not a final judg-

ment such as is contemplated by the statute; that the judgment is void. Then, if this be true, there is no judgment to appeal from, final or otherwise, and there is nothing for this court to review, because appellate jurisdiction is only given to review final judgments in criminal cases. In either event, there is nothing legally before this court for consideration. It surely cannot be contended that this appeal is from the action of the court in overruling the motion for a new trial. Motions for a new trial must be made before final judgment. Section 5425 of the Code of 1897. But on this proposition it is also argued that the judgment is not final; that the judgment was void when rendered; therefore the motion for a new trial was not filed after the final judgment. If that be true, then it follows that, there being no final judgment entered against the defendant, there can be no appeal from the ruling on the motion for a new trial. A ruling on the motion for a new trial is not in itself a final judgment, and, therefore, not a judgment from which an appeal can be taken, under the provisions of Section 5448 of the Code Supplement, 1913.

However, we follow defendant's suggestion in argument, that this appeal is not from the ruling on the motion, but from the action of the court in entering the original judgment; so, in either case, we must dismiss the appeal for want of jurisdiction. We must dismiss the appeal from the judgment, because not taken within the time limited by the statute. We must dismiss the appeal from the action of the court in overruling the motion for a new trial, on the ground that it was not a final judgment. Only final judgments can be appealed from.

The controversy resolves itself into this: There is, or is not, a final judgment in this case, from which an appeal can be taken. If there is a final judgment from which an appeal can be taken, the appeal was not taken in time. If there is no final judgment, then there is nothing to ap-

peal from. Either horn of the dilemma involves the jurisdiction of this court, and, in either event, the jurisdiction of the court is wanting for failure to comply with the requirements of the statute.

Many things are discussed in the record, but what we have said is decisive of this appeal, and we are constrained to dismiss the same for want of jurisdiction to entertain it.—*Appeal Dismissed.*

WEAVER, PRESTON and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. ED WEGENER, Appellant.

CRIMINAL LAW: New Trial—Misconduct of Juror—Recital of

- 1 **Former Crimes.** Statements asserting the guilt of an accused of former crimes, wholly foreign to the one on trial and aside the record, and of a nature such as would prejudice the jurors against the accused, in view of the record, made by a juror to his fellow jurors during the deliberations of the jury in a cause in which the evidence of guilt and innocence is in sharp conflict, and made with strong and apparently positive assurance of their truthfulness, constitute such misconduct as to demand a new trial.

WEAVER, EVANS and PRESTON, JJ., dissent, holding that no prejudice resulted in the instant case.

CRIMINAL LAW: Trial—Instructions—Differentiating Phases of

- 2 **Insanity.** Different phases of insanity properly in issue before the jury should be carefully differentiated in the instructions. But confusing and intermingling such phases is not necessarily reversible error.

CRIMINAL LAW: Capacity to Commit Crime—Insanity—Degree

- 3 **of Proof.** It is not reversible error to instruct the jury that defendant must "*clearly*" establish his plea of insanity, though it is preferable to omit such qualifying term.

LARCENY: Subjects of Larceny—Check Obtained by Duress and

- 4 **Fear.** A check obtained from the maker by duress, fear and compulsion, is a subject of larceny. So held under a charge of robbery. Section 4831, Code, 1897.

BILLS AND NOTES: Validity—Fraud, Duress and Compulsion. A check executed by the maker under duress, fear and compulsion—under threat of great bodily injury—is absolutely void as between the immediate parties, but voidable only as between the maker and third parties. Sections 3070, Code, 1897, 3060-a52, 3060-a55, 3060-a56, 3060-a57, 3060-a59, 3060-a60, Code Supplement, 1913.

Appeal from Polk District Court.—CHAS. A. DUDLEY, Judge.

TUESDAY, MAY 22, 1917.

DEFENDANT was indicted for robbery, convicted, and appeals.—*Reversed.*

Cummins, Hume & Bradshaw, Lester L. Thompson and Frank T. Jensen, for appellant.

George A. Wilson, County Attorney, and Earl C. Mills, for appellee.

GAYNOR, C. J.—Defendant was accused of the crime of robbery, alleged in the indictment to have been committed as follows: On the 9th day of October, 1914, the defendant, armed with a revolver, assaulted one Charles Ashworth; put him in fear of his life, and feloniously and forcibly took from him \$20 in money and one check in the value of \$5,000, all being the property of the said Ashworth. The defendant pleaded not guilty, and also tendered an issue as to his sanity at the time the act was alleged to have been committed by him. Upon a trial to a jury, the defendant was convicted and sentenced to the penitentiary. From this conviction he appeals. The defendant's complaint may be divided into three parts:

1. Error committed by the court in its instructions to the jury.

2. Misconduct of the county attorney in argument to the jury.

3. Misconduct of one of the jury prejudicial to the defendant's right.

We will take these complaints in their reverse order. Before considering this complaint, it is necessary that we place in the record somewhat of the situation confronting the jury at the time they were deliberating. Defendant Wegener was 42 years of age; lived in the town of Valley Junction with his wife and children; had lived there for 14 years; had amassed a fortune estimated at \$75,000; had been engaged in hotel, saloon and coal business; all his property was invested in the town of Valley Junction. He had an income at the time estimated at about \$650 a month; was not financially embarrassed. He had been something of a drinker. He was on friendly terms with the prosecuting witness, Ashworth, and had done business with him for several years. Ashworth was a wealthy man; lived a short distance outside the city of Valley Junction. The evidence tended to show that, the night before the robbery, the defendant was at home, and apparently in good spirits. On the morning of the robbery, he went to his office at the usual hour; talked with his wife about decorating his automobile for a carnival that was soon to occur, and suggested that his boys be dressed in white, that they might accompany him in the automobile. On the day of the robbery, the defendant and the prosecuting witness met in the open streets of the city, conversed together and were seen together on the streets and in public places. Defendant invited the prosecuting witness to accompany him to the rear of one of his buildings to view certain rubbish that, he thought ought to be cleaned up. From there, they passed to another building, for the purpose of looking over some repairs that were thought necessary. They entered this building together. Therein they were met by one Lavelle, armed with a gun and disguised, who, by the use of the gun, compelled the prosecuting wit-

ness to hold up his hands. Conflict arose between Lavelle and the prosecuting witness, in which it seems the prosecuting witness overpowered Lavelle, and had him down on the floor. He called to defendant to come to his assistance. Defendant did not respond, but requested the prosecuting witness to let Lavelle up, saying that there were others outside and that they would be murdered if they resisted any longer. Thereafter, Ashworth was conducted upstairs to a vacant room over a pool hall. Ropes were there, and the prosecuting witness was bound hand and foot; forced to sign a check for \$5,000 and deliver the same to Lavelle. \$20 in money passed at the same time from the prosecutor to Lavelle. Lavelle handed the check to the defendant and requested him to have it cashed, cautioning him not to mention what had transpired. Lavelle stood guard over Ashworth during the absence of the defendant. Defendant departed with the check. The check was never presented for payment. It was later found, unendorsed, in an adjoining room with some of Lavelle's clothing. Defendant went down, whether with the check or not, and met the prosecuting witness's brother; told him a story about himself and the brother's being held up by some bandits in the alley; said that the brother had been carried away in an automobile; made no mention of the check; said that \$1,000 was demanded of him and \$10,000 of the brother; said that he had sent for his thousand. About this time, one of defendant's clerks brought him a roll of money, and defendant said, "I have my thousand now." There was some evidence that, after that, defendant returned and talked with Lavelle in the hall near the door where prosecuting witness was tied; told Lavelle that the brother wouldn't do a thing for them; told Lavelle that he had better kill Ashworth; dead men told no tales. When the defendant told the brother that he had his thousand dollars, he asked the brother what he was going to do about the ten thousand.

After this, defendant disappeared and was gone for about a year. Lavelle was later captured, convicted, and sent to the penitentiary.

There was much evidence tending to show that there were hereditary taints of insanity in the defendant's family. The question of insanity was clearly for the jury, as was also the question of defendant's voluntary participation in the robbery. There was no question as to the conduct of Lavelle, and the defendant's presence during the whole proceeding. There was evidence of a pre-arranged scheme between Lavelle and the defendant to do what this record shows was subsequently done. That rests upon the testimony of Lavelle, and was denied by the defendant. It is true that Lavelle had done some work for the defendant, and, to a certain extent, had made the defendant's place of business his loafing place for several days prior to the occurrence of the matter complained of.

Before coming to the errors complained of, however, we might say that, in our judgment, the record presented a fair question for the jury upon the facts, and our consideration of the case will be confined to determining whether errors prejudicial to the defendant were committed in the making of the record upon which he was convicted. Every defendant charged with crime is entitled to a fair and impartial trial under the forms of law. The same power that made the law that punishes made also the law that protects. Every man is presumed to be innocent, and, upon such assumption, the law throws around him certain safeguards against conviction, not for the purpose of protecting the guilty, but for the purpose of guarding the innocent who may be wrongfully charged. The law neither denies nor affirms the guilt or innocence of the accused. That question is submitted to a jury. They are the triers of the fact. Defendant is entitled to the verdict of twelve jurors, uninfluenced by any consideration except the rec-

ord, as made, upon which the cause is submitted. Every man must be confronted with his accusers and has a right to be heard in his own defense, and matters may not be considered by the jury in determining his guilt or his innocence until he has had an opportunity to be heard in his own defense. This brings us to a consideration of the assignment touching the misconduct of the jury.

It appears that, after the jury had retired to consider their verdict, one of the jurors was in great doubt as to whether or not the defendant ought not to be discharged, on the ground of insanity. The affidavit upon which the misconduct is predicated is made by one Oransky, a juror in the cause. One Foster was also a juror. The affidavit sets out the facts, is corroborated by the testimony of other jurors, and is as follows:

1. CRIMINAL
LAW: new
trial: miscon-
duct of juror:
recital of for-
mer crimes:

"That when the jury retired for deliberation, I was in some doubt as to the question of guilt or innocence, and on the first ballot, with two others, I voted not guilty. That I felt that there had been nothing shown to us which indicated that the defendant had ever been anything else than a law-abiding citizen, and I could not understand how such a man in his right mind could suddenly attempt some crime of this kind. Some time before a verdict was agreed upon and before the final ballot was taken (I am unable to say positively whether before or after the second ballot, but my best recollection is that it was before the second ballot), the juror Foster stated in substance that Wegener had stolen eighty cars of coal from the Rock Island Railroad and had bribed switchmen to switch the cars in on his private spur; that it had not been discovered until after Wegener went away, and that it had been settled out of court by the Ills. I asked Foster if he positively knew that to be a fact, and he said that there was no question about it; that he had his information from someone who knew, and I under-

stood it was from someone who had taken part in the settlement of the coal matter. I knew then that the juror Foster was a railroad man. These statements were made very emphatically, and I was satisfied that Foster knew what he was talking about and I believed the statement to be true. I believe that one or more of the other jurors discussed this matter at that time, but I am unable to recall the exact statements made by them and who made them. There was also some discussion about the fact that Wegener's saloon was not operated in his own name, and I said that looked peculiar to me; that he evidently owned it, because it was turned over to his wife after he went away. My best recollection is that some juror said in substance that the reason he did not operate it in his own name was that he had been mixed up with a gambling house, and that the council at Valley Junction would not issue him a license. The jury was segregated for ten days on this trial, and during the confinement of the jury, between sessions of court and before the case was finally submitted to the jury, there was some discussion between jurors of the case, and some of the points brought out by the testimony. I cannot say how many times I heard such discussion, but I recall that I cautioned the jurors on at least one occasion that it ought not to be discussed. Enough was said at various times before the case was submitted so that, when the jury retired after final submission, I thought I knew about how most of the jurors would vote. The result of the first ballot showed that my judgment was practically correct. Three ballots were taken, and I did not vote guilty until the third ballot. I was thoroughly tired from the long confinement and strain of the trial, and I am unable to say how much influence the statements about the stealing of coal had on my mind; but the fact is that these statements were made at the time that I was attempting to determine the sanity or insanity of the defendant, and arguing that

I could not understand how a man who, so far as I knew, had always been a respectable business man could get mixed in this sort of a crime unless he were crazy."

The statements made by the juror Foster, as exposed in this affidavit, were clearly prejudicial to the defendant's right to have his guilt determined upon the record made. The State had accused him of this crime, which not only involved moral turpitude but exposed him to a long term of servitude in the penitentiary. It had been presented to the court upon the trial—the evidence upon which the State predicated its right to have this man's liberty taken from him. All that was proper for the jury to consider, in the determination of the ultimate fact, was exposed to their view upon the trial. Upon that record he was to be judged. Upon that record he was to be condemned, if condemned at all. After the evidence had all been closed, after the jury had retired, by this means there was injected into the case, without notice to the defendant, evidence which would not have been admitted if offered upon the trial. Through this means, there was brought to the jury a knowledge of a fact asserted by a member of their own panel as true, the truth of which the record shows these jurors had no reason to doubt. If true, it had a tendency to explain much of the conduct of the defendant which might otherwise seem inexplicable. At least, it seemed so to this juror, Oransky.

Conduct such as we have here is to be clearly differentiated, in its influence upon the mind and its effect upon the jurors, from mere argument of jurors, or mere statements of inferences drawn from admitted or proven facts, or reasons, however untenable, given by a jury in favor of conviction. This, for the reason that all these inhere in the verdict. Faulty and illogical argument made in the jury room by the jurors may not be considered by this court, but never has it been permitted that a juror assert, as upon his own knowledge, the existence of facts not introduced in evi-

dence, touching the guilt or innocence of the accused. Nor has it ever been permitted that a juror, when deliberating upon his verdict, may introduce to the jury, for its consideration during its deliberations, facts *de hors* the record, reflecting upon the life and character of the accused. That these statements would exercise some influence upon the jurors, we think manifest from the character of the statements, and from the manner in which they were delivered to the jury by Foster, and from the peculiar nature of this case considered in its entirety. Here, the evidence was in sharp conflict, in so far as the criminality of the defendant on the indictment was concerned, and as to the affirmative defensive matter upon which he rested his right to an acquittal. We cannot say what the verdict would have been had this evidence not been presented to the jury at the time and under the circumstances. We have had occasion to review this question in the case of *Douglass v. Agne*, 125 Iowa 67, and the record here presents a stronger reason than in the *Douglass* case. See, also, *Cresswell v. Wainwright*, 154 Iowa 167, this point discussed on page 186; *State v. Kirk*, 168 Iowa 244, particular point discussed in fourth division of the opinion, page 256.

It is true that in civil cases it has been held that if, upon the whole record, it appears that substantial justice has been done, and the verdict is clearly warranted by the evidence, the court will not interfere because of misconduct of a juror committed during deliberation. This rule cannot obtain in criminal cases, for the reason that the defendant is entitled to have the judgment of twelve men upon the whole record, as made, based upon a finding and pronouncement that, under the record, his guilt is established beyond a reasonable doubt. In determining this, the judgment of the jury must rest upon the record made upon the trial. See, also, *Kruidenier Bros. v. Shields*, 70 Iowa 428. We are clear that the conduct of the juror Foster was prej-

judicial to the defendant's rights, and for this reason, if for no other, the case must be reversed.

It is next contended that there was misconduct of the county attorney in argument. We have reviewed this question, but we do not feel that we are, under this record, in a position to say that the misconduct, if any, resulted prejudicially to the defendant. We have cautioned before against undue zeal in the prosecution of criminal cases on the part of county attorneys. It is true, however, that much of the conduct in argument can be accounted for as a necessary counterirritant to what has been said on the part of the defense, with no thought or intention on the part of the prosecutor to bring about a conviction not justified by the record. We find no reversible error on this score.

It is next urged that the court, in instructing the jury, failed clearly to differentiate between the several kinds of insanity that may be invoked in a case of this kind and presented in this case, on the record, for the consideration of the jury. The court, in one of its instructions, said, in substance:

2. CRIMINAL
LAW: trial:
instructions:
differentiating
phases of in-
sanity.

"If you find that the defendant's act in committing the robbery was caused by mental disease or unsoundness which had dethroned his reason and judgment with respect to the act, which destroyed his power rationally to comprehend the nature and consequences of the act, or which, overpowering his will, inevitably forced him to its commission, then he is not guilty in law of any crime, and your verdict should be 'Not guilty.'"

This much of the instruction is not complained of. Immediately following this, and as a part of it, the court then said:

"The interests of society and the welfare of the state demand that this defense ought not to be regarded as sufficient to exculpate, unless you believe from the evidence

that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will, and render it impossible for the defendant to do otherwise than to yield to the insane impulse," thus grouping two conditions of mind referred to in the first part of the instruction as if they constituted but one condition of mind. The court, in effect, said:

"The condition of the mind, in either case, ought not to exculpate or excuse the defendant, unless the propensity to commit the act existed in such violence as to subjugate the intellect and control the will, and render it impossible for the defendant to do otherwise than to yield to the insane impulse."

By this last part of the instruction the jury were led to believe that mental disease or unsoundness of mind which dethroned the reason and judgment with respect to the act, and destroyed his power of rationally comprehending the nature and consequences of the act, would not be sufficient to exculpate, unless there was a propensity to commit the act existing in the mind at the time, of such a violent character as to subjugate his intellect and control his will, and to render it impossible for him to escape from its compelling force.

The kind of insanity referred to in the first part of the instruction is that which renders the person unable to comprehend the nature and consequences of his act—renders him so that he has no intellectual conception of right and wrong with respect to the act; while, in the other, his intellectual conception of the act might clearly indicate to him that it is right or wrong for him to commit the act, and he might comprehend the nature and consequences of the act, but, because of the existence of this insane impulse in his mind, he is so subject to its control that he is powerless to avoid the commission of the act; that it is, as the court said, "impossible for him to do otherwise than to

yield to the insane impulse." The defendant was entitled to have both questions fairly before the jury. The court did this in the first part of the instruction, but in the last part practically withdrew from the consideration of the jury, as exculpating the defendant, any thought that he might be excused if the condition of his mind was such, at the time, that he was unable to comprehend the nature and consequences of his act, and did not know right from wrong with respect to the act, even though not driven to the act by an insane impulse that rendered it impossible for him to do otherwise than commit the act. The one is a man without a rational, moving, thinking mind; while the other is a man with a mind moving, active and controlling, but so diseased and perverted that he is pushed, as it were, by a demon at his back, into the doing of the act, without power to resist or control his action.

There are many phases of insanity, and it would be impracticable, if not impossible, for the court to cover all the possible phases. Insanity is a question of fact, and not of law. Courts have attempted many definitions, but no one definition is comprehensive enough to cover all phases of insanity. The court, in instructing the jury, therefore, ought to be controlled and guided by the record in the particular case in formulating its instructions upon this question. When, however, the court undertakes to instruct on different phases of insanity, on the assumption that these are phases which the jury must consider, the court ought to clearly differentiate between the different kinds of insanity submitted. In this particular case, we would not be inclined to reverse on this instruction alone, but, in view of another trial, we suggest that, if it becomes proper to submit these two kinds of insanity, the court should make the proper differentiation as herein indicated.

3. CRIMINAL
LAW: capacity
to commit
crime: insan-
ity: degree of
proof.

It is next contended that the court erred in its instruction to the jury touching the degree of proof necessary to establish insanity. In this instruction the court said (the italics being ours):

"Every person is presumed to be sane unless the fact is proven otherwise by a fair preponderance of the evidence, and you should treat the defendant as sane and his acts the acts of a sane person unless the evidence shows not only a possibility that his mental condition was otherwise, but further shows by a *fair* preponderance of the evidence in the case that defendant was then in fact irrational, or suffering from mental disease. You are not required to find the defendant was insane, unless the evidence *clearly* establishes such fact;" and that they should only find him insane upon evidence that convinced them that the fact of insanity was proven by a fair preponderance of the evidence. The criticism is of the use of the words "fair" and "clearly," and it is argued that they cast a greater burden than the law casts upon the defendant; that, if his insanity is proven by a preponderance of the evidence alone, he is entitled to an acquittal. There is some justice in the criticism. It would be better to omit these qualifying words, but an instruction similar to this was approved in *State v. Novak*, 109 Iowa 717. For the reasons stated in that case, we think no reversible error was committed by the court.

4. LARCENY: sub-
jects of lar-
ceny: check ob-
tained by
duress and
fear.

The next error assigned is that the court erred in its instructions in failing to distinguish properly between defendant's liability in regard to the check and defendant's liability in regard to the \$20 in currency. The statute under which defendant was indicted is Section 4753 of the Code of 1897, which reads as follows:

"If any person, with force or violence, or by putting in

fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense."

The contention of the defendant is that the check in question, signed as it was by the prosecuting witness under compulsion and through fear, was not the subject of larceny. The theory of the defense is that, where one person compels another, under duress, to write his signature to a check furnished by the former, he commits neither larceny nor robbery by taking the paper, because nothing is taken from the possession of the owner except the naked signature to the paper. At common law, promissory notes and bills and checks are not the subject of larceny. They are merely promises to pay, and do not constitute property in contemplation of law governing the felonious taking of property. Our statute, however, has defined what constitutes larceny. Section 4831 of the Code of 1897 provides:

"If any person steal, take and carry away of the property of another any money, * * * bond, bank note, promissory note, bill of exchange or other bill, order or certificate; or any book of accounts respecting money, goods or other things; or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release or defeasance; or any instrument or writing whereby any demand, right or obligation is created, * * * he is guilty of larceny, and shall, when the value of the property stolen exceeds \$20, be imprisoned," etc.

It will be noticed that, to constitute robbery, there must be a taking from the person of another property which is the subject of larceny. Under our statute against larceny, any instrument or writing whereby any demand, right or obligation is created, is the subject of larceny. To be the subject of larceny, however, it must have some value. Sec-

tion 4849 of the Code provides, speaking of the measure of value of stolen goods:

“If the property stolen consist of any bank note, bond, bill, covenant, bill of exchange, draft, order or receipt, or any evidence of debt whatever, * * * or any instrument whereby any demand, right or obligation may be assigned, transferred, created, * * * the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, * * * shall be adjudged the value of the thing stolen.”

The record in this case discloses that Lavelle demanded \$10,000 from the prosecuting witness; demanded this or his life; that, after some parley, he consented to reduce his demand to \$5,000; that the prosecuting witness did not have this much money on his person at the time; that, through fear, and inspired by the conduct of Lavelle, in which, it may be said, defendant aided and abetted him, the prosecuting witness agreed to give his check. The defendant produced, for the use of the prosecuting witness, a blank check. The prosecuting witness wrote the check for the amount of \$5,000 and signed it, and, still laboring under the fear impressed upon him by the conduct of Lavelle and the defendant, passed the check to Lavelle, who passed it to the defendant, with instructions to have it cashed at once and return with the money. This check was in due form and bore the genuine signature of the prosecuting witness. To a stranger, it bore all the indicia of being a genuine demand on the bank for so much money. If presented at the bank, it might have been paid. It was presumed to be of value to the amount stated in the check. It was drawn on the bank with which the prosecuting witness did business. By the making and signing of the check, the prosecuting witness, upon the face of the paper, parted with the amount of money in his bank covered by the check. He transferred his right to demand this money in the bank

to the defendant and Lavelle, and, on the face of the check, assigned so much of his money in the bank. At common law, this would not constitute larceny of a substantial thing, but, when the legislature made a check the subject of larceny, a promissory note the subject of larceny, a bill of exchange the subject of larceny, it made the taking of that which evidenced a right to a substantial thing—a thing the taking of which constituted larceny at common law—larceny. Any other theory of reasoning would lead us to the conclusion that there was no force in those provisions of our statute making the stealing of a note or check larceny, because the tangible thing taken would be, in and of itself, of no value. By the act, he stole the right to a substantial thing, a thing which, at common law, was the subject of larceny, and this justifies the statute. You take away the thing when you take away my right to the thing as evidenced by the instrument stolen. This is a departure from the common-law rule. It is the theory of the statute. It is the theory upon which rests the larceny of a writing, which, in and of itself, constitutes no tangible thing of value, but is of value simply because of the fact that a right to a thing of value is thereby created. When you take away the evidence of a right to it, in contemplation of this statute, you take the thing to which the writing gives evidence of a right. If deprived of the evidence of a right to a substantial thing—a thing which might have been a subject of larceny—by the act of larceny, you are, or may be, deprived of a thing of value.

5. BILLS AND
NOTES: valid-
ity; fraud,
duress and
compulsion.

The only question here is whether or not this check was a subject of larceny. The statute makes instruments of this kind the subject of larceny; but the argument of the defendant proceeds on the theory that, because the check was brought into existence by the wrongful act of the defendant, and without the voluntary will and consent of the

maker, the thing was a dead piece of paper when taken, and therefore had no value. It was accepted and taken by the defendant, after it had been executed by the prosecuting witness, as a full compliance with his demands for \$5,000. It was taken by the defendant from Lavelle with instructions to have it cashed and return the money. Why it was not cashed does not appear. It appears that some efforts were made indirectly by the defendant to induce the brother to furnish the money demanded by Lavelle. This purpose was not consummated. It is true that the paper upon which the check was written was furnished by the defendant; but, when the check was prepared and signed by the prosecuting witness, it then, upon its face, constituted a demand for money from the bank on which it was drawn. After it was prepared and signed, the same force operating that caused its preparation still continuing to operate, it was delivered by the prosecuting witness to Lavelle, and by Lavelle to the defendant. A demand for money, on the bank, was taken from the prosecuting witness by putting the prosecuting witness in fear, and it could well be said that the defendant, with force or violence, or putting in fear, stole and took from the person of the prosecuting witness property that was the subject of larceny.

The authorities to which our attention has been called are not controlling in a case like this, because of our statutes, to which attention is hereinafter called. There has been much discussion in the books as to the effect of duress in rendering negotiable instruments void or voidable. At common law, duress that would avoid a negotiable instrument was not considered unless it was carried to such an extent as to create in the mind of the maker of the instrument a reasonable apprehension of danger to his life or limb; unless he was forced to the execution of it through reasonable apprehension that, if he failed to execute it,

he would be subjected to great personal violence. A man has a right to protect his life, even to the taking of his assailant's life. The submission to coercive force of this character is not to be taken as a voluntary act of him who submits. He chooses, however, between the two alternatives, great bodily injury—imminent danger to his life—or the making of the negotiable instrument. Between the two, he has a choice. He chooses the latter, and executes the instrument. If it passes into the hands of an innocent purchaser, it is voidable, but not void. Some duty rests upon the person making the instrument to protect those who, in the ordinary course of business, might, in good faith, part with their money on the strength of the validity of the instrument created as the same appears upon its face.

The instrument in question was a direct demand on the bank to pay to the person to whom it was delivered the amount of money called for by the instrument. If the bank had paid upon this instrument the amount of money for which it was drawn, in good faith, in the ordinary course of business, without knowledge of the duress, it would seem that the maker would not be in a position to recover from the party the money so honestly paid upon the strength of the demand so executed. As between the parties to the duress, of course, a different rule would obtain, but, as to an innocent purchaser of a negotiable instrument, the statute provides (Section 3070 of the Code of 1897) :

"The want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, total or partial, except to negotiable paper transferred in good faith and for a valuable consideration before maturity, but if such paper has been procured by fraud upon the maker, no holder thereof shall recover thereon of the maker a greater sum than he paid therefor, with interest and costs."

As said in *Veach v. Thompson*, 15 Iowa 380, 382:

"To facilitate the business and commercial operations of the country, it is the policy of the law to impart to negotiable paper certain properties for the purpose of a free circulation; hence a bona fide holder for value before maturity is protected against all defenses which go only to make the note voidable, with certain specific exceptions, as incapacity, etc. * * * Duress, like fraud, does not make the note void, but only voidable."

See, also, *Callendar Sav. Bank v. Loos*, 142 Iowa 1. Section 3060-a52, Code Supplement, 1913, provides:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That the instrument is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 3060-a55 provides:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Section 3060-a56 provides:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Section 3060-a57 provides:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Section 3060-a59 provides:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

Section 3060-a60 provides:

"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

As bearing upon this question, see *State v. Thatcher*, 35 N. J. L. 445, in which it is said:

"The main question in the case is, whether our statute is impotent to punish the obtaining by false pretences a contract of suretyship. The note, in this case, and the paper upon which it was written belonged to the defendant; the prosecutor merely signed his name as surety, and returned the note to the defendant. Was this signature a valuable thing within the meaning of the fifty-second section of our act respecting crimes?"

It is said in that case:

"By the cheat, the prosecutor was moved to part with the thing of value, and was thereby placed in a position of jeopardy which he would not otherwise have occupied. The fraudulent intent was fully manifested in leading the prosecutor to assume a legal liability which subjected him to the contingency of loss."

Authorities are then cited pro and con. The question is then propounded:

"Is the maker's own note or contract of suretyship a valuable thing? The signing of the name was an act—the name, when signed, was a thing. Was it a thing of any value? While it remained locked up in his secretary, it was of no value to the maker, but *eo instanti* it passed out of his hands by the fraud, it became impressed with the qualities of commercial paper, and possessed to him the value which it might cost to redeem it from a bona fide holder. The moment Case delivered these signatures, he assumed a liability to pay \$1,000, contingent upon their being negotiated. Can it, therefore, be said that a paper which imposed such a risk was of no value to the maker? Its value to him consisted not in what it would put in his pocket, if he retained it, but in what might be taken out of his purse by the delivery of it to the defendant," citing authorities.

The court then concludes:

"Under the contrary view, the fraud-doer, instead of obtaining from his victim, by false pretences, his bank notes, may defy the law, by resorting to the simple device of getting his check and drawing the money at bank, or he may practice deception with impunity on the bank by drawing their own circulating notes. Under our humane system of criminal law, judicial ingenuity should not exhaust its resources to reach an interpretation in favor of the wrong. In common and legal understanding, the language of our act is broad enough to comprehend the maker's own negotiable note or contract of suretyship, by which a piece of paper, before worthless, is stamped with an exchangeable value."

See, also, *Bork v. People of State of New York*, 91 N. Y. 5; *Hart v. Church*, 126 Cal. 471 (77 Am. St. Rep. 195); *Fairbanks v. Snow*, 145 Mass. 153 (1 Am. St. Rep. 446).

In this last case, the action was upon a promissory note against a woman and her husband. The woman contended that her signature was obtained by duress and threats on the part of her husband. The case was reversed because the court refused to rule that, if the defendant signed the note under duress, it was immaterial whether the plaintiff knew when receiving the note that it was so signed; the court saying that the ruling requested was wrong, both on principle and authority.

It will appear from the statute above quoted, and the authorities cited, that the check in question was not void, but voidable. It is true that it is void as between the parties, but not absolutely void as to innocent purchasers without notice, who, in the ordinary course of business, took it in good faith and paid a valuable consideration. The instrument might become a valid and enforceable obligation against the prosecutor. For that reason, it had some validity in his hands, and the taking of it from his possession by force and violence, was the taking of that which might be the subject of larceny. It was an obligation whereby a demand upon the bank for \$5,000 was created. When it was taken from the possession of the prosecuting witness, it bore upon its face all the indicia of a demand by the prosecuting witness on the bank to pay to the payee named in the check the amount of money therein demanded.

Section 4849 of the Code of 1897 provides that, where an instrument which creates a demand for money is stolen, that shall be adjudged the value of the thing stolen which might, in any event or contingency, be collected thereon. We think the court rightly told the jury that the check was a subject of larceny.

There are other matters urged upon our attention by appellant which we do not think can arise on another trial, and are therefore not considered by us at this time. For the reasons pointed out, the case is—*Reversed*.

LADD, SALINGER and STEVENS, JJ., concur.

EVANS, J.—(dissenting). I am not able to agree to the reversal of this case. I put my dissent on the ground that the alleged misconduct of the juror resulted in no prejudice to the defendant. The misconduct of juror Foster is not such as is contemplated by Code Section 5381. That is to say, his statements did not purport to be "as of his own knowledge." We have frequently held that a new trial will not be granted for misconduct of a juror unless prejudice be found. *Hall v. Robison*, 25 Iowa 91; *State v. Cross*, 95 Iowa 629; *Carbon v. City of Ottumwa*, 95 Iowa 524; *Hathaway v. Burlington, C. R. & N. R. Co.*, 97 Iowa 747. In obedience to that rule, the defendant has specified the prejudice in this: that the juror Oransky was unduly influenced by the statements of juror Foster. Did the statements of juror Foster result in prejudice to the defendant in a legal sense? In considering this question, we have no right to separate it from the record of the case in its entirety. The evidence of defendant's guilt was overwhelming and practically undisputed. The only defense put forward was that of insanity, and the evidence in support thereof was so unsubstantial as to be hardly worthy of the name. A verdict of acquittal would have been a clear miscarriage of justice. Likewise, only in less degree, would have been a disagreement. There was no room under the evidence for a conscientious difference of opinion. The jury returned the only verdict which it could conscientiously find. This state of the record is a very important consideration, in that it reduced the probability, if it did not eliminate the possibility, of any legal prejudice to the defendant. This was undoubtedly a proper consideration by the trial court. It was so held in the *Cross* case, 95 Iowa 629. That case was very similar in its facts to the case at bar. The question of misconduct of the jury was presented on appeal. In that case, as in this, a juror had stated that

the defendant had been concerned in previous offenses. Upon a consideration of the entire record, the manifest guilt of the defendant was deemed a proper consideration in finding that no prejudice was suffered. Quoting from the opinion:

"The evidence satisfies us that the defendant is guilty of the offense of which he was convicted, and we are of the opinion that the alleged misconduct of the jury furnishes no sufficient ground for a new trial."

In the *Hathaway* case, 97 Iowa 747, a juror had assumed to state, as of his own knowledge, facts material to the issue, and became thereby clearly guilty of misconduct. In that case, the court said:

"But this case should not be reversed on account of these acts of juror Joslin, if the verdict actually rendered was substantially just. In other words, if, in view of all of the evidence, the verdict effectuates justice between the parties, it should not be set aside, and the parties put to the trouble and expense of a new trial, because of the misconduct of a juror in the jury room. It seems to us, on a full examination of all of the evidence, that substantial justice has been done by the verdict rendered; that, under the view of the evidence most favorable to the plaintiff, he would only have been entitled to nominal damages, if any; * * * We are therefore of the opinion that we are not warranted in reversing this case for the misconduct complained of."

Turning now to the affidavit of Oransky for the specification of prejudice, the two following excerpts therefrom contain all there is therein on the subject of prejudice:

"That I felt that there had been nothing shown to us which indicated that the defendant had ever been anything else than a law-abiding citizen, and I could not understand how such a man in his right mind could suddenly attempt some crime of this kind. * * * I was thoroughly tired

from the long confinement and strain of the trial, and *I am unable to say how much influence the statements about the stealing of the coal had on my mind*; but the fact is that these statements were made at the time that I was attempting to determine the sanity or insanity of the defendant, and arguing that I could not understand how a man who, so far as I knew, had always been a respectable business man could get mixed in this sort of a crime unless he were crazy."

It will be noted from the foregoing that Oransky did not claim in his affidavit that he was influenced by Foster's statement to agree to the verdict. The utmost of his declaration was that he was "unable to say." The affidavit of the juror Butler reciting his conversation with Oransky immediately before the third ballot, which resulted in the verdict, tends to show that the juror Oransky was not influenced in his verdict by the statements of Foster, but was influenced solely by absence of evidence in support of the defense of insanity. In so far as there is dispute in the affidavits, if any, the facts should be found in support of the ruling of the trial court.

Upon the second ballot, the jurors stood 11 to 1 for conviction. Oransky alone voted otherwise. His affidavit sets forth the reason for his vote of acquittal. The reason thus stated and the state of mind indicated by it were themselves wholly unjustifiable. It is argued by the defendant that it would have been clearly prejudicial error if evidence of previous crimes of the defendant had been introduced on the trial. Let this be conceded. And yet this juror declared himself unable to believe the defendant guilty because it did not appear from the evidence that he had ever been guilty before. In other words, he would not permit himself to be persuaded of the guilt of a defendant on trial for his first offense unless it were made to appear that it was not his first offense. I take it that the majority deem

the doubts of the juror as justified by the defense of insanity. But the previous law-abiding character of the defendant was not put forward in support of such defense of insanity. Such hypothesis was not included in defendant's hypothetical question to his experts. The utmost, therefore, that can be claimed from Oransky's affidavit is that the statements of juror Foster drove out of his mind an idea that had no business there.

Surely, therefore, in the light of our previous cases, we ought not to ignore the state of the record before us, with its overwhelming evidence of guilt. We have frequently said that the trial court has a large discretion in the matter of granting or refusing a new trial on this ground. *Perry v. Cottingham*, 63 Iowa 41. Such discretion necessarily takes account of the entire record of the case. If I am right in saying that upon this record an acquittal or disagreement of the jury would have been a clear miscarriage of justice, will a reversal by us upon this ground be anything otherwise? I would affirm.

WEAVER and PRESTON, JJ., concur in the dissent.

LUELLA STEFFEN et al., Appellants, v. P. FREDERICK BEREND et al., Appellees.

WILLS: Construction—Duty to Harmonize All Provisions—Devise

- 1 "To Children and Their Heirs." All provisions of a will must, if possible, be harmonized, and if not possible, then the provisions of a codicil, being the last expression of testator's wish, must be followed in preference to the provisions of the will proper. So held where the will devised a life estate to children with remainder over to the descendants of the children, while a codicil devised the estate in fee "to children and their heirs."

PRINCIPLE APPLIED: By the will, testator's estate was divided into four parts. Each part was to be held in trust for the support of a child or for the support of the child's descend-

ants in case the child died. If a child died, leaving no descendants, then such share was added pro rata to the remaining shares. After all the children died, then the trust ceased, and the property descended to the descendants of the children, each group of descendants taking the share of their parent as it then stood.

By a codicil, testator provided that the trust should cease after 10 years, and that the property should then descend "to said children and their heirs, as provided in my said will, upon the termination of the trust." Held that, harmonizing the conflicting provisions and giving due weight to the codicil as the last expressed wish of testator, the respective shares, at the end of the 10-year limit, descended absolutely to the children then living and to the descendants of those children not then surviving—that descendants of a living child took nothing.

WILLS: Annulment—Right of Executor to Object. Executors and
2 trustees under a will may not object to a decree setting aside a will, on the ground of the mental incompetency of the testator, *after due hearing to the court*, simply because some of the devisees were then insane and assumed to consent to such decree.

INSANE PERSONS: Guardian Ad Litem—Allowance. Reasonable
3 allowances to guardians ad litem for services rendered in the cause are proper. Sec. 3485, Code, 1897.

Appeal from Scott District Court.—F. D. LETTS, Judge.

MONDAY, JANUARY 22, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

SUIT in equity to set aside a decree in probate, which decree, it is alleged, was entered by consent in a contest over the probate of the will of Johann Berend, deceased; and to reinstate the contest over the probate of the will. Defendants demurred to the petition, and their demurrer was sustained, and judgment was entered against plaintiffs for costs. Plaintiffs appeal.—*Affirmed.*

Helmick & Boudinot and Scott & Scott, for appellants.

Charles Grilk, for appellees.

DEEMER, J.—I. Johann Berend died testate, leaving surviving the defendants herein, four children. He died seized of something over 300 acres of land in Scott County, Iowa. His will was filed for probate January 25, 1910, and notice of the probate thereof was given by publication, as the law requires. P. Frederick Berend, a son of the deceased's, and one of the defendants herein, filed objections and exceptions to the probate of the will, on the ground that the testator was of unsound mind at the time the will and the codicil thereto were executed. It is alleged that this contest came on for hearing on December 7, 1910, and a jury was impaneled to try the said contest; but, before the contest was determined, the defendants herein, being all the surviving children of the deceased, agreed upon a settlement of the contest, and entered into an agreement in writing for a division among themselves of all the property of the deceased. The jury was discharged, and a decree was entered pursuant to the stipulation, setting aside the will and codicil, and a decree was entered awarding to each of the children a one-fourth interest in decedent's estate, save that P. Frederick Berend's share was diminished by the sum of \$500, and he relinquished all claims he had against the estate for services rendered and labor performed, and Louisa Berend, one of the heirs, was awarded \$200 out of the estate for care of and services to the deceased during his lifetime. The decree also provided that, as P. Frederick Berend had already placed a mortgage upon his undivided share of the estate, this mortgage should attach to his one-fourth interest, and he was awarded a particular 80 acres as his share of the estate. Referees were appointed to appraise and divide the real estate according to the provisions of the stipulation and the decree. This decree, as will be noticed, was entered December 13, 1910. The present action was commenced some

L. WILL: construction: duty to harmonize all provisions: devise "to children and their heirs."

time in the year 1915, and stands upon an amended and substituted petition filed November 9, 1915. It was brought by or for Luella Steffen and Amalia Berend, minor children of Louisa Berend, one of the defendants, by their next friend, William Gethmann, a trustee appointed by the will of the deceased, and also the executor named in the will, the Mary and E. W. Gethmann Benevolent Association, and Adolph Gethmann, a contingent trustee under the will.

The minor children claim that they have a vested interest in the estate by way of remainder under the will. Gethmann claims that he was appointed trustee and also executor under the will, and given specific compensation for his services as trustee. The benevolent association claims that it had a contingent interest under the will, and Adolph Gethmann claims that he was appointed a trustee under the will in the event William Gethmann was unable to act.

It was also averred that, since the commencement of this suit, defendants Edward Berend, Louisa Berend and Minnie Berend have been adjudged insane, and that William Gethmann has been appointed as their permanent guardian. It was also admitted that the usual notice for the probate of the will was given by publication, and that P. Frederick Berend filed objections and exceptions to the probate of the will, which resulted in the decree hitherto mentioned. But it is averred that, as no notice was given of the probate thereof except by publication, no one is bound by the decree entered therein, except those who were personally served with notice thereof, or who appeared in the probate proceedings. It is further averred that, at the time the contest came on for hearing, and at the time the settlement was made, Edward, Louisa and Minnie Berend were each and all unsound of mind and incapable of transacting business, and that the purported settlement and agreement for the division of the property was null and void, and a

fraud upon the rights of the plaintiffs to this suit. They further alleged that the decree of the probate court, based upon the agreement and stipulation, was absolutely null and void and of no effect, for the reasons stated.

A guardian ad litem was appointed for the defendants who are claimed to be of unsound mind, and the guardian filed a demurrer to the petition, upon the grounds: (1) Misjoinder of parties plaintiff; (2) the action is barred by the statute of limitations; (3) no grounds are stated for a modification of the decree in the probate proceedings; (4) the court had no power to vacate or set aside that decree; and (5) that plaintiffs are not entitled to the relief demanded or to any relief. This demurrer was sustained, and the appeal is from that order.

At the outset, it is necessary to go to the will and codicil of the deceased. By the terms of the original, so far as material to this controversy, testator devised all his property in trust to William Gethmann, for the following uses and purposes:

"(3) My said trustee shall take and hold said property for the benefit of my four children, P. Frederick Berend, Edward Berend, Louisa Berend and Minnie Berend, and their descendants, which property shall be divided into four shares. The shares of my three children, Edward Berend, Louisa Berend and Minnie Berend, shall in the beginning be equal, and that of P. Frederick Berend shall be \$500 less than that of either of my other three children. * * *

"(5) My said trustee shall devote the net income of the respective shares of each of my said children in each year so far as necessary to the support of such child, and in case of death of any child, the descendant or descendants of such child shall be entitled to such net income, so far as may be necessary for their support and education. Any portion of such net income not required for such pur-

pose shall be added to the share of such child or its descendants in such trust fund.

"(6) My said trustee shall keep a separate account of such child's share of the trust fund.

"(7) In the case of the death of any of my said children prior to the last survivor of them, leaving no children or lineal descendants, or the death of the last lineal descendant of any deceased child, then such share represented by such decedent shall be divided equally between the remaining shares of said trust still existing, and such share shall cease to exist.

"(8) When all of my children above named shall have died, then forthwith the trust hereby created shall cease, and the whole trust fund and all the trust property of every kind then existing shall pass to and vest in the heirs of my deceased children; each child's share as constituted at that time (in case such child has children) shall descend to such child's children in equal share.

"(9) It is my will that, in case of vacancy of the trust hereby created, that Adolph Gethmann be and he is hereby appointed to fill such vacancy.

"It is my will that said William Gethmann, or any trustee appointed by or under this will, shall receive a reasonable compensation for his services as trustee, which compensation shall be fixed by the district court of Iowa for Scott County. * * *

"I hereby appoint my nephew, William Gethmann, executor of this will, and hereby exempt him from giving any bond, either as executor or trustee under this will."

The codicil, which was executed something like a year and three months after the signing of the original will, contained these provisions:

"Clause 1. It is my will that the trust in my last will and testament created shall terminate at the end of ten years from the date of my death, and at that time that the

shares of my said children in said trust estate shall vest in said children and their heirs as provided in my said will upon the termination of the trust, except that, in case my daughter Minnie Berend shall die without lineal descendants, either before or after the termination of said trust, it is my will that one fourth of her share then remaining shall go to the Mary & E. W. Gethmann Benevolent Association, a corporation to be hereafter formed for benevolent purposes.

"Clause 2. In case the income from the share of any of my children shall not be sufficient for the support of such child, it is my will that my said trustee shall sell such part of the share of said child as shall be sufficient for the support of said child.

"Clause 3. It is my will that my children or their husbands who are capable of farming shall have the first opportunity, if they so desire, to lease the real estate belonging to my estate from my said trustee, but no one child shall have such right as to more than 80 acres of said real estate."

Appellants' main point is that this will and codicil gave to the testator's children a life estate only in his property, with remainder over to the grandchildren, among whom were the plaintiffs herein, and that the consent decree made in the probate proceedings was in fraud of their rights and should be set aside. Both the will and the codicil create a trust estate in Gethmann, the trustee, which, by the will, was to last until the death of each and all of defendants' children. Until that time, the income from the shares of each of the children was to be used, so far as necessary, for the support of such child, or, in the event of the death of any leaving descendants, then for the support and education of such descendants; and, in the event of the death of any of the children prior to the death of the last survivor, leaving no children or lineal descendants, or the

death of the last lineal descendant of any deceased child, the share represented by such decedent was to be divided equally among the remaining shares still existing. It was expressly provided that, when all the testator's children died, the trust should cease, and the whole of the fund and of the trust property should pass to the heirs of his deceased children, and that each child's share as constituted at that time should descend to such child's children in equal shares; that is, *per stirpes* and not *per capita*. By the codicil, the trust estate created by the will was to terminate at the end of ten years from testator's death, and at that time the shares of his children in the trust estate were to vest "in said children and their heirs," as provided in his original will, on the termination of the trust, with the exception of Minnie Berend's share, as stated in the codicil. It is quite clear that, by the terms of the original will, testator's estate was given in trust to the named trustee, for the use and benefit of the four children named, during their lives or the lives of their children or descendants down until the death of the four children, and that, upon the happening of the latter event, the property was to pass to and vest in the heirs of the deceased children. By the terms of the codicil, the trust estate was to terminate ten years from the testator's death, and at that time, the shares of his children were to vest in these children and their heirs, as provided in his will, upon the termination of the trust.

The difficulty here is to determine what became of the estate upon the determination of the trust at the end of the 10-year period. Did it go in fee to his children who were then all alive; or did they take but a life estate in the incomes for their support, with the remainder to their heirs; or did they, the children then in being, and their heirs, among whom were the plaintiffs first named, take an estate in fee simple?

These questions are not easy of solution, because of the

failure of the testator to make plain his wishes and desires. By the terms of the original will, testator's children were never to receive anything more than the use and income of their share of testator's estate during their lives, and, upon the death of all of them, the trust was to cease, and the entire estate was to pass to the heirs of his deceased children.

By the terms of the codicil, the trust estate was to cease at the expiration of ten years from testator's death, and the shares of said children were then to vest in said children and their heirs, as provided in said will, upon the termination of the trust estate. Under the codicil, it is apparent that some estate was to vest in testator's children and their heirs at the termination of the trust estate. Appellants say that this was a life estate in the child or children, with remainder over to their heirs; while appellees say that the estate vested at that time in fee in such of testator's children as were then living and the heirs of such children as were then dead, if there should be such children. The gift under the codicil was to testator's children and their heirs. This, under our law, would be a gift in fee to such of the children as survived, and to the heirs of those who did not survive. *Pierson v. Lane*, 60 Iowa 60. At common law, a devise to one and his children created a joint tenancy, when the person named had children at the time of the devise; but when no such children existed, the term "children" was construed as a word of limitation, and as the equivalent of "issue" or "heirs of his body," creating a conditional fee, or an estate tail. But a devise to one and his heirs was universally held to create an estate in fee simple. In order to find an interest in these plaintiffs, it is necessary to overlook the codicil, which clearly provides for a vesting of the estate in testator's children and their heirs at the expiration of the 10-year trust period. Appellants say that the phrase is qualified by this proviso:

"As provided in my said will upon the termination of the trust." This, it will be noticed, is followed by an exception which clearly indicates that he intended his children to take something more than a life estate or the income from the property; for it provides that, in the event one of the children died without lineal descendants, either before or after the termination of the trust, one fourth of his share remaining should go to the benevolent association. Manifestly, if appellants' contention be correct, Minnie Berend had no share which could pass after the termination of the trust; for she, according to their claim, had nothing but a life estate, which would cease at her death. Moreover, at her death she could not have lineal descendants to whom her property might pass.

It will be noticed that the original will provides for a division of the estate into four shares, which were allotted to his four children, and these were to be kept separate. True, these shares were not to pass by the original will directly to the beneficiaries; they or their children were simply to have the use of the income thereof until the death of all of testator's children, when it was to pass to the heirs of his deceased children. But by the codicil we think it clear that testator intended a vesting of the shares theretofore allotted to his children directly in such children or their heirs at the end of the 10-year trust period. This is the only way to harmonize the different provisions of the will, and it is our duty to so construe it as to harmonize all of its provisions, if that be possible; and if it is not possible, and there be a conflict between the codicil and the will, then the codicil, being the last expression of the testator, must govern.

II. Although it is charged that the decree setting aside the will was based upon the stipulation and agreement entered into between the parties, and that they or some

2. WILLS: agreement: right of executor to object.

of them were *non compos mentis* when the agreement was entered into, the record shows that the will was set aside after a hearing to the court, a jury being waived, upon the testimony introduced pro and con upon that hearing.

The court found that testator was insane, and the decree ordered that the will be set aside and held for naught. It then appears that the parties, testator's children, had agreed upon a settlement and division of the estate, and the decree approved and confirmed this settlement. Attorneys' fees were allowed for the attorneys representing the proponents of the will, in the sum of \$1,000. It also appears that the trustee appointed by the will was also a party to the will contest, and appeared by counsel. This, no doubt, is the reason why nothing is said in argument respecting his rights as trustee or executor regarding the interests of the benevolent association. Surely, neither the trustee nor the executor named in the will may, under these circumstances, attack the decree entered upon the will contest.

III. The benevolent association has
3. INANE PER- nothing more than a contingent interest,
SONS: guardian
ad litem: al- which never could amount at any time to
lowance.
more than one fourth of Minnie Berend's
one-fourth interest in the estate of her father, and, according to the tacit admissions of counsel for plaintiffs, its cause of action, if it ever had any, is barred by the statute; so that we need not give this matter further attention.

The only serious question in the case is whether or not the minor children of Louisa Berend, she (Louisa) being yet alive, have or had a vested interest in the estate of Johann Berend under the will and codicil which we have hitherto set out. We reach the conclusion that they did not acquire such interest, and for this reason the demurrer to the petition was properly sustained.

The trial court allowed the guardian ad litem for the defendants herein the sum of \$100, and of this, complaint

is made in the errors assigned. The brief of points does not cover this alleged error, and nothing is said in argument respecting the matter, beyond a mere statement of error. The amount is not challenged, and we know of no reason why a guardian ad litem properly appointed for insane defendants may not have compensation for his services. Section 3485, Code, 1897, authorizes the appointment of such a guardian. Finding no error, the judgment must be, and it is,—*Affirmed*.

WEAVER, EVANS and PRESTON, JJ., concur.

SALINGER, J., concurs in result.

SARAH VORIS, Executrix, et al., Appellants, v. E. J. West et al., Appellees.

HOMESTEAD: Rights of Heirs—Liability of Homestead for Antecedent Debts of Issue. Homestead property passing to children of a deceased owner is not exempt from the debts of such children:

- (a) If the property passes by *devise*, or
- (b) If the property passes by *descent* and a spouse survives the owner. Section 2985, Code, 1897.

WEAVER, J., dissents as to Holding (b).

Appeal from Clarke District Court.—H. K. EVANS, Judge.

TUESDAY, MAY 22, 1917.

CONTROVERSY to determine whether certain land, claimed to be a homestead, is exempt from the debts of an heir. Decree for the defendants in the district court, holding the property liable for the payment of the debts. Plaintiffs appeal.—*Affirmed*.

W. B. Tallman and Temple & Temple, for appellants.

O. M. Slaymaker, for appellees.

HOMESTEAD:
rights of heirs:
liability of
homestead for
antecedent
debts of issue.

GAYNOR, C. J.—On the 4th day of April, 1913, Samuel Walker departed this life, testate. His will provided:

1st. For the payment of his debts.

2d. "I bequeath to my wife, Elizabeth Adaline Walker, all my property, both real and personal, for her sole use and benefit during her lifetime."

3d. "I direct that the remainder of my estate be divided, share and share alike, between my six children, James H. Walker, Sarah C. Walker, Samantha A. Hines, Ola Powell, Clara J. Black and John S. Walker."

4th. Nominates an executor.

This will was duly admitted to probate. Upon the probate of the will, the widow elected to take her distributive share in the real estate, and renounced any rights under the will. Among the property devised was the homestead of Samuel Walker. The controversy here arises over the disposition of the proceeds of the homestead.

The plaintiffs claim through a deed from Ola Powell of her interest in the entire estate. The defendants are creditors of Ola Powell's. Their judgments were obtained before the conveyance to the plaintiffs, and it is claimed that these judgments attached as liens to the interest of Ola Powell in the estate, prior to any claim asserted by these plaintiffs.

It is contended by the plaintiffs, however, that, so far as the homestead is concerned, Ola Powell took her share free of any of her antecedent debts; that, therefore, these judgments did not attach to her interest in the homestead, and her conveyance to the plaintiffs must prevail, so far as the proceeds of the homestead are concerned. It is contended, however, by the defendants that her interest passed to her under the will, and that she therefore cannot invoke the statutory exemptions. The plaintiffs' reply to this is that she takes the same as she would have taken had no will

been made, and, therefore, the will is inoperative, and she must be held to have taken under the statute, and so taken under the provisions of the statute, Section 2985 of the Code of 1897, the property is exempt from her antecedent debts.

It has been held by this court that, if one takes a homestead under a will, he takes it as a purchaser, and is not entitled to the exemption given to the issue as provided in the statute. See *Rice v. Burkhardt*, 130 Iowa 520. So it may be conceded that, if Ola Powell took under the will, the homestead was subject to her antecedent debts and to the claims of these defendants in their judgments. The contention, however, is that the will does not change her rights; that the will gives her just what the statute would give her, and, the statutory right being the greater right, she must be held to have taken under the statute.

Now we will not stop to discuss whether she took under the will or under the statute. It is conceded that, if she took under the will, her share in the homestead is subject to these judgments. It is contended that, if she took under the statute, it is not subject to these judgments. If the statute does not give her an exemption, therefore, from these judgments, the plaintiffs' complaint of the ruling of the court is not well founded. The court found her interest in the homestead subject to these judgments. It is from this finding that the case comes to us.

Conceding, however, that she took under the statute and not under the will, are the plaintiffs entitled to have this case reversed? Even conceding that she took under the statute, is the property exempt from her antecedent debts? This question we proceed to determine. It is decisive of the case. The question has never been squarely presented and decided by this court. The last expression of this court in this connection is found in *Ringland v. Johnson*, 177 Iowa 214. It will be noted that in that case

there was no surviving spouse, and the question here under discussion was not involved. Here, there is a surviving spouse, in whom the homestead right was invested, and in whom it was continued after the death of the owner. Section 2985 of the Code of 1897 reads as follows:

"Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law, but the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is herein contemplated. The survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased; *but if there be no survivor*, the homestead descends to the issue of either husband or wife according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents or their own, except those of the owner thereof contracted prior to its acquisition."

This section gives to the surviving spouse of the owner the passive right to continue the possession and occupancy of the homestead. This is a recognition of the right acquired and existing at the time of the death of the owner. It was the homestead of the husband and wife. The right to possess and occupy it existed then. Upon the happening of the death of either, the other may continue to possess and occupy; may continue to enjoy the same right in the property, so far as possession and occupancy are concerned, and the same right of exemption, as existed at the time of the death. To enjoy this requires no affirmative action, no change in the relationship to the homestead. The statute continues the same right after the death that existed before the death.

This section gives also another right—the right to elect to retain the homestead and use and occupy the same,

after the death of the owner, until the death of the surviving spouse. The exercise of this right requires a corresponding release of another right given by the statute, to wit, the right to a distributive share in the property.

The first right—the passive right, the right to continue and occupy—has its limitations, and ceases when the property is otherwise disposed of according to law; and it is so disposed of when the survivor elects to take a distributive share in the entire property of the deceased spouse. On such election, the right to continue in the occupancy of the homestead ceases.

The second right—the right to elect to occupy the homestead for life in lieu of dower—requires affirmative action, a choice between that and the distributive share given by statute.

She cannot take both. The taking of one involves a surrender of the other. It involves action to which the heirs are in no way parties, and action over which they have no control. The right of homestead in property is independent of title. The homestead right comes into existence when the property is occupied as a homestead, and exists in favor of either spouse whether owner or not, and, though the owner die, the surviving spouse still retains this statutory right of homestead in the property, a right which she may continue or not, at her election. But the right remains in the survivor even after the death of the owner, and may continue up to the time of the death of the last survivor of the homestead right, if she so elects.

Upon the death of the owner, the title passes to his heirs, subject, however, to the right of the surviving spouse to continue the homestead character, and, with the continuance, the right to enjoy and occupy the same during her life, if she so elects. The right at least continues in her until she abandons it by her own voluntary election to take something else in lieu thereof. Immediately upon the death

of the owner of *property* to which a homestead right has attached, the *property* passes to his issue, free from any debts of the *owner*, contracted since the homestead character attached. This not only because of the statute under consideration, but because of the provisions of Section 2972, Code, 1897, exempting homesteads from judicial sale.

Up to this point, we have assumed that there is a surviving spouse. The statute contemplates a condition in which the homestead right exists in favor of the surviving spouse after the death of the owner. The right of homestead having attached, it is continued in favor of the survivor, and she may make her passive or active election to retain it, as hereinbefore indicated. In the event, however, that there is no surviving spouse to exercise this passive or active right, then, upon the death of the owner, that which, under the law, constituted his homestead at the time of his death, descends, according to the rules of descent, to the issue of the owner. There being no surviving spouse, the title passes, and with it the incident of homestead, the right to hold it exempt from antecedent debts of the ancestor, with the added right to hold it exempt from the antecedent debts of the issue. The homestead character antedates the death of the owner, and, where there is a surviving spouse, is continued in her favor, with the right of election, as hereinbefore indicated. This right of homestead may be abandoned or may be preserved, at her election. If there be a surviving spouse, the homestead right does not pass to the heirs, the issue of the owner, but is continued in the surviving spouse, on the theory that the homestead right, having become vested in this surviving spouse during the life of the owner, is continued in her favor after his death, with a right of occupancy, and with a right to retain it in lieu of her distributive share. This is a personal right preserved to the survivor.

"The homestead passed to the widow, and she was en-

titled to use and occupy the same at least for one year." *In re Estate of Ring*, 132 Iowa 216, 222.

It is preserved to her by the statute, under certain conditions:

1st. To continue to occupy it as a homestead until otherwise disposed of according to law.

2d. The right to take it for life, in lieu of her distributive share.

These two are personal to the widow, and she may exercise or reject, as she sees fit. The statute clearly differentiates between the two situations: one, in which there is a surviving spouse in whose favor the homestead right is preserved after the death of the owner; and the other, where there is no surviving spouse, and the homestead right passes directly to the heirs with the title; and it is only in the event that there is no surviving spouse that the issue takes the homestead free from the antecedent debts of the issue. The homestead right passes to her, and with it the right to continue to possess and occupy the whole homestead until otherwise disposed of, according to law. The setting off of the distributive share to the wife is such a disposition. Upon the death of the owner, the homestead right passes to the surviving spouse, with a right to retain it for life in lieu of her share in the real estate of the decedent. The statute then proceeds to say that, *if there be no survivor*, the homestead descends to the issue of the owner, to be held by such issue exempt from their own antecedent debts, and the only provision of the statute exempting it from the antecedent debts of the issue is in the event that there is no surviving spouse of the owner. Then the title to the property, with its incident of exemption founded upon the homestead character of the property, passes directly to the heirs with the incident of exemption attached.

This statute had its foundation, no doubt, in reason, and the thought that lay back of it was that, in the event

that both parents were dead, the children would succeed to the homestead property, with all the exemptions that attached to it during the life of the parents, with the added exemption from the debts of the children. The thought was to preserve the homestead for the children in the event both parents were dead; that the old home should be preserved to them, under such conditions, the same as it was in the hands of the parents, but only in the event that there was no surviving spouse, to wit, no guardian and protector of the home.

All exemptions are statutory, and, while it is true that an exemption grant will be liberally construed to effectuate the purpose of the grant, yet we must find the grant in the statute, or no exemption can exist; and it is not for this court to say that the legislature intended a larger grant of exemptions than is given by the plain wording of the statute. In the case under consideration, there was a surviving spouse—a spouse in whom the homestead right was vested and continued after the death of the owner. True that, thereafter, she elected not to avail herself of these homestead rights, but to take her distributive share under the law. But the fact still remains that there was a surviving spouse, in whom the homestead right was vested and continued after the death of the owner; and, therefore, under the plain provisions of the statute, whatever title the heirs took in this property did not include the homestead right with exemption from their antecedent debts. It is true that this exemption is not founded upon any homestead right in the issue, but is founded upon the homestead right in the ancestor. It is, however, the homestead right that gives the exemption, whether in the ancestor or in the issue. Therefore, the homestead right comes from the ancestor. The homestead right must have passed to the issue upon the death of the ancestor, in order to justify the invoking of this statute. There cannot be two homesteads in the

same property. If the homestead right remained in the surviving spouse, it did not pass to the issue. If there was no surviving spouse, it did pass to the issue with the property, and then, for the first time, the right to invoke the exemption provided in this statute arose in favor of the issue.

In *Johnson v. Gaylord*, 41 Iowa 362, 366, the matter here under consideration was considered from one angle. The statutes then provided:

"Upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." Sec. 2295, Revision of 1860.

"If there is no such survivor, the homestead descends to the issue of either husband or wife according to the general rules of descent * * * to be held by such issue exempt from any antecedent debts of their parents or their own." Sec. 2296, Revision of 1860.

This court said:

"Now if there be no survivor to claim the homestead, the heir takes it free from the debts of the *deceased owner*. In such a case there is no homestead right existing, on account of the prior death of both the husband and wife. The law contemplates that, upon the termination of the homestead right in *such a manner*, the heir takes the property free from the debts of his ancestor. Now it is not provided that, upon the termination of the homestead right in another way, by abandonment, it is held subject to the debts;" and then proceeds to say that the statute contemplates that, when it comes into the hands of the heirs, it should be free from debts, and that this intention is clearly expressed in Section 2277, Revision of 1860, which reads:

"Where there is no special declaration of the statute to the contrary, the homestead of every head of a family is exempt from judicial sale."

And Section 2297 of the statute, as then written, provided that, if there is no survivor or issue, the homestead is liable to be sold for the payment of any debts to which it might, at that time, be subjected if it had never been held as a homestead; then proceeds to deal with—and the case simply deals with—the right to subject the land to the payment of the antecedent debts of the ancestor.

The facts of this case did not call upon the court for a discussion of the matter here under consideration, and wherever it speaks in that case of debts, it refers clearly to the debts of the ancestor, and not to the debts of the issue. Prior cases are considered and discussed in that opinion. We will not take the time to review them here.

This is also true of *Jamison v. Crocker*, 148 Iowa 104. In the *Johnson* case, the right to subject the homestead to the debts of the heir was not before the court. It is assumed, but not argued or determined, because not involved, that the property would not be subject to the antecedent debts of the heir.

In *Rice v. Burkhardt*, 130 Iowa 520, there was no surviving spouse, and the opinion must be read with this thought in mind; and, though the court says in that case that, in the absence of a will directing differently, the property should pass to the owner's issue according to the rules of descent, and be held by such issue exempt from prior debts, the language was used with reference to the fact that there was no surviving spouse.

In *Nicholas v. Purczell*, 21 Iowa 265, the action involved the partition of real estate. The plaintiffs were the brothers of the owner, and his only heirs at law. The defendant was his widow, and the other defendant was her second husband. The action involved 40 acres of land, and constituted the homestead of herself and her first husband, John Nicholas, at the time of his death. It was held that, notwithstanding her second marriage, she, as the widow of

the original owner, had a right to continue to occupy it during her life, if she elected to do so, and that it was not subject to partition on request of the heirs. This emphasizes the fact heretofore adverted to, that the homestead right passed to the survivor; that it was an independent statutory right, growing out of the relationship sustained by her to the deceased owner.

In *Cotton v. Wood*, 25 Iowa 43, the only portion of the opinion that touches the matter here in controversy is found in the fifth division. In that case, all that was decided that touches the matter here is that, upon the death of the owner, the homestead descends to his heirs, subject to the right of occupancy as a homestead in the survivor.

In *First National Bank v. Willie*, 115 Iowa 77, the controversy involved the question as to whether the defendant took the property sought to be subjected, under a will of the owner, or as heir. The will in that case made no specific provisions as to the disposition of the homestead, but directed, in general terms, that the widow should have for her use and support, during her natural life, all the testator's property, and that the executor should dispose of it and apply the proceeds thereof to the maintenance of the wife; and further provided that, after the death of the wife, the executor should divide the same, share and share alike, equally among the three children. The court said:

"These provisions clearly negative any idea that a share in the homestead, as such, is to pass to defendant. And it is immaterial that in fact the estate in the hands of the executor consists entirely of the proceeds of the homestead. The case is plainly not one for the application of the statutory provision exempting the homestead in the hands of the issue from their debts."

This holding could rest on two theories: One, that the party took under the will, and, therefore, could not invoke the statute; second, that the will expressly reserved the

homestead to the wife during her life, and, therefore, the homestead, as such, did not pass to the heir with its intended exemptions. Under this construction of the statute, it follows logically that Ola did not take her interest in the homestead property exempt from antecedent debts. It never was her homestead. Therefore, whatever right to exemption she had must be found in this statute, Section 2985 of the Code of 1897, hereinbefore set out; and, as it appears she does not come within the protection of that statute, the court was right in holding that her interest was subject to be taken under the judgments in question.

The case is, therefore,—*Affirmed*.

LADD, PRESTON and STEVENS, JJ., concur.

WEAVER, J., dissents.

WATERLOO, CEDAR FALLS & NORTHERN RAILWAY Co., Appellee, v. SUSANNA HARRIS et al., Appellants.

DOWER: Nature of Estate—Sale of Part Prior to Admeasurement

- 1 —**Effect.** A surviving spouse, prior to the setting off of his or her distributive share in the lands of the deceased intestate spouse, may not, as against other cotenant heirs, validly sell, encumber or charge with an easement, *any definite aliquot part* of such undivided lands.

TENANCY IN COMMON: Mutual Rights—Sale of Aliquot Part of

- 2 **Undivided Property.** Principle recognized that a cotenant, prior to some form of partition, may not, as against his cotenants, sell any definite aliquot part of the premises.

FRAUD: Acts Not Constituting Fraud—Exercising Legal Right.

- 3 Principle recognized that the exercise of a legal right cannot constitute a fraud.

ESTOPPEL: Equitable Estoppel—Sale of Part of Unassigned Dow-

- 4 **er—Knowledge of Heir.** An heir is not estopped to assert the invalidity, as to him, of a contract by which a surviving spouse

(his mother) assumed to grant a railway right of way over lands held in common. from the fact that he learned that his mother had made such a contract, did not object thereto, and permitted the company to construct its road.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

SATURDAY, JANUARY 20, 1917.

REHEARING DENIED TUESDAY, MAY 22, 1917.

THIS is an action in equity for the specific performance of a written contract made by defendant Susanna Harris, in which she agreed to convey a right of way over lands owned by her, or in which she had an interest, at the time the contract was executed. Defendants deny the validity of the contract; say that, at the time it was made, Susanna Harris did not own the land, and had no authority to make a contract for a right of way thereover; and further plead that J. W. B. Harris is now the owner of the land unencumbered by the right of way. On these issues, the case was tried to the court, resulting in a judgment for plaintiff, and defendants appeal.—*Reversed and remanded.*

F. L. Anderson and Voris & Haas, for appellants.

Edwards, Longley, Ransier & Smith, and Barnes, Chamberlain & Hanzlik, for appellee.

DEEMER, J.—I. On November 15, 1913, Susanna Harris entered into a written agreement with plaintiff, whereby she agreed to give plaintiff "a strip of land 100 feet in width, the same being 50 feet on each side of the center line which may be hereafter located and staked out over and across the lands now owned by me." The consideration for the agreement was plaintiff's promise to locate and grade a right of way for its interurban railway over and upon the land said to be owned by Susanna Har-

1. DOWER: nature of estate; sale of part prior to admeasurement; effect.

ris, and the location of the tracks thereon before December 1, 1915. Plaintiff performed its part of the agreement some time prior to May 1, 1914, but the defendant refused to comply with her part of the contract. The title to the land originally stood in the name of B. F. Harris, the husband of Susanna, but he died intestate some time prior to the making of the contract in suit. j

He left surviving Susanna, his widow, and her codefendant, J. W. B. Harris, his only heirs. On May 1, 1914, defendant J. W. B. Harris commenced an action against the plaintiff for damages, alleging that he was the owner in fee simple of an undivided two thirds of the real estate upon which the right of way had been located, and on May 14, 1914, the widow made an assignment to J. W. B. Harris of her alleged cause of action, or claim against the plaintiff herein, for damages by reason of the location of the right of way over the lands of which her husband died seized, and thereafter, and on December 8, 1914, plaintiff Harris amended his petition in the damage suit, claiming damages to the entire land theretofore owned by his father. Thereafter, and on the 8th day of February, 1915, the two defendants in this action entered into a voluntary agreement for partition of the real estate left by deceased. By the terms of this agreement, J. W. B. Harris was to receive that part of the real estate upon which plaintiff's right of way was established, and the widow's dower was so admeasured as to exclude therefrom any part of the right of way. Quitclaim deeds were made by one to the other in furtherance of this agreement. J. W. B. Harris was at all times aware of the contract made by Susanna, the widow, with plaintiff, although the record does not show that he was personally present at its making. He was in joint possession with his mother of all the land left by deceased, at the time she agreed to give the right of way, knew of the performance

by plaintiff of its part of the agreement, and made no objections thereto.

Plaintiff demanded a conveyance from defendants, according to the terms of the agreement with Susanna Harris, but they declined to execute the same. It then brought this action for specific performance, the same having been commenced on December 19, 1914.

Appellants contend that the contract made by the widow before the admeasurement of her dower was and is invalid and of no effect, and that plaintiffs are not, in equity, entitled to enforce the same. Appellants' counsel have made a learned argument to establish the fact that the widow had no title to any part of the lands of her deceased husband until her dower or widow's share was admeasured and set apart to her; that, as she had no title, she could not mortgage, sell or encumber the same, and that any attempt on her part to do so is of no validity whatever.

The share of a widow in her deceased husband's real estate is of statutory origin and regulation, subject to certain limitations not necessary to be noted; and these statutes have been changed from time to time. By the Code of 1851, the widow was entitled to one third in value of her husband's real estate, upon his death, as her property in fee simple, and the same Code provided that it should be so set off as to include the dwelling house and the land constituting the homestead. The Revision of 1860 repealed this law, and the widow was given one third in value of the real estate, said estate in dower to be and remain the same as at common law, to wit, an estate for life. The ninth general assembly changed this law, and enacted the following in lieu thereof:

"One third in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, to which the wife has made no relin-

quishment of her right, shall, under the direction of the court, be set apart by the executor, administrator or heir, as her property in fee simple, on the death of the husband, if she survive him. * * *

"All the provisions hereinbefore made in relation to the widow of a deceased husband, shall be applicable to the husband of a deceased wife. Each is entitled to the same right of dower in the estate of the other, and the like interest shall in the same manner descend to their respective heirs. The estate *by curtesy* is hereby abolished." Ch. 151, Secs. 1, 3, Acts of the Ninth General Assembly.

These two provisions were substantially embodied in the Code of 1873, and re-enacted in the Code of 1897. They were in force at the time the contract in suit was executed. Due to a failure to observe these statutory changes, some of our decisions are in apparent conflict. It is claimed that, under the statute as it now exists, and as it existed when the contract in suit was made, the widow, upon the death of her husband intestate, became invested with a fee simple title to an undivided one third of all the real estate of which her husband died seized, subject to some limitations, which we shall notice.

We have expressly held that, before admeasurement of the widow's distributive share, and before she may have elected under other statutes to take a life estate in lieu of dower, she may encumber her interest in the real estate by mortgage. *Herr v. Herr*, 90 Iowa 538; *Britt v. Gordon*, 132 Iowa 431, 438. Again, in *Larkin v. McManus*, 81 Iowa 723, and *Huston v. Seeley*, 27 Iowa 183, it was expressly held that she might sell her one-third interest before assignment, and that the purchaser might enforce his contract. We have also held, however, that, until assigned, it is not subject to execution or attachment. *Rausch v. Moore*, 48 Iowa 611; *Brightman v. Morgan*, 111 Iowa 481; *Getchell v. McGuire*, 70 Iowa 71. Again, until assignment of dower, the

widow cannot recover for damages done the land, or for use and occupation thereof. *Tuttle v. Burlington & M. R. R. Co.*, 49 Iowa 134; *Huston v. Seeley*, supra; *Laverty v. Woodward*, 16 Iowa 1. But upon her death before admeasurement, her share passes to her heirs as other real estate owned by her. *Potter v. Worley*, 57 Iowa 66; *Blair v. Wilson*, 57 Iowa 177; *In re Estate of Proctor*, 103 Iowa 232. And it is such an interest that it may be recovered in a real action. *Rice v. Nelson*, 27 Iowa 148; *Huston v. Seeley*, supra. In more recent cases, it is held that the widow's title vests upon the death of her husband. *In re Estate of Proctor*, supra; *Boscorth v. Blaine*, 170 Iowa 296; *In re Estate of Smith*, 165 Iowa 614.

If the widow has such an interest in the estate of her husband that she may sell, convey or encumber it before it is admeasured, may she sell a part of it or create an easement in the lands which will be binding upon her and the other heirs, so that, upon admeasurement of her dower, or upon partition, voluntary or otherwise, the part so sold, or over which an easement has been created, will be recognized and enforced against the other owners of the land? At best, the widow in this case was a tenant in common with her son, owning an undivided one third of the land. The statute provides that the survivor's share may be set off by the mutual consent of all the parties in interest, or by referees, etc., at any time within ten years. See Sec. 3369, Code, 1897. But this remedy is not exclusive. We have held that dower or distributive share may be set aside in an action in equity or by partition.

The points to be noticed here are that the parties in interest may, by mutual consent, set aside the survivor's share or a surviving spouse's right to distributive share, and if they may have partition by action in court, they may also, by conveyance among themselves, make a voluntary

2. TENANCY IN
COMMON: mutual
rights:
sale of aliquot
part of undi-
vided property.

one. So that, from the time of the death of the husband in this case, the right to have the distributive share of the widow set aside existed. Until that was done, the right or title was to an undivided part of the land not definitely ascertained until some of the remedies suggested were adopted. We shall put the case in the strongest light for the plaintiff, and say that the widow was a tenant in common, owning a vested interest in an undivided one third of the property left by the deceased, and ascertain what right, if any, she had to sell or create a lien upon a definite aliquot part of her interest less than the whole, or convey a right or easement over a specific part of the whole tract, which will be binding upon her and also upon her co-owners. Upon this proposition, the authorities speak with no uncertainty. Neither of the cotenants has authority, in virtue of the relation of cotenancy, to transfer or by any means dispose of the common property. *Strickland v. Parker*, 54 Me. 263, 268. Of course, there may be an agency in fact, but this must be shown. This may be done by direct testimony, or by such a showing as that an agency will be implied. But in this case, there is no claim that any agency in fact existed, and there is no such showing as to justify a finding of an implied one. But one cotenant may sell, convey or encumber the whole of his undivided interest as such, although such a conveyance of an aliquot part of the entire estate, describing it by metes and bounds, is of no effect in law. Freeman on Cotenancy and Partition (2d Ed.), Sec. 199, and cases cited. *Stookey v. Carter*, 92 Ill. 129; *Marks v. Sewall*, 120 Mass. 174.

As it is well settled that a cotenant cannot make a grant of a specific part of the common property which will convey title as against his cotenants, it follows that he cannot grant any right or easement upon any specified portion so as to confer a right capable of successful assertion against the other owners. Freeman on Cotenancy and Par-

tion (2d Ed.), Sec. 185; Washburn on Easements and Servitude, Chap. 1, Sec. 3, and cases cited; *Collins v. Prentice*, 15 Conn. 423, 426; *Stookey v. Carter*, supra. The latter case is almost directly in point. The reasons for these rules are well stated by Chief Justice Shaw in *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 361, 369, as follows:

"The ground upon which the doctrine is established is that a tenant in common of an entire estate is entitled, on partition, to have his property assigned in one entire parcel, according to his aliquot part. The respective cotenants may convey their shares to one or many grantees, as they please, so it be of the entire estate; because, whether there be one or many cotenants, each may still have partition, which is inseparably incident to an estate in common, and have it in one parcel, and of like kind and quality with the estate which he holds in common. I have a moiety; my cotenant has a moiety. He may convey a quarter of the whole estate to one, an eighth to another, a sixteenth to another, and so on indefinitely, letting in other cotenants with me. But all being seized of aliquot parts in the same estate and of like kind and quality, my right to partition is not disturbed by the number of cotenants. But if he could convey his aliquot part in specified parcels of the estate, he might diminish the value of my right, if not render it worthless."

Another case has said, and truly, that a deed of a specified part, less than the whole, operates to break the unity of possession. See also, *Tainter v. Cole*, 120 Mass. 162, 164; *Stark v. Barrett*, 15 Cal. 361, 370; *Gates v. Salmon*, 35 Cal. 576, 588; *Sutter v. San Francisco*, 36 Cal. 112, 115. We have adopted these same rules in *Farr v. Reilly*, 58 Iowa 399; *Forrest Milling Co. v. Cedar Falls Mill Co.*, 103 Iowa 619; *Rush v. Burlington, C. R. & N. R. Co.*, 57 Iowa 201; *Hook v. Garfield Coal Co.*, 112 Iowa 210.

Of course, such a conveyance is not absolutely void,

for it may be good as between the parties to the extent of vesting title thereafter acquired by the grantee in an aliquot part covered by the transfer. *Cunningham v. Pattee*, 99 Mass. 248. And sometimes a court, wherever the interest of the parties will not be impaired, will set off the lands so as to protect a grantee from one of the cotenants. *Campau v. Godfrey*, 18 Mich. 27, 38; *McKee v. Barley*, 11 Gratt. (Va.) 340, 346.

Some courts have said that such a conveyance is good as against everyone but the cotenants, and can only be avoided by them. *Dall v. Brown*, 5 Cush. (Mass.) 289, 291. J. W. B. Harris, the cotenant in this case, is seeking to avoid the contract made by his mother, and the question arises as to whether it is his right to have the same disregarded. As pointed out, sometimes a court will make partition, so as to protect a grantee from one of the cotenants to a specific part of the land. But the difficulty here is, the statutes say that, in setting off the distributive share of the widow, the land must be so divided as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will equal the share allotted by law to the widow, unless she prefers a different arrangement. This right is, of course, paramount to the right of a grantee of a specific part not homestead in character.

2. FRAUD: acts not constituting fraud: exercising legal right.

Again, one of the statutes quoted permits a setting off of the distributive share by mutual consent, and the right of voluntary partition, of course, exists. This sort of a partition was made, and it so happened that the widow's share was fixed, as by law provided, so as to include the homestead, or at least a part thereof, leaving to the cotenant, J. W. B. Harris, the part upon which the right of way was located. As the widow had the undoubted right, under the statute, to insist on this arrangement, her insistence on that right cannot amount to a fraud, and there are, in such circum-

stances, no equities in favor of the plaintiff. It must have known of the condition of the title to the land, for it was of record, and it knew, or must be held to have known, of the widow's right under the law to take the part of her husband's lands which were given the widow as her share.

II. An estoppel might be found. had
 4. ESTOPPEL: equitable estoppel: sale of part of unassigned dower: knowledge of heir. the son been personally present when the mother made her contract with plaintiff, and failed to repudiate or disapprove the same. As a rule, one cannot stand by and

see another sell his property as his own without being estopped from asserting that the party making the sale was not the owner. But there is no such showing in this record. The most that can be said from the record is that, after the contract was made, he knew of it and did not then object thereto, but permitted the plaintiff to go ahead and construct its road and build its tracks. There is no showing that plaintiff was in any manner misled by his conduct, or that it acted any differently than it would have done had this defendant made objections to the improvement. As the conveyance did not attempt to bind him, he was not bound to object thereto. Plaintiff was as fully aware of its rights as he was, and must be held to have known of its rights under the contract with the widow.

The fact that defendant brought an action, at one time, for two thirds of the damages to the land, and at another, and after the assignment from his mother, for the whole of the damages, the case not having been tried or decided, but merely pending, does not conclude the defendant J. W. B. Harris. Neither is he bound by the fact that he obtained a deed to the part set aside to him from his mother. The making of the deed was necessary to the voluntary partition, and J. W. B. Harris did not receive his title from his mother in virtue of her deed to him; that title came from the father.

As already suggested, as defendants did nothing but what the law allowed and permitted them to do, it cannot be said that the partition was fraudulent. Indeed, no fraud is charged in the pleadings. Plaintiff is in no sense an innocent purchaser; and, as it has no contract with J. W. B. Harris for the land set apart to him, it cannot claim a right of way over that land. It had a contract with Mrs. Harris, but this contract did not cover the land set apart to her, and specific performance cannot be had against either defendant. What plaintiff's rights may be at law, or in defense to some claim of defendants', we do not decide. The trial court was in error in not dismissing plaintiff's petition, and the decree must be, and it is, reversed, and the case remanded for one in harmony with this opinion.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

W. H. WOOD, Appellee, v. HONEY CREEK DRAINAGE & LEVEE DISTRICT No. 6, and BOARD OF SUPERVISORS, Appellants.

DRAINS: Apportionment of Cost—Power of Commissioners—Excluding Lands. Commissioners appointed to apportion the cost of a public drainage improvement are wholly without power to apportion the entire cost upon *part* of the lands within the district, on the theory that the remaining lands will receive no benefit from the improvement—a question conclusively settled by the establishment of the district. Nor has the board of supervisors any power to entertain such a report. Section 1989-a12, Code Supp., 1913.

Appeal from Pottawattamie District Court.—J. B. ROCKAFELLOW, Judge.

WEDNESDAY, DECEMBER 13, 1916.

REHEARING DENIED TUESDAY, MAY 22, 1917.

APPEAL by defendants from a decree of the district court setting aside assessments against lands included in a drainage district.

John P. Organ, for appellants.

W. S. Baird and Roadifer & Roadifer, for appellee.

LADD, J.—The petition praying for the establishment of the drainage district, with territory described substantially as subsequently included in that established, was filed with the county auditor January 21, 1909. In pursuance thereof, an engineer was designated, and his report duly filed September 22d following. Another engineer, E. E. Spetman, was appointed to examine and report on the project and district proposed. His report was not filed until March 8, 1911. It recommended that the district be established as outlined in the former report, but suggested some changes in the improvements to be made. The board of supervisors, by appropriate resolution, approved this report, and on notice, such as required by Section 1989-a3, Code Supp., 1907, claims for damages were filed, appraisers appointed and their report made, and the damages to be allowed fixed by the board of supervisors, and, on the day fixed for final hearing, the improvements were ordered and the boundaries of the district defined. The contract was then let. Everything up to and including the making of the contract is conceded to have been regular in all respects. The board of supervisors then appointed three commissioners, one of whom was the engineer Spetman, to “make an equitable apportionment of the costs, expenses, and cost of construction, fees and damages assessed for the construction of any such improvement * * * and make report thereof in writing to the board of supervisors.” In so doing, the commissioners omitted

Drains: apportionment of cost, power of commissioners: excluding lands.

nearly three fourths of the lands of the district, or, to be exact, 72 per cent thereof, saying that lands so omitted derived no benefit from the improvement to be made; and therefore should not share the burdens of constructing the dikes or excavating the ditches as proposed. Notice was given to all interested, as required, and, more than five days before the day set for hearing, plaintiff filed written objections to said report, asserting: (1) That the lands omitted should have been classified as benefited by the proposed improvements, and that it would be inequitable to impose all the burden upon other lands only; (2) that it would be inequitable to assess lands not benefited by the ditch to be excavated for the construction of the dike, or those not benefited by the dike for expenses involved in constructing the ditches, and that the commissioners confused the two and made no effort to separate the benefits to be derived from each as a basis for assessment; and (3) in any event, the assessments against his lands are inequitable as compared with those levied against other lands of the district, and should be reduced.

The board of supervisors reduced the assessments against the several tracts of plaintiff's land, but approved the omission of 72 per cent of the lands in the district from classification and the apportionment of costs and expenses. The evidence disclosed that the classification of lands according to benefits was with reference to those derived from both dike and ditches, and therefore the second objection was unfounded. The last objection will be disposed of by our conclusion with reference to the first.

After the establishment of a drainage district, under the provisions of Chapter 2-A, Title X, Code Supp., 1913, is the inquiry whether any land included therein will be benefited, open to the commissioners appointed to classify and assess such lands, or are they to assume that the lands will be benefited and classify and assess accordingly? At

the outset, the board of supervisors must determine whether such a proposed improvement will be conducive to the public health, convenience, utility and welfare, and, having so determined, its decision is not reviewable by the courts. *Denny v. Des Moines County*, 143 Iowa 466. But whether any particular tract of land is to be included in the district to be established, and bear its portion of the burden of making the improvement, is to be determined on due notice and opportunity afforded those interested therein to be heard. Sections 1989-a3, 1989-a4 and 1989-a5, Code Supp., 1913. Such burden may be imposed only when some special benefit is to be conferred, a benefit other than that to be enjoyed by the public generally, a special benefit. And before the engineer may recommend that land be included in the district, or the board include the same, the engineer must find that in some way said land will be affected by the improvement proposed, and that its value will be enhanced thereby, either by relieving it of some burden or by rendering it adapted for a different purpose than or better adapted to the purpose for which it is used, or in some manner more accessible. In other words, the test is whether the particular tract of land will receive some special benefit from the improvement proposed; if it will, the engineer is to include it, and, if not, to exclude it. *Zinser v. Board of Supervisors*, 137 Iowa 660. But the finding of the engineer is not conclusive. As said, every landowner is afforded a hearing before the board of supervisors, and, if lands not benefited are included therein, its duty is to reject the engineer's report, or refer the matter back to him or another competent engineer for further investigation and report, and only when satisfied that the district as proposed by the engineer contains all the land which will be, and no land which will not be, benefited by the improvement, may the board of supervisors establish a drainage district. *Hartshorn v. Wright County Dist. Court*,

142 Iowa 72; *Shaw v. Nelson*, 150 Iowa 559. And a resolution of the board of supervisors establishing the district constitutes a conclusive finding that all lands included therein will be specially benefited by the improvement. *Chicago, R. I. & P. R. Co. v. Wright County Drainage District No. 43*, 175 Iowa 417; *Zinser v. Board*, *supra*; *Kelley v. Board of Supervisors*, 158 Iowa 735.

Counsel for appellants concedes that the order establishing the district is thus conclusive on the landowner, but argues that it is otherwise as to the board of supervisors, and relies on certain language in Section 1989-a12, Code Supp., 1913, a portion of which, after directing the appointment of three commissioners, reads:

"The board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the state not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within 20 days after such appointment begin to personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or reopening of the same, in tracts of 40 acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement, or the repairing or reopening of the same, and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of 100 and those benefited in a less degree shall be marked with such percentage of 100 as the benefit received bears in proportion thereto. This classification when finally estab-

lished shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof. In the report of the appraisers so appointed, they shall specify each tract of land by proper description and the ownership thereof as the same appears on the transfer books in the auditor's office, and the auditor shall cause notice to be served upon each person whose name appears as owner and also upon the person or persons in actual occupancy of any such land in the time and manner provided for the establishment of a levee or drainage district, which notice shall state the amount of special assessments apportioned to such owner, upon each tract or lot, the day set for hearing the same before the board of supervisors and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing. When the day set for hearing shall have arrived, the board of supervisors shall proceed to hear and determine all objections made and filed to said report and may increase, diminish, annul or affirm the apportionment made in said report or in any part thereof as may appear to the board to be just and equitable; but in no case shall it be competent to show that the lands assessed would not be benefited by the improvement, and when such hearing shall have been had the board shall levy such apportionment so fixed by it upon the lands within such levee or drainage district."

It will be observed that the commissioners are not authorized to inquire whether the land will be benefited at all, but the entire section proceeds on the theory that every tract of land in the district will be benefited to some extent, and the two things, and the only two, which the commissioners are to do are: (1) To classify the lands on a percentage basis according to benefits; and (2) to equitably apportion the costs and expenses enumerated against

the several tracts of land, so doing as prescribed, and report accordingly to the board of supervisors. As said in *Oliver v. Monona County*, 117 Iowa 48, they are to assume that all the land within the district is benefited and to classify and assess accordingly. In *Kelley v. Drainage District No. 60*, 158 Iowa 735, it was remarked that this section of the Code Supplement "declares that 'in no case shall it be competent to show that lands assessed would not be benefited by the improvement.' This is for the reason that, by including such lands in the district when established, the board of supervisors necessarily found that such lands would be benefited by the improvement, and the matter will not be reconsidered in levying the assessments."

The commissioners, then, failed to perform their duty, as exacted by this statute, in omitting 72 per cent of the lands from classification and assessment. Not only that, but, in undertaking to pass on whether such lands would be benefited, they exceeded their authority and this part of the report was the merest surplusage. Nor do we think that, even had the omitted lands been classified and assessed and so reported by the commissioners to the board of supervisors, said board might have reconsidered the finding that these would be benefited, made in establishing the district, or have omitted them from the assessment roll entirely. If so, then the requirement that the district be established as recommended by a competent engineer would be of no consequence, for it subsequently might be evaded at the will of the board by omitting to assess a portion of the lands previously included. The commissioners' report necessarily includes all lands in the district as established; the board of supervisors is to pass on objections thereto which are in writing and filed with the county auditor on or before noon of the day set for hearing, and, in doing so, "shall proceed to hear and determine all objections made and filed to said report and may increase, diminish, annul or affirm

the apportionment made in said report or any part thereof as may appear to the board to be just and equitable; but in no case shall it be competent to show that the lands assessed would not be benefited by the improvement." If the owner may not show that his land will not be benefited, any objection on that ground would be idle and unwarranted, and manifestly not contemplated. In the absence of objection, the board may levy the assessment as recommended by the commissioners. The hearing provided does not contemplate reopening the question previously decided that all the lands will be benefited in some measure, but is solely for the purpose of equalizing the apportionment of costs and expenses placed on the several tracts with the benefits to be conferred. True, the power is conferred to "annul * * * the apportionment made in said report or any part thereof," but this is limited by what follows, prohibiting any showing at the hearing that "the lands assessed would not be benefited." In other words, such an inquiry is excluded from the hearing, and, if the apportionment is to be annulled, this must be done on some other ground. In *Ross v. Board of Supervisors*, 128 Iowa 427, the section considered (Sec. 1946, Code, 1897,) did not contain the prohibitory clause above, it being found in Section 1947, Code, 1897, and then only precluded such showing of no benefit on appeal to the courts. Here, the clause relates to the hearing before the board of supervisors, and plainly was inserted to obviate a second inquiry into the question as to whether the lands included in the district would be likely to be benefited. The board of supervisors should have annulled the entire apportionment as made, and required the commissioners to classify and assess all the lands of the district as required by law. Instead, the levy of assessments was spread over but 28 per cent of the lands, and it is utterly impossible to say how much plaintiff's lands should have been assessed, had assessments been levied on

the omitted lands. As the appeal to the district court was from the action of the board of supervisors, the relief available there was appropriate for the district court, and, as the board might have annulled the assessments against plaintiff's lands, the order of the district court so doing, without prejudice to the right, if any, to make a new assessment, was rightly entered.—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

L. T. ANDERSON, Appellee, v. J. B. LEMKER, Appellant.

CONTRACTS: Requisites and Validity—Implied Agreements—Pur-

1 **chases on Credit of Another.** One who authorizes purchases to be made on his personal credit impliedly agrees to pay for such purchases when made. Liability is not dependent on such promisor's knowing at the time of such purchase that credit had been extended on his account.

CONTRACTS: Consideration—Detriment to Promisor. Detriment

2 **to a promisor furnishes as adequate a consideration for a contract as a benefit to promisor.** So held where the promisor orally agreed to pay for goods purchased by and for the use of another.

FRAUDS, STATUTE OF: Debt or Default of Another—Contract

3 **not Within Statute.** A promisor's oral agreement that another may make purchases for such other and have such purchases charged to the promisor, is an agreement by promisor to pay his own debt. Section 4625, Par. 3, Code, 1897.

PARENT AND CHILD: Support of Child—Necessaries—When

4 **Showing Unnecessary.** Whether certain purchases by a minor on the credit of the parent were or were not for necessities becomes quite immaterial when it appears that the parent authorized such purchases.

Appeal from Carroll District Court.—M. E. HUTCHISON, Judge.

TUESDAY, APRIL 3, 1917.

REHEARING DENIED MONDAY, JUNE 18, 1917.

ACTION on account resulted in judgment as prayed. The defendant appeals.—*Affirmed.*

W. C. Saul and W. I. Saul, for appellant.

E. A. Wissler, for appellee.

LADD, J.—Recovery is sought against defendant on an account consisting of 54 items of merchandise and repairs. The sum of \$20 had been paid, leaving \$212.85, with interest from June 27, 1910, six months after the last item. The first 7 items, amounting to \$81.75, were purchased by Wm. Gute, defendant's son-in-law, who made the payment of \$20, and all others by his son. Gute testified that defendant asked him to move on his farm, and, upon being informed that he did not have the tools, equipment and machinery to farm with, told him to procure such articles as he needed at the store of plaintiff and charge same to his account, and what he (the witness) could not pay, this defendant would pay for; and that, as so directed, he purchased the 7 articles and caused them to be charged to defendant. This testimony was corroborated by defendant's daughter. His son testified that he had purchased all other articles; that he had been told by his father so to do, and to have repairs as per the account, and to have such items charged to defendant's account; that all said articles were taken to and used on defendant's farm where the witness lived, except those purchased for witness' use, which were bought and charged "with his parent's" consent; and that the repairing charged was of defendant's property. The plaintiff swore that he sold the different items on statements by the purchasers that defendant had authorized them to buy and have charged to his account, and that the items were so entered on his books. The defendant denied

having authorized the purchasers or that the items be charged to his account. Other evidence need not be set out; for, if that stated is held to sustain the judgment, it must necessarily be affirmed. Objections to the evidence as tending to prove agreements not in writing, to answer for the debt, default or miscarriage of another, were interposed and overruled. Nine errors are assigned; but, as counsel for appellant say, only two propositions are involved.

- I. Appellant contends that there is no liability on the first 7 items of the account, for that (1) there is no evidence that defendant knew that plaintiff was extending credit to Gute on his (defendant's) account; (2) plaintiff was not informed that defendant was to pay for these items; and (3) no benefit or advantage was shown to have moved to the defendant. If defendant "advised his son-in-law to go to the store of plaintiff and purchase such articles as he needed and could get and charge the same to his (defendant's) account, and what he (the witness) could not pay, this defendant would pay for," and in pursuance of such advice Gute purchased the several articles, and these were charged, at Gute's request, to defendant's account, as testified to by plaintiff and Gute, the defendant became liable, regardless of whether defendant was otherwise informed of credit's having been extended to him. Nor is it material that plaintiff was not otherwise informed that defendant was to pay for the items. If, in selling, plaintiff extended credit to defendant, as had been arranged between the purchaser and defendant, and did not sell on the credit of the purchaser, it is immaterial whether or not plaintiff was informed of defendant's promise to pay. The clear implication of a promise to pay arises from the authority to buy on defendant's credit, even though he had not promised anyone to pay.
1. CONTRACTS:
requisites and
validity: im-
plied agree-
ments: pur-
chases on cred-
it of another.

2. **CONTRACTS:**
 consideration:
 detriment to
 promisor.

It may be, as contended, that he derived no advantage from the transaction, but it does not follow therefrom that there was no consideration for his undertaking. A detriment may be a sufficient consideration, as well as an advantage or benefit. That plaintiff, in parting with his goods in reliance on defendant's credit, authorized to effectuate his purpose in enabling his son-in-law to operate his farm, certainly worked a detriment which constituted an ample consideration for defendant's undertaking to pay the account. *Harlan v. Harlan*, 102 Iowa 701. The absence of detriment appears in *Regan v. Kirk*, 140 Iowa 302, where an employe had obligated himself to work 8 months for the tenant before the landlord told him to go ahead and work and he would see that he got his pay. In completing his contract with the tenant, the employe did no more than he was obliged to do under his contract, and therefore the promise of the landlord was without consideration. See *Meginnes v. McChesney*, 179 Iowa 563.

3. **FRAUDS, STAT-**
 UTE OF: debt
 or default of
 another: con-
 tract not with-
 in statute.

Had the goods been sold and charged to Gute, and the promise of defendant been merely to pay the account, the agreement must have been regarded as collateral, and within the statute of frauds. *Langdon v. Richardson*, 58 Iowa 610. But Gute did not become indebted to plaintiff. The understanding between them was that the purchases were on defendant's credit, and, therefore, plaintiff necessarily looked to him for payment. The debt was that of defendant, and the promise implied, or as made to Gute, was to pay his own indebtedness, though created for goods sold to Gute. Manifestly, the transaction did not involve a promise to answer for the debt of another, and the court rightly held evidence thereof admissible, notwithstanding Par. 3 of Section 4625 of the Code.

4. PARENT AND CHILD: support of child - necessities: when showing unnecessary.

II. Liability for the other goods bought and repairs done is denied by defendant. for that, as is said, these were sold to the son "without order or direction from him (defendant) for their delivery, and for the further reason that they were not necessary for the minor's support or welfare." Conceding the facts to be as stated, they do not obviate liability. What defendant might have done he could authorize another to do for him. If the son truly testified, the defendant authorized him to purchase the goods and have the repairs done and to have the prices charged to defendant's account. In other words, he did, as defendant's agent, precisely what defendant himself might have done, and, as he acted within the scope of his authority, defendant became liable precisely as though he had bought the goods and had the repairs done. This being so, it is immaterial whether he had directed plaintiff to deliver the goods or whether these were necessities for the use of the son. As to whether authority was given the son to buy on his father's credit, the evidence was in conflict, and the finding of the district court is as conclusive as a verdict of a jury.

There was no error, and the judgment is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

EMILINE CHIDESTER, Appellee, v. FRANK HARLAN et al., Appellees, VAN V. BALDWIN, Intervener, Appellant.

IN RE ESTATE OF A. W. HARLAN, Deceased.

WITNESSES: Competency—Transaction with Deceased—Inferable

- 1 **Facts.** Conceding, *arguendo*, that one incompetent to testify to a personal transaction or communication with a deceased is competent to testify to nonprohibited facts, from which, by inference, other facts may be found, even though the fact found

by inference be a fact to which the witness is not competent to testify to directly, yet such principle does not embrace the right of such witness *to testify to the contents of an instrument* constituting a personal communication between deceased and said witness.

PRINCIPLE APPLIED: An heir received certain property under an agreement that he would receive the same in full of his interest in the grantor's estate. After the death of grantor, the heir claimed that, subsequent to the deeding of the land to him, the grantor executed to him another writing, which, in effect, canceled the agreement that the heir should receive the land in full of his share in the estate, and reinstated him as an heir along with other heirs. This heir testified, over objection:

1. That, after the deeds were delivered to him, he had another paper in his possession.

2. That said paper was not delivered to him by any person other than the said deceased.

3. That the paper was in the handwriting of said deceased.

Held that, conceding the above to be unobjectionable under Sec. 4604, Code, 1897, yet the witness was incompetent to testify *as to the contents of the writing*.

DESCENT AND DISTRIBUTION: Advancements—Cancellation

2 **Agreement—Sufficiency of Evidence.** Strongly contradictory evidence reviewed, and held insufficient to establish the making of an agreement canceling an advancement made in full of the heir's interest in an estate.

EVIDENCE: Best and Secondary—Loss of Writing—Sufficiency of

3 **Showing.** Evidence reviewed, and held, at the best, to be very unsatisfactory on the question of the loss of a written instrument.

EVIDENCE: Declarations—As Showing Intent and Purpose on Is-

4 **uable Fact.** When the very issue is whether a deceased party *did* do a certain act, i. e., execute a certain alleged instrument, the declarations of such party showing his intent and purpose not to do, or inconsistent with the doing of, such alleged act, made prior or subsequent to the time when it is *alleged* that he did such act, are competent as bearing on whether he actually *did* said act.

PRINCIPLE APPLIED: An heir received deeds to certain property, under an agreement, in the deeds, to accept the same in full of his prospective share in grantor's estate. After gran-

tor died, the heir claimed that, some years subsequent to the execution of said deeds, the grantor executed another instrument, in effect canceling the agreement that the said conveyances should be in full of the grantee's interest in grantor's estate. The said grantor died several years after the date of this last alleged instrument. Issue was raised on the execution of this last alleged instrument. *Held*, the declarations of the grantor both prior and subsequent to the date of said *alleged* last instrument, *consistent with the agreement in the said original deeds and inconsistent with the execution of said last alleged instrument*, were competent as bearing on whether such last instrument was executed.

EVIDENCE: Presumptions—Inconsistent Conduct—Effect. Princi-

- 5 ple recognized and applied that the long-continued and unexplained failure, under urgent circumstances, to make known the existence of an instrument conferring a valuable right on the grantee, furnishes persuasive evidence that such instrument never in fact validly existed.

EVIDENCE: Weight and Sufficiency—Inherent Improbability.

- 6 Principle recognized that the inherent improbability of testimony may destroy it, even though, in a technical sense, it may be said that such testimony is undisputed.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

SATURDAY, OCTOBER 21, 1916.

REHEARING DENIED MONDAY, JUNE 18, 1917.

ACTION in partition. Decree in the court below affirmed.—*Affirmed*.

Hughes & McCoid, for appellant.

John E. Craig, Lutz & Jordan, Hollingsworth & Blood and Archer C. Miller, for appellees.

GAYNOR, C. J.—This is a suit in equity to partition real estate. The parties to the action are the children and grandchildren of one A. W. Harlan, deceased, who was the owner of the property during his lifetime. The suit is brought by his daughter, Mrs. Emiline Chidester. Frank Harlan, a

son, and Vivian C. Harlan, intervener, joined with Emiline Chidester in her prayer for partition. These three, under the record now made, claim to be the sole owners of the property in controversy, and each claims to own an undivided one-third interest therein. Frank Harlan is a son of deceased's. Vivian C. Harlan is a son of Albert Harlan's, deceased, who was a son of A. W. Harlan's, deceased. Mark T. Harlan is a grandson of A. W. Harlan's, deceased, and is the only son and heir of Justin B. Harlan, who died on April 20, 1890. In this partition suit, as it was tried and submitted to the court, the claim was made by this daughter, Emiline Chidester, Frank Harlan, and the grandson, Vivian C. Harlan, that Mark T. Harlan had no interest in the land to be partitioned, and no right to participate in the proceeds of the land, for the reason that, prior to the death of A. W. Harlan, he had executed and delivered to Mark two deeds, one in 1896, conveying to Mark 65 acres of land, and another in 1901, conveying to him $33\frac{1}{3}$ acres of land, in full of any claim which he might have as heir of A. W. Harlan. The deeds referred to contained this clause:

"For the consideration of natural affection and full release of all claims against me or my real estate, as the only heir of my son Justin B. Harlan, or otherwise, I, A. W. Harlan, hereby sell and convey to my grandson, Mark T. Harlan [Here follows a description of the property].

"Grantee herein accepts said land for the consideration herein named, and covenants to make no claim as above stated."

Mark T. Harlan accepted these deeds with this covenant in them, and thereafter sold the land. It is claimed by these contesting heirs that, by accepting this conveyance with the covenant, Mark T. Harlan released all his claim to his grandfather's estate, and is not, therefore, upon his death, entitled to participate in his estate, or to share in

the real estate left by the said A. W. Harlan, deceased. It is conceded that, if nothing more appeared, Mark T. Harlan would not have any interest in the real estate involved in the partition suit, and would not be entitled to a share in the proceeds, and that his assignee, the intervener Van V. Baldwin, has no greater right than Mark would have. Baldwin, however, claims, in his petition of intervention, that A. W. Harlan, during his lifetime, made gifts to the other heirs, and that, subsequent to September, 1904, he modified and changed the conditions in the deeds to Mark T. Harlan referred to in the petition, and made the land therein described a gift to Mark, and that Mark was thereafter to take his father's share in the estate of his grandfather, upon the grandfather's death; that this was evidenced by a writing signed by A. W. Harlan and delivered by him to Mark; that this instrument was dated on election day in November, 1904. It was claimed upon the trial that this modifying instrument was lost, could not be, and was not, produced upon the trial. Evidence was offered tending to show its loss, or at least that it could not be found, and an attempt made to give to the court the substance of its contents, though no one attempted to state its contents verbatim, or to state substantially its contents in the words of the instrument. It is claimed that this instrument was lost about December, 1910. A. W. Harlan died April 30, 1911, and was at the time over 90 years of age. The decision in this case involves the sufficiency of the competent evidence to sustain this claim of the intervener's. It is contended that much of the evidence offered to support intervener's contention was given by witnesses who were incompetent to testify, under Section 4604, Code, 1897, and that there was insufficient competent evidence to sustain the intervener's claim. In the court below intervener's petition was dismissed, and intervener alone appeals.

Two questions are presented: First, Was the paper

alleged to have been executed and delivered to Mark T. Harlan on election day in 1904 in fact executed and delivered to him by A. W. Harlan? Second, Was this paper lost, so that its contents could be proven by parol?

We will first determine from this record whether or not it is proven by competent evidence, or by the mouths of competent witnesses, that such a paper as the one relied upon by intervener was ever in fact executed and delivered by A. W. Harlan to Mark T. Harlan; second, whether this paper was proven to have been lost or mislaid, so that its contents could be proven by parol; third, if proven to have been executed and lost, whether or not the contents of the instrument have been shown by competent evidence, and, if so shown, the effect of the execution and delivery of the instrument upon the rights of Mark T. Harlan to participate in his grandfather's estate, notwithstanding the provisions of the deed hereinbefore referred to.

It is conceded that Mark T. Harlan is an incompetent witness to testify to personal transactions between himself and the deceased, because he is the person through whom the intervener received whatever right, title or interest he has in the estate of A. W. Harlan. He was called as a witness by the intervener, and was asked these questions:

"Q. You may state whether or not you had a paper with reference to your interest in his estate in your possession after the summer of 1904. A. I had. Q. In whose handwriting was it? A. A. W. Harlan's. Q. What became of the paper? A. It became mislaid or lost. I have not been able to find it, anyhow. Q. How long was it in your possession? A. About six years that I know of."

Then he was asked these questions:

"You may state whether or not this paper (not referring to any personal transaction with your deceased grandfather, A. W. Harlan) was given to you by someone.

A. It was. Q. You may state whether or not this paper (not referring to any personal transactions between yourself and A. W. Harlan) was given to you by any person other than A. W. Harlan. A. It was not. Q. You may state, as nearly as you can, the contents of that paper. A. This paper was to me, and said A. W. Harlan had changed his mind in regard to two deeds covering land that had been given to me personally, and he intended that this land should be given to me, and that I should share in his estate equally with the other three heirs. Q. State whether or not you have searched for this paper. A. I have time and again. Q. In the safe where you usually kept papers? A. Yes, sir. Q. Have you searched in every place that you ever kept any such papers? A. Yes, sir. Q. Have you exhausted every means of finding that paper? A. I have."

The witness gave other testimony touching the loss of the paper. Thereupon, the plaintiff cross-examined this witness touching the possession of the paper which he claimed to have, its date, where he got it, and then proceeded as follows:

"You state that you got that paper before you went to the house? A. No, sir. Q. Did you learn anything about it? A. I asked grandfather to give me a paper of that kind before we went to the house. Q. You asked him to give you the paper? A. Yes, sir. Q. Was the paper in pencil or ink? A. In ink. Q. Who wrote it? A. A. W. Harlan. Q. Did he write it that day? A. Yes, sir, that day. Q. At the house? A. At the house. Q. After you went to the house? A. Yes. Q. You say you were present, and your wife and mother? A. Yes. Q. And you had it ever since? A. I had it in my possession until 1910. That was the last time I saw it."

Then he proceeded on cross-examination to state the

contents of the paper substantially as set out on his direct examination, and he was asked this question:

"That is what the paper said? A. That I should share equally with the other heirs. Q. Is that all that was in it? A. Practically all. I don't think it was signed before a notary public. The only name on the paper was A. W. Harlan."

If we concede that, under the rule laid down in *McElhenney v. Hendricks*, 82 Iowa 657, followed in *Campbell v. Collins*, 152 Iowa 608, and other cases, Mark T. Harlan was competent, notwithstanding the provisions of Section 4604, to testify that he had a paper in his possession after the summer of 1904, made with reference to his interest in his grandfather's estate; that this paper was in his grandfather's handwriting; that it was given to him by someone; that it was not given to him by any person other than A. W. Harlan,—a concession difficult to make, even under these authorities,—we still believe that the witness went beyond the limit of these authorities, and directly violated the inhibition of the statute when he stated, or attempted to state, the contents of the instrument so held by him. The evidence leading up to the giving of the contents of the instrument, under the rule laid down in the *McElhenney* case, can only be justified on the theory that the statute does not exclude proof of facts from which, by inference, other facts may be found, even though the fact found by inference be a fact to which the witness is not competent, under the statute, to testify to directly. In the *McElhenney* case, it was said:

"The question and answer expressly exclude any personal transaction between the plaintiff and the deceased."

The same is attempted here. The inference to be drawn, if it has any probative force at all upon the issues tendered here, is that the plaintiff received from his de-

ceased grandfather a written instrument touching his interest in his grandfather's estate, to be effectual upon the death of his grandfather. Assuming that the facts proven justified such an inference, the contents of the instrument are not inferable from the facts proven. The contents of the instrument involve a communication made by the grandfather to this grandson, touching his purpose and wish in the disposition of his estate after his death, in so far as it affected the grandson. This was purely a personal transaction or communication, and came within the inhibition of the statute. This incompetent witness was called upon and allowed to state, over objection, the contents of this communication. This was clearly within the inhibition of the statute, and cannot be considered by us in this case, triable *de novo* here.

2. DESCENT AND DISTRIBUTION: But three witnesses were called who testified to the contents of this instrument, advancements: although it appears that there were others cancellation agreement: who were equally cognizant of its contents, sufficiency of evidence. if such instrument existed. These other witnesses were the mother and father-in-law of Mark. George Ray, the father-in-law, testified that he was 65 years old; that Mark married his daughter; that they (meaning Mark and his daughter) were at his house, the winter of 1904; that while they were there, he saw a paper in their possession purporting to be signed by A. W. Harlan; that he read the paper; that it was shown to him by his daughter; that he thought the paper stated like this: That he had changed his mind in regard to the land that he had deeded to Mark, and he intended that as a gift, and intended later for Mark to get his equal share of his property. He further testified that he had no knowledge about the paper except that his daughter handed a paper to him and he read it; that old man Harlan's name was signed to it; that he had six children at home, the oldest 39 years of age; that he

was not the only one the daughter showed the paper to; that she passed it around and they looked at it; that he thinks his wife and oldest daughter read it; that she took it out of her pocket and handed it to him, and he gave it back to her. He further testified that he did not know Mr. Harlan's handwriting, and does not know whether this paper shown to him was in Harlan's handwriting or not. He further testified that his attention was not called to the existence of this paper since the fall of 1904, until the fall of 1912 or 1913.

The other witness, Mrs. Saltzgaber, testified that the deceased came to her house on election day, 1904; that she remembered his making out a paper; that she saw the paper, read it, saw him write it; that she knew his handwriting, knew his signature; that this paper that she refers to was in his handwriting, and has his signature. She further testified that at the time the deceased said to her that Mark should have more; that the land that he had given him was not enough; that he should have an equal share with the other children; that he told her this frequently before this time; that, after the paper was written, she read it; that the old man handed it to Mark, and Mark handed it to the wife; that she and the wife read it over to see what disposition he was going to make of the land; that the paper stated that he had charged Mark with the land that he had given him, and he wanted Mark to have all—he was going to give that to him as a gift; and that he would share equally with the others in the distribution of the land when he was dead. She further testified that she knew nothing of the paper since that time; that her attention was not called to the fact again until 1913.

This is practically all the testimony, competent and incompetent, offered by the intervener to support his contention that, after the making of the deeds, Mark received an instrument modifying the terms of the deeds, in so far as

the deeds released the estate from any claim on the part of Mark to share in the balance left at the time of the death of A. W. Harlan. According to the testimony of these witnesses, this paper evidenced the fulfillment of a promise frequently made prior to its execution. It was a paper that Mark evidently recognized the need of if he would participate in his grandfather's estate after his death, a paper he desired and prized, and, if his contention be true, secured for the purpose of enabling him to hold not only the property deeded to him in the deeds hereinbefore referred to, but also one fourth of all the property that remained at the time of his grandfather's death.

It is claimed that this instrument was lost. The proof offered in support of the contention that it is lost is very unsatisfactory. Mark Harlan claims that, upon the execution of the instrument, he gave it to his wife for safe-keeping. If the testimony of Ray relates to this instrument, it was in the possession of Mark's wife after its execution. There is no direct testimony that she ever parted with the possession. She was not called as a witness. The manner in which it is claimed the instrument was kept, the care taken of it, suggests a loose and careless method of preserving valuable papers. The evidence as to the loose manner in which it was kept possibly aids the suggestion that it is lost. It does not appear that any other instruments from the same receptacle were lost; that the receptacle was mislaid. No reason is suggested why, if placed in the receptacle, it should have disappeared therefrom. It is not shown that anyone who was interested in suppressing it had access to the receptacle. No one seems to have thought of it or talked of it since it is claimed the instrument was made.

Mrs. Saltzgaber is really the only competent witness to the making of this paper and its contents. She is the moth-

3. EVIDENCE:
best and sec-
ondary: loss of
writing: suff-
iciency of
showing.

er of Mark. She testifies that, away back when the deeds were made, Mr. Harlan had expressed a purpose to do what it is claimed this instrument does; that, during all the intervening years, he had frequently and persistently invited her attention to the fact that he intended to give Mark more than the property conveyed in the deeds; that he had frequently and persistently discussed the matters with her. Her testimony, if believed, tends to show a fixed purpose in the mind of Mr. Harlan to do what, by this instrument, it is claimed he did. We must either accept or reject her testimony. If not true in part, it possibly is not true at all. This case is triable *de novo* here. We must weigh the evidence and judge of the credibility of the witnesses. As against this, we have in the record the testimony of several witnesses who were closely related to A. W. Harlan during his lifetime, to the effect that, on the 29th day of August, 1904, a little over a month prior to the time when it is claimed this revoking instrument relied upon by the intervener was executed, A. W. Harlan executed the following instrument:

“Near Croton, Iowa, August 29, 1904.

“The instrument that I shall endeavor to write is what is meant to be in case of emergency a substitute for a will.

“Whereas, I have heretofore deeded to Mark Harlan, only heir of Justin B. Harlan, deceased, who was my son, the gift was made in two separate deeds, making in all about 100 acres lying in Van Buren Township, Lee County, Iowa, and he was informed on receiving the last deed that it was what I considered his full share of all my real estate. And that I hereby order and instruct my administrator that said Mark Harlan had already had his share of my estate.

“Confirmed by my usual business signature.

“A. W. Harlan.

"Witnesses: Eliza J. Watts, Eva South, Louisa O'Neil, John O'Neil."

Louisa O'Neil testifies that this paper was executed in her presence, and in the presence of the other witnesses; that Mr. Harlan drew it up, and asked her and the other witnesses to sign it as witnesses. One Sherman South, husband of the witness Eva South, testified that he saw the instrument above executed, and witnessed by the parties to it; that, at the time, he heard Mr. Harlan say that he had given Mark all he intended to give him of his estate; that he gave him 100 acres as his share of the estate; that, at another time, he told witness that the land was Mark's share. John O'Neil testified that he saw Harlan sign the paper. L. E. Williams testified that he surveyed A. W. Harlan's land in 1901; that, while he was surveying the land deeded to Mark, A. W. Harlan said that the 100 acres was for Mark's entire share of the estate, and the young man was present, and expressed gladness at the getting of it at that time.

It appears from the testimony of many witnesses that, during all the years intervening between the execution of the deeds conveying the land to Mark, and the death of A. W. Harlan, he had persistently and consistently said that his purpose and intention in executing the deeds to Mark was as expressed in the instrument dated August 29, 1904, and that the same was in full of any share that Mark might have as heir in the estate of A. W. Harlan. It is contended, however, that, conceding this to be true, A. W. Harlan may have changed his mind and executed the instrument claimed to have been executed on election day, 1904, and, even though he did have the purpose in his mind as expressed in the deeds and as exposed in the instrument of August 29th, yet this does not overcome the positive testimony that later he changed his mind, and executed the instrument relied upon by the intervener. This contention goes to the

real weight of the testimony, and involves the credibility of the witnesses who have testified touching these matters.

It is contended, however, that declarations of the testator as to intent and purpose are not competent as against his proven act. This may be conceded, but still the

4. EVIDENCE: declarations, as showing intent and purpose on issuable fact.

question remains, Is it proven that he executed the instrument relied upon by intervener? Upon this point, we have to say: When the record discloses that an heir to an estate, or one who might be heir to an estate, or who, in the event of death, would be, in law, entitled to participate in the estate, releases to the ancestor all right in the estate and accepts in advance a certain portion of the ancestor's estate as a consideration for such release, and the release and consideration are reduced to writing, the party so releasing his interest is bound by such release. If, after the death of the ancestor, he seeks to claim an interest in the estate, based on the claim that, subsequent to the execution of the original instrument under which he released his interest in the estate, the ancestor changed his mind touching his estate, and agreed and consented, in writing, that the claimant should not be bound by such release, but should take the thing given in the original written instrument as a gift and retain it as such, and, upon his death, share equally with the other heirs in the estate, and the second instrument, releasing him from the original contract, is claimed to be lost, is not produced upon the trial, a question arises as to whether the ancestor did change his mind and did execute the second instrument. It then is important and necessary to inquire into the state of the ancestor's mind touching the subject matter of the controversy at all times since the execution of the original instrument, as bearing upon the probability of his having changed his mind as alleged, and of his having executed the second written instrument releasing the heir from the obligation

of the first. When it is conceded that the first instrument took from the plaintiff a right which, under the law, he was entitled to, when it is conceded that he surrendered the rights which, under the law, he was entitled to, and received from the ancestor a portion of his estate as a consideration therefor, and he seeks to show thereafter that the ancestor changed his mind touching the disposition of his estate, and consented that he should hold the property originally given as a gift, and share equally in the ancestor's estate upon his death with the other heirs, then the declarations of the ancestor which disclose his condition of mind touching the subject matter at all times subsequent to the time of the execution of the original instrument, may be shown as bearing upon the probability of his having changed his mind, and granted the claimant more than he was entitled to under the original instrument. All declarations of the ancestor up to the time of the execution of the second instrument, if any such instrument was executed, are competent to show the state of his mind, not for the purpose of defeating the second instrument, if executed, but as bearing upon the probability of the execution of the second instrument.

Again, the record discloses that this instrument, executed on the 29th day of August, 1904, was presented for probate as the last will and testament of A. W. Harlan; that, upon the filing of said instrument, Mark T. Harlan appeared and protested against its admission to probate, and filed under oath his objections, asserting that, at the time the papers were supposed to be executed, A. W. Harlan was of unsound mind and memory; that he had not sufficient mental capacity to know of all the property which he possessed, or of all his relatives, or of those who were entitled to receive under and through him; that he was of unsound mind and memory; that he was un-

5. EVIDENCE: pre-
sumptions: in-
consistent
conduct: effect.

duly influenced to sign it. He said, among other things, that, at said time, A. W. Harlan did not have sufficient mental capacity to control his thoughts and intentions or acts or deeds, and that parties in interest, knowing of the weak condition of his mind, and taking advantage of the same, had him sign and execute the said paper without the said A. W. Harlan's knowing what he was doing at the time. This was in May, 1912. In May, 1911, in an action involving the estate of A. W. Harlan, Mark Harlan appeared. It was claimed that he was not entitled to participate, because of the deeds executed to him by A. W. Harlan. In the answer filed, he denied that in the deeds he gave a full release in and to all his claim against the estate of A. W. Harlan; denied that he ever covenanted or agreed to make no claims against the estate for his interest as an heir; denied that he accepted the deeds in full settlement of his claim; denied that he was barred by the deeds from making a claim; but nowhere did he make any reference to the existence of the instrument now relied on by his intervener, Baldwin. The suit now before us was commenced on the 11th day of March, 1912. In this suit he appeared, and filed substantially the same kind of an answer, and made no reference to the instrument now relied upon by the intervener. The intervener's petition was filed May 23, 1913, and this is the first time that the instrument relied upon by intervener is injected into the controversy. It appears strange that, in these two proceedings, with these deeds standing so convincingly in their proof against the claim that Mark is entitled to share in the balance of A. W. Harlan's estate, this alleged lost instrument should not have been mentioned, and it further seems strange and incredible that, with the knowledge of the lost instrument in his mind, if it ever existed, he should have gone on record as saying that, just about a month prior to the time when this lost instrument was alleged to be executed, A. W. Harlan was wholly mentally

incompetent to execute any instrument, or intelligently express himself as to the disposition he desired to make of his property. These considerations go to the weight of the testimony offered by intervener touching the existence of the alleged lost instrument. The attempted excuse for his silence is not convincing. Common experience teaches that men who possess written instruments involving valuable rights are not slow to urge the existence of these instruments when their rights are called into question. A failure to assert the existence of the instrument has strong persuasive force against a later claim that such instrument existed and was lost. Three instruments were produced upon the trial, executed and signed by A. W. Harlan, one on the 17th day of January, 1896, one on the 23d day of September, 1901, and one on the 29th day of August, 1904, and these negative the intervener's contention. Against these, we have the uncertain memory of those who say that they saw an instrument at variance with these instruments. This instrument they had never seen since the date of its execution, in November, 1904. Their attention was never called to its existence until some 8 or 10 years afterwards. Even Mark does not claim to have read the instrument later than the time of its execution, or to have examined it or discussed it with any of the parties who testified in his favor.

It is urged that the testimony of Mrs. Saltzgaber is not disputed as to the execution and contents of this claimed lost instrument, but we think otherwise. She is contradicted by the facts and circumstances to which we have called attention. We may not disregard evidence, even though it be circumstantial, and perhaps inferential, which affects the probability or improbability, the reasonableness or unreasonableness of direct testimony. We are not bound by direct testimony, even though it is not

6. EVIDENCE:
weight and
sufficiency: in-
herent improb-
ability.

otherwise impeached or contradicted. Its inherent improbability may destroy it. Testimony is only to lead the mind to a knowledge of the truth. It is the weight of the evidence which turns the balance, whether that rest upon the testimony of facts and circumstances, negative or positive, or whether it rest upon direct testimony. All the circumstances disclosed in the record must be taken into consideration in weighing the testimony and giving it effect. Where the record presents solemn, written instruments, disclosing an intent and purpose on the part of the mind to do or not to do a particular thing, and that this purpose existed in the mind for a number of years, it would take a strong showing to satisfy the mind that, within one month after the last written declaration, the party had changed his mind, and did something diametrically opposed to all his formerly declared purposes.

No good purpose would be served by setting out the record in this case in full. We are satisfied from a careful reading of it that intervenor has not carried his burden to a successful issue. We think the whole record negatives the claim that the instrument relied upon was ever executed by A. W. Harlan; that the written deeds stand as the true expression of the testator's mind and purpose with reference to Mark; that, in accepting the deeds with the provision, Mark released all claim to his grandfather's estate; and that the intervenor is bound by such release.

In both appeals, the judgment of the court below is—
Affirmed.

LADD, EVANS and SALINGER, JJ., concur.

G. A. CODNER, Appellant, v. CENTRAL CREDIT RATING AGENCY
et al., Appellees.

LIBEL AND SLANDER: Actionable Publication—Malice and Def-
1 amation—Pleading. An allegation that defendant published a

named writing (a) maliciously, (b) of and concerning plaintiff, (c) in a named defamatory sense, and (d) falsely, states a good cause of action for libel, irrespective of the literal language of said writing. Section 3592, Code, 1897.

LIBEL AND SLANDER: Privileged Communications—Malice—Effect. Actual malice destroys qualified privilege.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

MONDAY, MARCH 12, 1917.

REHEARING DENIED MONDAY, JUNE 18, 1917.

ACTION for damages for alleged libel. There was a demurrer to the petition, which was sustained. The plaintiff refusing to plead over, his petition was dismissed and he has appealed.—*Reversed and remanded.*

F. J. Lund and Chase & Chase, for appellant.

O. J. Henderson and Wesley Martin, for appellees.

EVANS, J.—It appears from the petition that the principal defendant is an association of business men organized for the purpose of operating a credit rating agency. The defendants Foster and Harrell are officers and managers of such agency. Such agency published a pamphlet which purported to give the credit rating of all those whose names were contained therein. The name of the plaintiff was included in such pamphlet by the defendants. For the purpose of such rating, the following key was used:

1. LIBEL AND SLANDER: actionable publication: malice and defamation: pleading.

"1. Good pay. Financially responsible, or the party who wants to pay his bills every 30 days, and calls and pays, or asks to have his bills presented.

"2. Slow pay. Financially good, but careless with his credits.

"3. Honest. Usually prompt pay. Limited means. Cannot force collections.

"4. Honest. Limited means, but liable to buy beyond his ability to pay.

"5. Phone this office for special instructions, or C. O. D."

Rate "5" was put opposite the plaintiff's name in such pamphlet. It is averred in the petition that this pamphlet was circulated among the members of the agency and others; that, by the purported rating given therein, it was intended to "impute to the defendant insolvency and dishonesty in his business dealings, and an unwillingness to pay his debts and unworthiness to credit;" that the rating given to the plaintiff therein was false and malicious, and was done with intent and design to injure and to humiliate the plaintiff; that its publication was malicious and without reason or justification. Six grounds were laid in the demurrer, which may be resolved into two general propositions: (1) That the petition on its face set forth no libel; (2) that the petition on its face showed that the published matter was privileged.

The argument in support of the demurrer is that the key which we have above copied, and which is supposed to constitute the libel charged, contained no statement whatever concerning the plaintiff; that it contained nothing upon which an issue of truth or falsity could be made; that it was plain and unambiguous, and that the question of its libelous character must be determined upon the literal language used. The argument at this point is not well taken. The language of the key is not necessarily plain and unambiguous. The plaintiff had a right to set it forth in his petition, and to support it with a further allegation that it was used in a defamatory sense. Under Code Section 3592, it was not necessary for the plaintiff to state extrinsic facts for the purpose of showing the defamatory

sense, or the application of it to the plaintiff. He was entitled to allege that the words were used in a defamatory sense, and to state the defamatory sense in which they were used as applied to himself. The plaintiff did aver in his petition the defamatory sense in which he claims the words were used. He averred also that they were used in such defamatory sense falsely and with express malice and with intent to injure the plaintiff. These allegations are within the permission of our rules of pleading as set forth above. The defendants' demurrer necessarily admits these allegations. For the purpose of the demurrer, therefore, we cannot ignore them and confine our attention to the mere words of the alleged libelous publication. The petition was not subject to demurrer on this ground. *Call v. Larabee*, 60 Iowa 212.

Nor can it be said that the petition shows upon its face that the publication was privileged. The allegations of defamatory sense and malicious intent stand in the way of the defendants at this point also. While there is much in the record to suggest privilege, yet, usually, the question of privilege is a mixed question of law and fact. Privilege may be absolute or qualified. If a qualified privilege, it may be lost through actual malice, if any. For this purpose, the demurrer necessarily admits the allegations of malice. We reach the conclusion, therefore, that the petition stated a cause of action. The demurrer, therefore, should have been overruled.—*Reversed and remanded.*

2. LIBEL AND
SLANDER: privi-
leged communi-
cations: mal-
ice: effect.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

ROY E. CUBBAGE, Appellant, v. STANDARD FIRE INSURANCE COMPANY, Appellee.

REFORMATION OF INSTRUMENTS: Grounds—Mistake and Fraud—Evidence—Insufficiency. Evidence reviewed, and held wholly insufficient to show either fraud or mistake in the insertion of a warranty clause in a policy of insurance.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

TUESDAY, MARCH 13, 1917.

REHEARING DENIED MONDAY, JUNE 18, 1917.

Suit to reform a policy of insurance, and for judgment thereon. On hearing, the petition was dismissed, and plaintiff appeals.—*Affirmed.*

Read & Read, for appellant.

William C. Howell, for appellee.

LADD, J.—The policy insuring against
REFORMATION OF INSTRUMENTS
 grounds: mistake and fraud;
 evidence: insufficiency. loss by fire was covered by property in plant No. 2 of the W. D. Reeves Lumber Co., located at Helena, Arkansas, for the term of one year from August 30, 1907. The property burned January 9, 1908, and thereafter the claim was assigned to plaintiff, who, in this suit, prays reformation of the policy by cancelling therefrom what is known as "the warranty clause," and recovery of the stipulated indemnity. This clause was stamped on the face of the policy with a rubber stamp in blue ink, and reads:

"Warranty Clause. This policy is issued on the representation and is a warranty by the assured that the Lumber Insurance Company of New York has a policy, or policies, in force on the identical property described herein to the amount of at least \$11,000 in form concurrent herewith on

the identical subject matter, and in identically the same proportion on each separate part thereof, and at no higher rate of premium. It is hereby further warranted by the insured and is a condition of this insurance that this policy is subject to same clauses, conditions, rates and proportions and will follow the same adjustment and settlement as that made on policy or policies as above issued by the Lumber Insurance Company of New York."

As so stamped, it covered a space 2½ inches one way and 4 inches the other, and the name of the "Lumber Insurance Company of New York," and the figures "11,000" were in large type. The warranty as stamped on the policy was alongside of a pink paper, describing the property insured, furnished by plaintiff's assignor, and made a part of the policy by being pasted thereon, the respective amounts of insurance being inserted opposite each description. It appears from the evidence that Helion Dickson, of Vicksburg, Mississippi, was agent of the insured in placing insurance on its property, and, as such, negotiated in behalf of the insured with W. L. Pettibone & Company, of New York City, who issued policies as recording agent in "Surplus Line Insurance;" that is, issued policies for insurance companies in states where the companies were not authorized to do business. The policy in suit was issued by Pettibone & Co., with the warranty clause stamped thereon as stated, and the petition alleges that plaintiff's assignor did not request or assent thereto, nor even know of the warranty clause until after the fire; that it was attached to the policy by defendant through mistake or fraud. The evidence disclosed that Dickson first applied to Pettibone & Co. in June or July, 1907, and on July 23d, following, Pettibone & Co. tendered insurance in four different companies, one of which was defendant. After some correspondence concerning financial standing of the companies, Dickson, on August 1st, furnished the plaintiff's description of the prop-

erty to be insured and requested policies of \$1,500 in each of the insurance companies previously named. Pettibone & Co. answered, August 10th, requesting Dickson to fill out enclosed applications to furnish information from which to prepare the policies, adding, "Please be particular to name the companies and the amount which can be used for warranty." On the 27th, Dickson wrote Pettibone a letter, saying, in part:

"Practically all the better surplus line offices in New York are full on this risk, embracing all of the companies of Jameson & Frelinghuysen, Starkweather & Shepley, Crum & Forster, Vedder Underwriting Company, J. W. Durbrow, Dickson & Tweeddale, Daniel Woodcock, T. A. Duffey and a number of others. We enclose you herewith forms for both mill plants and Yard No. 1. You may send me as much as \$7,500 on each mill, and \$5,000 at the present time on Yard No. 1, rate \$2.75. I will need additional insurance later on Yard No. 1 and 2, but just at this time the stock on No. 2 is decreasing. You need not in any wise fear this risk, because it is only written by the better class of companies, and a loss or unfavorable criticism of the assured has never existed. In order that I may determine my placing for this month on this risk, kindly wire me on receipt hereof how much you cover on each plant and on Yard No. 1, naming the companies. You are not authorized to offer this outside your own office, as I deal with all brokers direct in the placing of all business in my office."

Pettibone & Co. telegraphed, August 30th:

"Are covering \$6,500 each mill, \$5,000 lumber. Send list companies and amounts each risk naming one company and amount as warranty."

On the same day, a letter was sent, quoting the telegram, naming the respective companies, including defendant, issuing policies, and amount of each, and adding, "The Standard require a warranty company to be named on

their policy, which is the only company which required it." On receipt of this letter, Dickson inquired which company was meant by "Standard," and was answered in a letter dated September 5, 1907, "The Standard Fire of Keokuk," with the addition, "We have given you all the insurance we can take care of in our office," and, by way of postscript, "We are awaiting list of companies and amounts, naming Warranty Co." On September 9th, Dickson responded:

"I have your letter of the 5th inst., enclosing policies for the W. D. Reeves Lumber Company as stated, for which please accept thanks."

Dickson then was requested to furnish names of companies, with amounts of their policies, which might be used as warranty companies, and also was informed that the defendant company required "a warranty to be named on their policy," and that this was not exacted by the other companies. When in New York City, shortly before, he had called on the Lumber Insurance Company and found that he could obtain a \$10,000 policy from it, but that it must be issued by a local agent at Helena, Arkansas. But Pettibone & Company was not aware of this, and appears to have made use of that company without so informing Dickson, who, though often requested, had furnished the names of none for purposes of warranty. True, he named agencies, of which, doubtless, Pettibone & Co. was aware, and possibly some of these might, from a search of their records, have advised the firm as to policies issued on the insured's property. That firm had informed Dickson, however, that defendant required a warranty company, and he knew that none had been furnished. The circumstance, then, that an English company had required such a clause on a policy previously obtained by him, and that he had never known of such a requirement by an American company, would have tended to fix the above facts in his mind rather than excuse forgetfulness. With the knowledge referred to, this

policy with the others came into his hands. Dickson testified that he did not know whether he, or anyone in his office, examined the policy when received; that it was registered by a clerk who had since died; "that there is nothing to prevent anyone seeing the warranty clause, and it is a mystery how it passed the Reeves Lumber Company and ourselves. * * * Q. I believe you said that you wouldn't say whether you examined this policy or not? A. I cannot say. I would say that I do not believe I could have and failed to see the warranty. Q. You think anyone would see it? A. I think any experienced man examining it would have seen it. I would have noticed if I had examined the policy. * * * Q. I note on the back of the policy Exhibit 'A,' there is a pencil notation which seems to be 'Mill 2;' in whose handwriting is that? A. Mine. Q. When did you put it there? A. The Lord only knows. Q. And these figures there? A. They are not mine. I don't know whose they are. Q. Would you say from this notation, 'Mill No. 2,' that you yourself probably received this policy when it went through your office? A. This stamp shows it went through my office. Q. Did you personally make that notation, 'Mill No. 2?' A. Yes, sir. Q. When did you do that? A. The Lord only knows; I cannot tell you. I should think about the time the policy came. * * * Q. You don't know whether you examined it (the policy)? A. I cannot swear to that but I must have had it. It bears my stamp, and 'Mill No. 2' is in my handwriting, so I must have had it. Q. You don't know whether you had it personally. A. I know I had it personally. There is my mill number on it, and it passed through my office."

The secretary of the insured testified that he customarily examined policies when received, to see that they were in standard form, and opened the policies to see that the insured's form describing the property had been used with-

out change, to ascertain the rates charged, and to satisfy himself of the standing of the company, and that he so examined the policy in suit; that this was the only policy endorsed as it was, among hundreds received by the company at different times, and that he did not discover the warranty clause until after the fire.

This evidence leaves no escape from the conclusions, then: (1) That plaintiff knew through Dickson that the defendant exacted the insertion in or endorsement on its policy of the warranty clause; (2) that, though repeatedly requested to furnish the names of companies and amounts of their insurance to insert in this clause, Dickson had not done so; (3) that the clause was stamped on the policy, not among conditions usually in fine print, but in a conspicuous place on the face of the contract, where anyone examining could not well overlook it; (4) that Dickson did examine the policy, as did also the secretary of the insured; and (5) that, had either of these agents of plaintiff examined the policy, even casually, he must have observed the warranty clause. Surely, then, no fraud was perpetrated in attaching the clause to the policy precisely as plaintiff had been informed the defendant required. Nor was there any mistake made in doing so, for each party to the contract well knew that this would be done. If any wrong were committed, it must have been in inserting in the clause the name of the Lumber Insurance Company as the warranty company, and the amount of the insurance supposed to be carried by it. But defendant's agent had repeatedly requested the names of companies and the amounts of insurance carried by each, to be made use of in preparing this clause. Plaintiff's agent, Dickson, was aware that he had omitted to comply with the request. Upon receipt of the policy, he must have known that defendant's agent had inserted the name of some company or companies and the amount of insurance supposed to be carried, for he had been

advised that this was essential to the issuance of the policy. The transmission of the policy, then, to Dickson was a tender thereof with company named therein as the warranty company, and it was up to the plaintiff, through his agent, Dickson, or some other acting for him, to accept or reject the policy, as might be determined. It might be accepted and made valid by procuring a concurrent policy in the amount named from the Lumber Insurance Company, or rejected. Surely, there was no fraud in so tendering the policy, for this was practically the only course left to Pettibone & Co., as Dickson had persistently neglected to furnish information which would enable that firm to insert the names of companies actually carrying insurance on the property. The correspondence was such as to put Dickson on inquiry as to the name of the warranty company, and, in not directing his attention thereto, Pettibone & Co. cannot be said to have concealed anything. Had care even less than ordinary been exercised by plaintiff, through his agents, upon the receipt of the policy, the warranty clause and its contents must have been observed. The circumstance that the correspondence directed attention to the clause distinguishes the case from those excusing the assured from reading the application for insurance or policy. See *Fitchner v. Fidelity Mut. Fire Assn.*, 103 Iowa 276; *Chismore v. Anchor Fire Ins. Co.*, 131 Iowa 180; *Eckert v. Century Fire Ins. Co.*, 147 Iowa 507.

We are of opinion that the defendant was without fault, and the retention of the policy is attributable to the negligence of plaintiff's agents, and, therefore, that the district court rightly declined to reform the policy by striking therefrom the warranty clause.—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

Mrs. WILBUR A. DOBSON, Appellee, v. CITY OF WATERLOO,
Appellant.

TRIAL: Reception of Evidence—Discretion of Court. Pending a motion for a directed verdict at the close of plaintiff's evidence, the court may allow plaintiff to reopen his case for further testimony.

Appeal from Black Hawk District Court.—H. B. BOIES,
Judge.

MONDAY, MARCH 12, 1917.

REHEARING DENIED MONDAY, JUNE 18, 1917.

ACTION for damages for personal injuries sustained from a fall upon the sidewalk in the defendant city. There was a verdict and judgment for the plaintiff, and the defendant appeals.—*Affirmed.*

Burr A. Brown, for appellant.

E. H. McCoy, for appellee.

EVANS, J.—The negligence charged against the city was that it had negligently permitted snow and ice to accumulate upon its sidewalk in such a rough and uneven and irregular manner as to amount to a defect or obstruction of the sidewalk, whereby the plaintiff was caused to fall thereon, and from which she sustained very serious injuries. At the close of plaintiff's evidence, the defendant moved for a directed verdict. Pending the motion, the plaintiff asked leave to introduce further testimony, which leave was granted, and further testimony was introduced, over the objection of the defendant. Two propositions are presented for our consideration:

TRIAL: reception
of evidence:
discretion of
court.

(1) That the court erred in permitting the plaintiff to reopen her case and introduce further testimony pending the motion for a directed verdict.

(2) That the evidence was insufficient to warrant a submission of the case to the jury, and therefore that the verdict is not supported by the evidence.

On the first proposition, it is argued that it was unfair to the defendant to permit the plaintiff to reopen her case to further evidence, and thereby to enable her to cover by additional evidence defects pointed out by defendant in the motion for a directed verdict. If the trial of a case were a mere game of skill between opposing counsel (as it is sometimes supposed to be), there would be much force in defendant's contention. But the duties of a judge are not merely those of an umpire in a game. It was clearly within the discretion of the trial court to permit the plaintiff to introduce further testimony even pending the motion. It would be a harsh rule that would forbid such discretion, and the administration of justice would suffer thereby. The exercise of such discretion by the trial court is frequent and usual, and not exceptional. There was no abuse of it in this case.

As to the sufficiency of the evidence to support the verdict, the finding must also be in the affirmative. The line of demarcation between sidewalk conditions of ice and snow which give rise to liability, and those conditions which do not give rise to such liability, is not very satisfactory. It can be contended with some force that rough and uneven conditions of ice and snow are frequently quite as natural and unavoidable as the smooth and level conditions. Under the rule obtaining in such cases, however, we have deemed the field of doubt in a given case as a field of fact, and therefore as the field of the jury. The question in this case was submitted to the jury by instructions of which no

complaint is made. We find no ground, therefore, to interfere with the verdict.

The judgment below is—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

L. A. MICHAELSON et al., Appellees, v. GUST SCHULKE, Appellant.

FRAUD: Reliance on Fraud—Inspection Following Representations—Effect. One who makes an unimpeded examination of premises, prior to purchase, and after certain false representations as to value had been made to him by another, may not thereafter assert that he relied on such false representations.

Appeal from Ida District Court.—FRANK M. POWERS, Judge.

MONDAY, JUNE 18, 1917.

Suit to recover upon a promissory note alleged to have been given for a commission. Defendant answered and set up a counterclaim for damages. He had the burden of proof in the trial court. At the close of the testimony adduced by him, the court sustained a motion to direct verdict against defendant. He appeals.—*Affirmed*.

Charles S. Macomber, for appellant.

Elwood & Tourgee, for appellees.

FRAUD: reliance on fraud—inspection following representations: effect. SALINGER, J.—I. The petition alleges that, about the 15th of May, 1911, defendant made and executed a promissory note to the plaintiffs, and judgment is prayed.

The answer admits the execution of the note, but says that plaintiffs are not entitled to recover upon same, because it was given in payment of a commission to real estate brokers for making an exchange of a farm owned by defendant for another farm near Sutherland, Iowa, which said agree-

ment was made in 1911, in the course of which transaction, the holders of the note practiced deceit and fraud upon defendant. The counterclaim sets up a claim for damages caused by such alleged fraud.

1-a

There is evidence that defendant was physically coerced into signing the contract of exchange. It is utterly incredible and self-contradictory. But, at all events, no such matter is covered by the pleadings.

There is a plea that the plaintiffs were guilty of double dealing, and were in fact the agents of Holst and concealed that fact from defendant. To support this, there is no evidence except that defendant did not know that plaintiffs were acting for Holst. None that they were thus acting.

There is no evidence that plaintiffs represented that the O'Brien County land was worth \$5.00 an acre rental, or was renting for that, or if such representation was made, that same is false.

II. Both the pleadings and the sustained motion to direct verdict for plaintiffs are very lengthy. It suffices to say that the controlling question is whether defendant should prevail on the issues tendered by answer and counterclaim, because of the claim that plaintiffs fraudulently represented the O'Brien County land to be worth \$150 an acre, and that same would sell for that, and thereby induced defendant to contract. Reliance upon that is expressly pleaded, and practically in terms of exclusion. And defendant says, "It was just the price of the land" that he is complaining of. The error points present practically just that; the argument *in extenso*, that only. On this head, the state of the evidence is this:

Defendant was the owner of a 160-acre farm in Ida County, and he and his wife maintained a homestead thereon. Some negotiations were had concerning the exchanging this farm for one of 240 acres in O'Brien County. De-

fendant and one Holst, alleged to be the owner of the O'Brien County tract, entered into written agreement. The effect of it is that the O'Brien County land was bought by defendant at \$150 an acre, and that he transferred his interest in the Ida County land at \$165 an acre. The wife of defendant did not sign this writing.

The jury could find that defendant was born in Germany, and came to this country 23 years ago; that Michaelson asked defendant to sell his land, and that defendant said he would sell it if he got \$165 an acre; that there never was any talk about trading, and that, in the opinion of defendant, he did not trade his land; that defendant did not call it a trade; that Michaelson was to sell defendant's land and buy defendant another piece; and that, when defendant signed the contract, Michaelson was selling defendant's land, and promised that defendant was getting \$165 an acre for it. It could find that, while Michaelson was showing defendant the farm, he said he "knew all about it;" that he told defendant nothing about there being any sand on the O'Brien County land, and said that the transaction constituted a "good deal" for defendant. The jury could find that Michaelson said that the O'Brien County land was worth and would sell for \$150 an acre, and find that, just before the time when the contract was signed, plaintiff, Holst and a banker called on defendant and told him how much money he would make out of the deal. Michaelson took defendant to Sutherland to show him the land, and told him he was going to get that land for him, describing it as the land that would sell for \$150. This was before the contract was signed. Defendant went to find out "how much the land sells for." He says that, when he saw the land, it was a nice day, and about two in the afternoon; he remained about half an hour, "a little on the east side." He could see "just one corner of it." Michaelson did not tell defendant to walk no farther, but he went no farther

than Michaelson did; he would not walk alone, because it was a strange country, and he went just where Michaelson did. Defendant looked at all the buildings.

Defendant says that the front part of the eighty is very rough; that he was on the rough part and "saw all what the land was;" that Michaelson showed him all the roughest of the land; defendant saw it and "knew the land all right;" that he saw some stone; that there was just one rough place on the land, by the house; and that the front part was bad gravel and the back part flat, so that water could not get off. He says, also, that the inspection was made on Sunday, when no one was around, and defendant could see nobody; that "they did not give me any time;" that Michaelson just kept him there alone and did not allow him to see anybody; that he introduced him to nobody and brought him to see nobody; that defendant asked Michaelson where the owner was, and was told that he lived in town, but defendant did not ask to stop in town or anywhere; that they did not enter the house. On the other hand, he admits that Michaelson wanted to show defendant in, but he wouldn't go in; did not like to go in there and look everything over, "and the woman in there." He admits that he saw a man on the place; that Michaelson told defendant who he was, but defendant did not talk to him, though they shook hands. Finally, he admits that he told no one that he wanted to see anything else on the farm. He says: "I did not tell nothing what I wanted to see. I said, 'Let's go now, so we can get home.'"

As to reliance, when the parties talked of making contract, it was also arranged that defendant should first see the O'Brien County land, which was, at that very time, said to be worth \$150. Yet defendant says he was "standing" on the word of Michaelson that said land was worth \$150 an acre; that he took his word and believed him; that he "would not pay that if he did not lie to me." On the other

hand, it appears without dispute that, when Michaelson stated that the O'Brien County land "sells" for \$150, the wife of defendant said, in the presence of her husband, that she didn't believe it; and that they wanted to go to town before contract signing to find out what the contract meant.

There is testimony by one witness that the market value of the Holst land in the spring of 1911 was \$115. The same testimony is given by another witness. This witness, however, testifies that, somewhere about that same time, or a little later, he sold his own farm, not particularly better than the one in inquiry, for \$155 an acre. The third witness gives the value as from \$115 to \$120 an acre; says there is no particular fault with the farm, but that \$120 was the most it was worth in the spring of 1911. There is no evidence that plaintiffs knew that the farm was not worth and salable for the sum they are alleged to have represented.

2-a

Reduced to its lowest terms, when the testimony closed, it appeared that the jury could find that the plaintiffs did say that the O'Brien County land was worth \$150 an acre and would sell for that, and that, if the exchange was made, it would be advantageous to the defendant; that the wife of defendant declared, in his presence, that she didn't believe this; that an arrangement was made for an inspection, and that thereafter the contract was to be signed, if at all; that an inspection was made; that, while pursuing it, defendant had full opportunity to investigate the value of the land; that, for all that appears, the plaintiffs knew no more about the land than defendant did, and had no greater opportunity to examine; that, if defendant had at the time made the examination he made later, he would have ascertained all that he claims now to have ascertained; that, in the opinion of three witnesses, the land was not worth in the market above from \$110 to \$120, rather than

\$150 an acre, and there is absolutely no evidence of scienter. On such a situation, the authorities relied upon by the appellant accomplish little

Jansen v. Williams, (Neb.) 20 L. R. A. 207, holds that certain conduct shows that defendants did not act in good faith towards their principal, and were, therefore, not entitled to a commission. *Tyler v. Sanborn*, (Ill.) 4 L. R. A. 218, involves the setting aside of a conveyance which the agent got for his wife after making a failure of selling to another on behalf of the principal. *Hegenmeyer v. Marks*, (Minn.) 32 N. W. 785, is a case where an agent authorized to sell and keep all above a certain sum for himself found that the property had been made more valuable through a building of which the principal did not know, and it is held that the principal had a right to have the sale made by the agent rescinded, and to have a reconveyance. *Norris v. Tayloe*, 49 Ill. 17, holds that, if an agent induce his principal to sell to another for an inadequate sum, without disclosing the discovery of valuable ore deposits, the principal may have the conveyance set aside. In *Tilley v. Wolverton*, (Minn.) 48 N. W. 908, an agent, with others, bought the property which he was to sell on a fixed commission, and there was a resale at a big advance. It is held that the principal can compel this agent to account for the part of the price he received through the resale. In *Cannell v. Smith*, (Pa.) 21 Atl. 793, plaintiff paid the agent a commission for the sale of his property, in ignorance of the fact that he was also an agent of the purchaser, and plaintiff recovered back the amount paid. *Laverty v. Sneathen*, 68 N. Y. 522, holds that, where one who has a note put in his hands to discount delivers it to another who appropriates it to his own use, the bailee is liable as for a conversion of the note.

Pratt v. Allegan Circuit Judge, (Mich.) 143 N. W. 890, is authority merely for the proposition that a representa-

tion that property would readily sell in a certain market at a given price is a representation of a fact, and, if relied upon, may be made the basis of an action grounded on false representations. *Hetland v. Bilstad*, 140 Iowa 411, holds that while, as a general rule, mere expressions of opinion as to the value of property when standing alone do not constitute actionable fraud, yet, where the property is so situated that the parties do not stand on an equal footing, and the seller knows that reliance was placed upon his statements, his representations as to the value, if false and made with intent to deceive the purchaser, amount to an affirmation of the fact upon which fraud may be predicated. In *Ross v. Bolte*, 165 Iowa 499, we define the measure of damages when there is a false representation as to value wholly relied upon, and hold that, although representations of a vendor as to value are generally mere expressions of opinion, yet, where a buyer of a house indicated that he was ignorant of values at that place, and therefore proposed to rely upon the vendor, and the vendor thereupon stated as a fact that the house was worth a certain amount, and that its rental value was a certain amount, such representation may be a proper basis for a charge of fraud. It is held in *Van Vliet Fletcher Auto Co. v. Crowell*, 171 Iowa 64, that the rule that an expression of opinion as to the value of property will not ordinarily sustain an action for fraud does not apply where the representation was intended to be taken as a fact and as an inducement to the trade, where the parties do not have equal opportunity to know the truth. In *Gustafson v. Rustemeyer*, (Conn.) 66 Am. St. 92, it is ruled that the general rule prevails, in the absence of special knowledge of the value possessed by one and entirely relied upon by the other, and that the mere false representation as to the value of the real estate, knowingly made by the seller to the buyer, is not actionable unless the buyer has been fraud-

ulently induced to forbear to inquire as to its truth. *McClanahan v. McKinley*, 52 Iowa 222, is merely an affirmance of the general rule. True, we held, in *Faust v. Hosford*, 119 Iowa 97, where an agent authorized to invest money on first mortgage took a second mortgage and reported to the principal that it was the first mortgage, and that she "could depend on him," that, though plaintiff might have discovered, by an examination of the records, that the mortgage was a second mortgage, she was under no obligation to do so, but had a right to rely upon this representation. But in *Lucas v. Crippen*, 76 Iowa 507, we say that, while cases may arise in which representations as to the value of an article may be regarded as statements of fact, the general rule is otherwise; and we defeat a claim arising from a negotiation for an exchange of real estate where, though the defendant made statements as to the value of his property, the right to make personal examination was reserved before dealing, to ascertain value, and a confidential agent was sent out and the exchange made upon his examination and opinion as to values. In *Hoffman v. Wilhelm*, 68 Iowa 510, the general rule is affirmed, and it is said:

"Plaintiff was in possession of the goods when the representation was made, and had full opportunity to satisfy himself of the truth or falsity of the representation. He was not justified in relying upon statements as to value."

Bosley v. Monahan, 137 Iowa 650, turns on the fact, among others, "that plaintiff is not warranted in relying on these representations, as he had inspected the land, and his means of the knowledge of the facts stated were as good as defendant's." In *Ross v. Bolte*, 165 Iowa 499, it is held that, on buying real property and inspecting it, the buyer cannot recover for false representations if he failed to use ordinary care in arriving at value, and that an instruction which allows a recovery unless he was grossly careless is

erroneous. The Supreme Court of the United States ruled, in *Slaughter's Admr. v. Gerson*, 13 Wall. 379:

"Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

This fairly sums up this case.

Van Vliet Fletcher Auto Co. v. Crowell, 171 Iowa 64, merely holds that certain evidence is sufficient proof of *scienter* to take the question of fraud to the jury, and, therefore, that such proof is necessary. We are unable to find anything in *Hessenius v. Wetmore*, (S. D.) 153 N. W. 937, except that plaintiff is not required to set out further that an agreement lacks mutuality, if he sets out the agreement in full, and that shows lack of mutuality.

We find no error in the record, and must, therefore, affirm the action of the district court. This disposition of the appeal makes it needless to enter upon the question of what damages might otherwise have been recoverable.—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

STATE OF IOWA, Appellee, v. FRED MEYER, Appellant.

CRIMINAL LAW: Evidence—Opinion Evidence—Effect of Gun-
1 **shot Wounds.** A witness must not be permitted to testify to the
relative effects of gunshot wounds on alleged suicides and on
one alleged to be a nonsuicide *unless similarity of conditions is*
first shown; i. e., similarity of weapon, kind and quantity of ex-
plosive, distance of weapon from body, etc.

CRIMINAL LAW: Evidence—Suicidal Tendency. Evidence tend-
2 ing to show suicide opens the door to nonremote evidence tend-
ing to show (and for no other purpose) a predisposition toward
self-destruction; i. e., despondency, melancholy and depression
on the part of deceased.

CRIMINAL LAW: Evidence—Nonconclusive Character—Relation
3 **of Parties.** Unpleasant relations existing between defendant
and the deceased may be shown, though the testimony bearing
thereon may be far from persuasive. So held where the State
was permitted to show some slight trouble between the deceased
and her husband (the defendant) relative to the defendant's
visits at "beer" parties.

CRIMINAL LAW: Evidence—Suicides—Percentage of Nonfeloni-
4 **ous Homicides.** Evidence of the percentage of suicidal and acci-
dental homicides has no bearing whatever on whether a particu-
lar homicide was either, or whether it was or was not feloni-
ous.

CRIMINAL LAW: Evidence—Remoteness—Possession of Weapon.
5 Evidence that defendant, 15 months prior to the homicide in
question, had in his possession a weapon different from that
found with deceased at the time her dead body was discovered,
is too remote for admissibility.

CRIMINAL LAW: Evidence—Relevancy—Drinking Habits of De-
6 **fendant.** Evidence that defendant, on the evening preceding
the day on which deceased was killed, had, to some undefinable
extent, "been drinking," is wholly irrelevant.

HOMICIDE: Trial—Aiding and Abetting—Nonapplicable Instruc-
7 **tions.** Instructions authorizing a conviction for homicide
by "aiding and abetting" the actual killing by another is revers-

ible error when the record is bare of any evidence of such aiding and abetting.

CRIMINAL LAW: Appeal—Decisions Reviewable—Constitutional
8 **Questions—Absence of Exceptions.** Constitutional questions not raised and preserved in the trial court will not be reviewed on appeal.

CRIMINAL LAW: Trial—Instructions—Uxoricide—Presumption of
9 **Innocence.** Under a charge of uxoricide, defendant is not entitled, as a matter of law, to an instruction that the ordinary presumption of innocence is strengthened by reason of the marital relation.

CRIMINAL LAW: Motive—Nonessential Element of Crime. Proof
10 of motive is not absolutely essential to conviction for crime.

Appeal from Madison District Court.—**LORIN N. HAYS,**
Judge.

MONDAY, JUNE 18, 1917.

THE defendant was convicted of murder in the second degree and sentenced accordingly. He appeals.—*Reversed and remanded.*

John A. Guiher and W. S. Cooper, for appellant.

George Cosson, Attorney General, John Fletcher, Assistant Attorney General, and Phil R. Wilkinson, for appellee.

LADD, J.—The defendant was married to Ethel Clayton in February, 1915, and she died from a gunshot wound July 25th of the same year. At the time, defendant and his mother only were on the premises, a farm about 7 miles from Van Meter. The defendant testified before the coroner's jury, as was proven, that, at about 6 o'clock in the morning in question, he arose and did his chores, returning to the house with the milk at about 7 or 7:30 o'clock, and, with his mother, strained the milk and ate breakfast. He then asked his wife, who was upstairs, if she wanted breakfast, and, as she did not care for any, went back to

bed and slept until about 11 o'clock. Upon waking, his wife suggested that they go to a neighbor's for the day, and, having so agreed, he dressed and went out to harness the team, his wife being engaged in dressing her hair as he left. Having put the harness on, he proceeded to bridle one of the horses, when his mother called him to see what had happened upstairs. When both went up, they saw his wife lying near the window at the head of the bed, head over the window sill, and hair down. This was in the south bedroom of the second story. A bullet had entered the forehead, three fourths of an inch to an inch above the bony arch of the right eye, and it and two fragments of lead were subsequently extracted from the brain. A 38-caliber revolver was lying on the floor with one chamber empty, and a 32-caliber revolver was in the bureau drawer. The blood was still flowing and brain matter oozing out when a physician reached the house. The theory of the State was that defendant had shot his wife with a revolver other than the one on the floor, or his mother had done so, and he was accessory before the fact; while that of the defense was that death resulted from suicide or accident. As the judgment must be reversed, details need not be recited, other than to say that no motive whatever was shown, not even previous ill feeling on the part of either mother or son toward the wife, who was about 5 months advanced in pregnancy and was somewhat afflicted with skin diseases known as lichen and impetigo. 22 errors are assigned, but of these, only such as involve doubtful rulings will be reviewed, the others being approved without specific reference thereto.

I. One Fisher, who had had 12 or 13 years' experience as undertaker, prepared the body for burial, and, after describing its appearance, and saying that the wound was surrounded by a dark circle which he first thought powder burn, but which the embalming fluid caused to disappear,

1. CRIMINAL LAW:
evidence. opin-
ion evidence:
effect of gun-
shot wounds.

testified that "the skull did not seem to be shattered," and was then asked if he ever had any experience in taking care of a body in case of suicide, and answered: "Two or three.

Q. You may state to the jury what difference you observed in those cases of suicide—those which were proved to be suicide—and the case of Ethel Meyer." An objection as incompetent, immaterial and irrelevant, "and for further reason that the conditions under which the wound had been inflicted had not been shown to be the same, and the witness should describe the condition and appearance of the wound and let the jury make comparison," was overruled, and he answered, "I do not know as I know any difference.

Q. State, Mr. Fisher, whether or not you observed a difference in the shattering of the skull in cases of suicide that you observed and in the case of Ethel Meyer. (Objection as immaterial was overruled.) A. In cases that I have known of that were suicide, the gun was held so close that it pulled the skin loose from the bone, loosened it up, and the wound is larger. (Thereupon, the defendant asked that the answer be stricken, on the ground that the conditions under which the wounds were inflicted were not shown to have been the same, nor were the weapons shown to have been alike. The motion was overruled.) Q. In these cases of suicide, Mr. Fisher, was there any difference in the shattering of the skull than there was in the case of Ethel Meyer? (The same objection was overruled.) A. Well, I think there would be a difference; the skull would shatter more."

The witness explained on cross-examination that the wound on the body of one suicide had been inflicted with a shotgun, another committed suicide with a 32-caliber revolver, the shot having entered the right temple at a place where the bone structure is lighter than that above the eye, and the other body was merely supposed to have been that of a suicide, and the wound supposed to have been inflicted in the right temple with a 38-caliber revolver, and that he

knew nothing as to the distance the guns were from the heads of these men when discharged, and further, that he understood that some revolvers of the same make and caliber shot with greater force than others; but said that he was not informed as to whether the kind or amount of powder in the cartridge made a difference, or the kind of bullet or its shape or the length of the barrel, but supposed these would have some effect.

There was manifest error in permitting this witness to make the comparisons, without showing of similarity of conditions, and, had objection been interposed, in permitting him to testify as an expert. He was not shown to have information as to the relative effects of bullets striking the skull when discharged close to the head and from some distance, and the objections to the questions calling for testimony as to relative condition of the skull, as well as the motion to strike, should have been sustained.

II. The court struck out, on motions, evidence of declarations of the deceased concerning her physical condition, and complaint of these rulings is made. In each instance, the witnesses were afterwards permitted to state fully what she had said, in so far as tending to show despondence, melancholy or depression—a condition of mind likely to exist in one contemplating self-destruction. Ordinarily, testimony of what the alleged victim of murder may have said, save when part of the *res gestae*, is regarded as hearsay; but, when evidence adduced tends to show that the homicide may have been suicidal, the condition of deceased's mind is somewhat in issue, and evidence tending to prove a predisposition toward self-destruction is admissible. Such predisposition may be shown by acts or declarations of the deceased within such reasonable time before the killing as that there may have been some tendency to establish such a condition of mind when this happened. Such declarations are in the

2. CRIMINAL LAW:
evidence of suicidal tendency.

nature of verbal acts and have a direct bearing, as indicative of the condition of the mind. Of course, consideration of evidence of what may have been said by deceased should be limited to this purpose, and the jury warned that such declarations are not evidence of the truth of what deceased may have said. *Commonwealth v. Trefethen*, 157 Mass. 180 (24 L. R. A. 235); *People v. Conklin*, 175 N. Y. 333 (67 N. E. 624); *State v. Lentz*, 45 Minn. 177 (47 N. W. 720); *Blackburn v. State*, 23 Ohio St. 146; *State v. Baldwin*, 36 Kans. 1 (12 Pac. 318); 4 Chamberlayne on Evidence, Sec. 2673; 6 Encyc. of Evidence 746; *State v. Asbell*, 57 Kans. 398 (46 Pac. 770); *Boyd v. State*, 82 Tenn. 161. See, contra, *Siebert v. People*, 143 Ill. 571 (32 N. E. 431); *State v. Fitzgerald*, 130 Mo. 407, 429 (32 S. W. 1113).

The matters stricken did not come within the rule as stated, and there was no error in sustaining the motions to strike.

III. One Lenz testified that defendant had said to him that his wife objected to his going to "beer drinks," and, when he met him on the road, wanted to know "if we could have a keg of beer at our house, for his wife objected to it, having it at his house. Q. Nothing indicated that they had any trouble about it? A. Never told me they did."

Another witness testified, in substance, that defendant had said to him that his wife did not like him to go to beer parties, but did not care if he drank a little at home, and another, that she did not want him to and that "she probably would raise the 'dickens' with him for a little while, and then it would be all over." A motion to strike the evidence of these three witnesses was overruled, and this is complained of. It was competent to show the relations between defendant and wife, and, though the evidence

3. CRIMINAL LAW:
evidence: non-
conclusive
character: re-
lation of par-
ties.

was not very persuasive, the ruling cannot be said to have been erroneous.

4. CRIMINAL LAW:
evidence: sui-
cides: percent-
age of nonfel-
onious homi-
cides.

IV. The defendant undertook to show the number of homicides committed in the country during each year for the 13 years beginning with 1900, and of these how many were by suicide, and of the latter, the number where death was caused by firearms; also the number of accidental deaths and accidental deaths by firearms in certain years. On objection, the evidence was excluded, and rightly so. It was without relevancy, and did not tend in any degree to prove or disprove any issue. Appellant suggests that the purpose of the evidence was to show the probabilities, on the same theory that the Carlisle Life Tables are received in evidence. There is no analogy. That a certain percentage of homicides are suicidal and another percentage accidental, tends in no manner to prove that a particular one was consequent of either, or that it was not felonious. There was no error.

5. CRIMINAL LAW:
evidence: re-
moteness: pos-
session of
weapon.

V. Albert Prohaska was permitted to testify that he saw defendant with a gun, not one of the revolvers found in the room, in March or April, 1914. Defendant moved that this evidence be stricken, for that the time was too remote; and, as the circumstance was not connected with the issues in the case in any way, we are of the opinion that

6. CRIMINAL LAW:
evidence: rel-
evancy: drink-
ing habits of
defendant.

the motion should have been sustained. This witness also testified that he had seen defendant in Van Meter the night before the tragedy, and, over objection, that he had been drinking. To what extent he had been drinking was not disclosed, nor did any other witness testify that he had drunk. What relevancy this evidence had does not appear, and the motion to strike it from the record should have been sustained.

7. HOMICIDE;
trial: aiding
and abetting:
nonapplicable
instructions.

VI. Exception is taken to the portion of the tenth instruction following:

"The State, however, is not required to show that the defendant Fred Meyer, now on trial, actually discharged the shot which resulted in the death of the said Ethel Meyer, but it is required to show beyond a reasonable doubt that he either inflicted said injury himself or was present and aided, counseled or abetted in some manner the person or persons who did inflict such injury. And if you believe from the evidence and under these instructions beyond any reasonable doubt that the said Ethel Meyer was murdered substantially as charged, and that the defendant Fred Meyer was guilty of the commission of such crime, either by inflicting the injury of which she died directly himself, or by aiding, counselling, advising, directing or abetting in the commission of such crime, then and in such case you would be warranted in finding the defendant guilty of the crime as charged in the indictment."

The converse of this also was stated. Timely objection that the evidence was not such as to warrant so instructing the jury was interposed. The same thought was expressed in the eleventh instruction, and like objection made.

A second reading of the record has failed to discover any evidence whatever even tending to show that deceased was killed by anyone other than defendant or herself. True, his mother, Ida E. Meyer, was on the premises and may have called to defendant, as the latter is said to have testified before the coroner's jury, to come in, immediately before deceased was found with the bullet in her brain. But this had no tendency to prove participation on her part. She could have done no less had the shot been fired by deceased or someone else. It disclosed knowledge that something had happened, and the most that can be said is that: (1) She was near enough so that she could have

fired the shot; and (2) she knew that something had happened. Manifestly, these facts furnished no justification for a finding that Ida E. Meyer was guilty of the crime charged. Moreover, the record is barren of evidence of any combination or understanding between defendant and his mother, or of his aiding and assisting her in any other manner whatever. The instructions were clearly erroneous and extremely prejudicial. *State v. Fuller*, 125 Iowa 212.

VII. Counsel for appellant argue that

8. CRIMINAL LAW:
appeal: de-
cisions review-
able: constitu-
tional ques-
tions: absence
of exceptions.

Section 5299, Code, 1897, is unconstitutional, and, in support of their contention, cite *State v. Gifford*, (Wash.) 53 Pac. 709; *State v. Stewart*, (S. D.) 157 N. W. 1048; *State v. Dougherty*, 4 Ore. 200. No such objection was made to the giving of Instructions 10 and 11, and the point, not having been raised in the district court, may not be considered.

VIII. Exception is taken to the ninth instruction, and also to the fourteenth. The former is criticized for what it omits. This was supplied by the fourteenth instruction. The latter enumerates many matters to be taken into account by the jury, and is criticized for omitting others. But the jury was directed to consider all the circumstances proven, and, from all those referred to and "all other circumstances developed on the trial," determine whether defendant was guilty. The recital did not unduly emphasize the matters mentioned, but on another trial, whether deceased was inclined to melancholia, and was pregnant, may as well be added. The jury was told therein to consider whether "the relationship between defendant and his wife, Ethel Meyer, was pleasant," and it is urged that this was error, because of there being no evidence that such relationship was other than pleasant. If so, it was proper matter for the jury to consider in defendant's favor. The instruction was not erroneous in the respects criticized.

IX. Defendant asked that the jury be

9. CRIMINAL LAW: trial: instructions: uxoricide: presumption of innocence.

instructed that the existence of the marriage relation between deceased and defendant strengthens the ordinary presumption of the innocence of the accused, and that, unless want of affection or less than is usual was shown by the State, the presumption would be increased. The court declined to do so, and instead, told the jury to "consider the relationship existing between defendant and the deceased; the known instinct or propensities of husbands to love and protect their wives." The ruling has our approval. The presumption of innocence is the same in all cases. Relationship of the alleged perpetrator and victim may have a bearing as to the accusation's being likely, but has no effect on the presumption of innocence with which the law shields every person. *Haues v. State*, 88 Ala. 37, 72.

10. CRIMINAL LAW: motive, nonessential element of crime.

Complaint is also made of the court's refusal to give the twelfth instruction requested. It, in substance, declared proof of motive essential to conviction in a case depending on circumstantial evidence only. It seems hardly necessary to say that this is not the law. *State v. Klute*, 160 Iowa 170, 179; *State v. Whitbeck*, 145 Iowa 29. As the jury was advised, the finding of the existence or non-existence of a motive is an important circumstance bearing on the guilt or innocence of the accused, but never decisive; for one might be guilty of manslaughter, at least, without motive, and again, one might have a motive and yet not take life. So, too, motive might exist without discovery of evidence thereof.

The weight to be attached to presence or absence of motive necessarily depends on the facts and circumstances of each particular case, and should be left for the jury to determine. See *Goley v. State*, 85 Ala. 333. It was enough to direct the jury's attention to the absence of evidence of

motive, as was done. The instruction was rightly refused.

The sufficiency of the evidence to sustain the conviction is challenged, but the record may not be the same on another trial, and for that reason we deem it best not to review the evidence at this time. Because of the errors pointed out, the judgment is reversed and the cause remanded.—*Reversed and remanded.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

STATE EX REL. WOODBURY COUNTY ANTI-SALOON LEAGUE,
Appellant, v. ANNA TALBOTT et al., Appellees.

APPEAL AND ERROR: Abstract of Record—Evidence—Necessity.

On appeal by plaintiff from an order discharging two of three defendants in an action to enjoin a disorderly house nuisance (Sec. 4944-h1, Suppl. Supp., 1915), the court may not, in the absence of the evidence, review the order of discharge on the appellant's presented theory that the court, having enjoined one defendant, ought to have enjoined all the defendants.

Appeal from Woodbury District Court.—W. G. SEARS,
Judge.

MONDAY, JUNE 18, 1917.

Suit in equity to enjoin a disorderly house nuisance. The suit was brought under the provisions of Sections 4944-h1 to 4944-h11, inclusive, Supplemental Supplement, 1915. This was the enactment of the thirty-sixth general assembly commonly known as the Red Light Injunction Statute. Three defendants, Talbott, De Roos and Valiquette, were named. After a full hearing, the trial court enjoined the defendant Anna Talbott, and dismissed the bill as to the other two defendants. From such order of dismissal, the plaintiff has appealed.—*Dismissed.*

John F. Joseph, for appellant.

No appearance for appellees.

APPEAL AND
ERROR: Ab-
stract of rec-
ord: evidence:
necessity.

EVANS, J.—The petition charged that the defendant Anna Talbott operated the nuisance complained of; that the defendant De Roos had an interest in the personal property used in the operation of such nuisance; that the defendant Valiquette was the owner of the real estate upon which the same was operated; that De Roos and Valiquette each had full knowledge of the maintenance of such nuisance. It is further made to appear by the pleadings that De Roos held a chattel mortgage on some or all of the personal property in use by the defendant Anna Talbott, and that the same was given to secure the purchase price thereof. Each defendant answered separately with a general denial and a special denial of any knowledge of the existence of a nuisance upon said premises. The constitutionality of the statute was attacked by both De Roos and Valiquette, on various grounds, which we shall have no occasion to consider.

There was a full hearing of evidence on the merits. The case is triable here in equity, *de novo*. It does not appear that any of the evidence was preserved, and none is presented in the abstract. The case is presented here by the appellant on the theory that, inasmuch as the court found a decree against the defendant Anna Talbott, it was bound, as a matter of consistency, to find a like decree against the other defendants, regardless of their actual participation in the offense, and regardless of their knowledge of the offense by their codefendant.

If such general proposition were conceded, it would not avail the appellant. It would amount only to saying that the decree of the trial court involved an inconsistency, in that it should have been against all of the defendants or against none. This might be a sufficient showing of error, but whether such error was adverse to the plaintiff would depend upon an examination of the evidence. The

appellant argues the appeal upon the assumption that the decree of guilt against the defendant Talbott is a final adjudication as against all of the defendants, and that it does not need to be sustained on appeal by the presentation of the evidence in its support. The trouble with this position is that the dismissal of the action against these appellees left no adjudication against them. If the adjudication had been against them, they could have appealed. On such appeal, they could have been heard to deny the sufficiency of the evidence to show the guilt of the defendant Talbott. A finding by us of the insufficiency of the evidence to that end would operate as a complete protection to them. The trial court having dismissed the action below as to them, it left them nothing from which they could appeal. They are entitled, however, on this appeal of the plaintiff, to make precisely the same defense upon the merits of the evidence as they could have made as appellants if they had been beaten below. This is a sufficient indication of the necessity of the preservation of the evidence and of its presentation in the abstract here. Furthermore, one of the questions presented by the pleadings is whether the statute should be construed retroactively, so as to operate upon contracts entered into and continued innocently and in affirmative good faith. This is perhaps the most important question in the case, and is the least argued. If we should hold that good faith might be a material consideration in favor of the appellees, it could not be ascertained without an examination of the evidence. Upon the state of the record before us, we do not feel justified in making partial pronouncements as to the applicability of the statute in question, because in no event could the case be reversed upon the merits in the absence of the evidence. We have no argument for appellees. The appeal will be dismissed.—*Dismissed.*

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

**GEORGE WOOD, Appellant, v. MINNEAPOLIS & ST. LOUIS RAIL-
ROAD COMPANY, Appellee.**

**MASTER AND SERVANT: Fellow Servant—Use of Instrumental-
1 ity Furnished by Independent Fellow Servant.** Liability of a master may not be predicated on the act of a servant in using, without the express or implied direction of the master, an instrumentality known by the servant to have been supplied by another fellow servant solely for the independent, separate and temporary use of the latter.

**MASTER AND SERVANT: Place for Work—Scaffolds—Directions
2 to Use.** Consent on the part of a vice-foreman that a servant might "use" a certain plank may not, under the circumstances attending the consent, amount to an express or implied direction to the servant to go upon the plank in its then condition and use it as a platform.

**MASTER AND SERVANT: Warning Servant—Obvious Dangers.
3** Principle recognized that there is no duty to warn when the danger is obvious.

*Appeal from Webster District Court.—R. M. WRIGHT,
Judge.*

MONDAY, MARCH 12, 1917.

REHEARING DENIED MONDAY, JUNE 18, 1917.

ACTION for damages for personal injuries sustained by plaintiff as a result of falling from a plank upon which he was standing while engaged with his work. At the close of plaintiff's evidence, the trial court sustained a motion for a directed verdict for the defendant. The plaintiff appeals.—*Affirmed.*

Maurice O'Connor, for appellant.

Burnquist & Joyce, for appellee.

1. MASTER AND
SERVANT: fel-
low servant:
use of instru-
mentality furn-
ished by inde-
pendent fellow
servant.

EVANS, J.—The plaintiff was an experienced bridge worker, and, as such, was an employee of the defendant at the time of the accident in question. His particular work at the time of the accident was “tightening up the cord bolts.” This work ordinarily required him to take a position on the cap of the bridge. From this position, he reached down to the bolts, and with a wrench tightened the burrs thereon. In this manner, the plaintiff had done his work and had proceeded from the south end of the bridge and tightened every bolt up to the last bolt at the north end. In the tightening of the last bolt, he encountered some inconvenience, and conceived the idea that he could tighten it more conveniently from the under side. This idea was perhaps stimulated to some extent by the fact that there was a plank in position on the under side which would furnish him standing room and from which he could reach the bolt. It was from this plank that he fell, and suffered therefrom a sprained ankle. The circumstances attending the placing of this plank in position and the use thereof by the plaintiff are an important consideration.

The regular foreman was not present with the crew on the day of the accident. Casey, another workman, acted as vice-foreman. He also engaged in his regular work as a fellow workman with the other members of the crew. Early in the day, for his own temporary use, Casey had procured this plank and put it in position. This position was that one end thereof was allowed to rest upon the top of the bank, and the other end rested upon the timbers of the bridge. These timbers consisted of an upright piling and a diagonal brace called the sway brace. The upright piling and the diagonal brace formed an angle, and the further end of this plank rested in such angle. The plank was 12 inches wide and 3 inches thick. It was not nailed. Casey

used it for a brief time until he had finished his work thereon. The plaintiff was present, and saw Casey put the plank in position and saw him use it. It was two hours thereafter that the plaintiff got upon the plank himself. He worked thereon for several minutes. In his efforts at tightening the bolt, his wrench slipped. The plank tilted on one edge, and the plaintiff went to the ground, 5 or 6 feet below.

The contention for the plaintiff is that the plank was in the nature of a scaffolding, and that it was not a safe place to work; that he was entitled to warning of the danger thereof and received none; that he was expressly directed by Casey to go upon such plank for the purpose of his work. It is contended that it was the duty of the defendant or its vice-principal to have made such plank more secure, either by the use of ropes or hangers or toenailing. The plank was not put there for the plaintiff's use. He knew that. He saw it put there by Casey, and knew that it was so put only for Casey's temporary use for his own work. He knew that it was not protected by hangers or ropes or nails. The act of Casey in putting it there was not the act of a principal or a vice-principal. Assuming that Casey was a vice-principal for some purposes, he was also a fellow workman. He used the plank for doing the work of a fellow workman only. There was no actual negligence, then, to be found in the manner in which the plank was put in position. It is urged, however, that even this did not excuse him from the duty to warn the plaintiff of the danger of using the plank. The duty to warn ordinarily pertains to unknown and nonobvious dangers, and has its most frequent application in dealing with inexperienced persons. In this case, there was nothing known or obvious to Casey that was not as well known and obvious to the plaintiff. Casey could have told him nothing about the plank that he did not already know.

2. MASTER AND SERVANT: place for work: scaffold: directions to use. Passing this point, however, the emphasis of the appeal is laid upon the proposition that the plaintiff was directed by Casey to use this particular plank in this position as a scaffold. This contention is based upon the following testimony by the plaintiff:

"A. I asked Mr. Casey if he was using the scaffold—if he was through with the scaffold—and he said, 'Yes, use it.' * * * A. I asked him if he was through with the scaffold, and he said, 'Yes, use it.'"

Can it be said that the foregoing amounted to a direction from Casey that the plaintiff use this plank as a scaffold? At the time of this conversation between the plaintiff and Casey, Casey was at the further end of the bridge. He had not been upon the plank for some time. It is not claimed that the plaintiff advised Casey that he wanted to use the plank as a scaffold. For the purpose of tightening bolts, his place was upon the top of the bridge. He had never before tightened a cord bolt from the under side nor used a scaffold for that purpose. He did not advise Casey that he wished to make such experiment then. It is urged that the question which he put to Casey implied plaintiff's purpose to go upon the plank himself. We think no such implication could fairly arise from the question put. If the plaintiff merely wished to use the plank for a few moments, there was no apparent occasion for asking Casey any question at all. Plaintiff knew that Casey was not using the plank, and knew that he was at the other end of the bridge. He did not, of course, know that Casey was *through* with the plank. That part of the question, therefore, would have been appropriate if he had wanted to remove the plank from its position. Such purpose was the only fair implication of his question. In the light of the real purpose of the plaintiff, the question as testified to by him was quite incongruous. It had no apparent purpose to

serve. Taking it, however, as he put it, and the answer of Casey thereto, we can see in it nothing more than a permission by Casey to the plaintiff to "use" the plank. If the implication of the question and answer was any broader than that, it was that he had permission to remove the plank for such use as he wished to make of it. The language of Casey cannot fairly be construed as a direction or command to the plaintiff to go upon such plank in its then position.

The situation, therefore, sums up briefly as follows: The plank was put in position by Casey for his own temporary use, and without any intent that it should be used by the plaintiff, and the plaintiff knew it. In putting such plank in position for his own use, he was not acting as a vice-principal. The danger involved in the use of the plank was as obvious to the plaintiff as it was to Casey, and there was no duty to warn. The plaintiff's appropriate place for his work was upon the cap of the bridge. Casey did not command or direct or request him to go upon the plank in question. We think, therefore, that the evidence wholly fails to show negligence on the part of the defendant or its vice-principal, and that the trial court properly directed the verdict.

S. MASTER AND
SERVANT: warn-
ing servant:
obvious dan-
gers.

The judgment below is accordingly—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

DAVID D. CARTER, Trustee, et al., Appellees, v. CITY COUNCIL OF CITY OF COUNCIL BLUFFS et al., Appellants.

MUNICIPAL CORPORATIONS: Additions—Statutory Plats—

- 1 Council May not Refuse to Approve. A city council has no discretion in the matter of approving a plat of an addition to the city, when such plat is in full compliance with the law. Secs. 914 to 916, Code, 1897. So held where the council demanded, as a condition to its approval, that the owner safeguard the city

by bond against expenditures which it might be compelled to make in the way of grading streets, etc.

STATUTES: Construction—Courts May not Add Conditions. Principle recognized that, when the statute makes specific enumeration of the conditions governing a subject matter, the courts may not impose additional conditions.

Appeal from Pottawattamie District Court.—O. D. WHEELER, Judge.

TUESDAY, JUNE 19, 1917.

ACTION in equity for a writ of mandamus, in which action it is sought that the defendants, the duly elected, qualified and acting aldermen of the said city, be ordered and commanded to approve a plat, in the manner provided by Section 916 of the Code, 1897.—*Affirmed.*

L. W. Schneider, City Solicitor, for appellants.

Mayne & Green, for appellees.

SALINGER, J.—I. The question for our determination arises upon a ruling of the trial court overruling a demurrer to plaintiffs' petition. Review must, therefore, be confined to the legal effect of such allegations in the petition as the demurrer admits. What is thus admitted is that the plaintiffs are the unqualified owners in fee simple of described real estate situated in Council Bluffs, Iowa; that, prior to April 13, 1914, they caused said property to be laid off and platted as an addition to said city; that said plat was prepared and certified in all matters as provided by the laws of the state; that it was acknowledged and dedicated in the manner provided by law; that, on or about April 13, 1914, same was filed with the city clerk of said city; that, at a meeting of said council, the plat was presented to it for their approval, in manner provided in Section 916 of the Code of 1897, and re-

1. MUNICIPAL CORPORATIONS: additions: statutory plats: council may not refuse to approve.

quest made that same be approved in manner as provided by law; that thereafter, the council took the plat under consideration and referred it to the city engineer for estimate on the cost of grading of the property covered by the plat; that, upon the matter's being again presented to the council, with request that the plat be approved, the council refused to approve unless the plaintiff would give a bond sufficient to cover the cost and expense of grading said property.

II. The parties, of course, agree upon, and it was needless for appellant to cite either statute or case law in support of, the proposition that the writ of mandamus may not control discretion in acting. The sole question is whether the council might, in its discretion, as a condition precedent to approving the plat, make the requirement it did make.

As we apprehend it, the position of the appellant is that, when the plat is once duly recorded, title to the streets therein is "thrust" upon the city. It argues that the land covered by the plat is rough and hilly; that, the plat once being approved, there might be necessity for opening streets and alleys in the addition platted; that this would entail an obligation for a large expenditure to so grade the streets and alleys laid out in the plat as to make them available for use by the public; that, within a reasonable time, the owner of the platted land might demand such expenditure, and that the council would be obliged to comply; that, as matter of common knowledge, nearly all new streets and alleys in new additions need some grading, to put them in proper condition to be used by the public; that the owner may sell some of the lots and the purchasers erect houses, and thereupon make demand for such improvement and expenditure, which the city would be compelled to accede to; and, should we affirm, there will be imposed a duty upon the city to expend money to grade the streets and alleys

involved, and the owner of the plat will be freed from the cost of such improvement. The ultimate argument is that, since the city is subject to this peril, therefore it has power to make security against that peril a condition to approval of the plat, and that doing this is a justifiable exercise of discretion. The only support by citation with which the appellant favors us is a reference to *Richardson v. Sioux City*, 136 Iowa 436, at 441. The case holds, at most, no more than that, if a change be made in an established grade, the municipality is liable for damages caused by the change. It is true that a condition may arise where, by forcing the city to pave, it might have to pay for grading streets and alleys in the addition which the plat covers. Code, 1897, Sections 792, 793; *Collins v. City of Iowa Falls*, 146 Iowa 305, at 309.

Appellee relies upon *Giltner v. City of Albia*, 128 Iowa 658, *Campau v. Board*, (Mich.) 49 N. W. 39, and *Van Husean v. Heames*, (Mich.) 52 N. W. 18. Separating argument and matter of inducement from the decision, the *Giltner* case holds, not that there is no discretion to make *any* requirement as a condition precedent to approving the plat, but that, when the owner has platted in conformity with the statutes, the approval may not be withheld because he has not laid out and dedicated alleys through blocks which he has not subdivided into lots. The case is authority for no more than that, where the proposer of the plat has complied with all things exacted by the statutes, he may not be refused approval on the ground aforesaid. In much the same situation is the *Campau* case. There, everything required had been done, unless the one thing on account of which approval was refused, controlled. That was that the relator's plat showed a public alley on his land 20 feet north of a public alley upon a nearby plat, and that, as the alleys in the city were cleaned and cared for at the public expense,

it was undesirable and not for the public interest that an alley on relator's plat should be permitted. The case, however, holds that the city is under no legal obligation to assume that burden of cleaning alleys; that the possibility it will voluntarily assume it affords no legal excuse for declining to approve the plat; and that the board of public works has no power to direct where an owner of land shall establish an alley, and he may establish it where he pleases, so long as he interferes with no public or private right. In substance, that is the effect of the holding of the *Van Husen* case.

If put at its best, the case of appellant stands, so far, thus: The appellee has complied with all that the statutes exact. But he has refused to safeguard the city against expenditures which it may be compelled to make if the plat be approved. There will be no such possibility if the plat be not approved. There are no decisions cited that deny the city the right to demand this particular safeguard. But of what avail is all this if the legislature has seen fit to define just what need be done to entitle the plat to approval, and, in enumerating, has failed to include such bond as the appellant demanded as something that need be done? It may be conceded that the council *should* have the power to make such bond a prerequisite to approval. But if that power is not given, the legislature is the body that must give the relief. The sole question, then, is, What has the legislature done? The answer must be sought and is found in the statutes. Sections 914 and 915 of the Code specify most minutely what the platter is to do. The giving security such as appellant sought to exact is not specified, and no possible construction can find such a requirement in these statutes. More, Code Section 916 does some specifying of its own. It requires that:

"All plats of additions * * * shall be divided by

2. STATUTES: construction: courts may not add conditions.

streets into blocks, with alleys separating abutting lots, and such blocks, streets and alleys shall conform as nearly as practicable to the size of blocks and the width of streets and alleys in such city or town, and such streets and alleys shall be extensions of the existing system of streets and alleys thereof."

This does not require what appellant did. The requirements stated are followed by the statement that all subdivisions except those less than one block, "before being recorded, shall be filed with the clerk of such city or town, and when so filed the council, within a reasonable time, shall consider the same, and if it is found that such plat conforms to the provisions hereof," the council shall direct approval. Assume that this requires compliance not only with the provisions of Section 916, but also with those of Sections 914 and 915, and it is still true that appellee has complied with all three, and that, this being true, the council had no discretion as to whether to approve or not. It follows that it could not decline to approve because something not required by law was not done, and that the court ruled rightly in overruling the demurrer of defendants. Its action must be, and is,—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

GEORGE COHEN et al., Appellees, v. PERLE L. HAYDEN, Appellant.

PRINCIPAL AND AGENT: Liability of Agent—Liability on Contract. Liability of agents on contracts entered into by them, discussed generally.

EXECUTORS AND ADMINISTRATORS: Real Property—Leases—
2 Personal Liability. An executor or administrator who enters into a lease without authority from the court or under the will, is personally liable thereon. So held where a tenant in common, who was in possession of the property under a will, and who was also executor, leased the property without authority from the court or in the will. Sec. 3333, Code, 1897.

LANDLORD AND TENANT: Quiet Enjoyment Covenant—Breach

3 —Defense—Pending Partition. It is no defense to an action for breach of an implied covenant in a lease for quiet enjoyment that the lessee knew when the lessor executed the lease that an action for the partition of the property was then pending.

LANDLORD AND TENANT: Leases—Construction—Covenant for

4, 7 Quiet Enjoyment. A covenant for quiet enjoyment, even in the absence of the word "devise," etc., is implied in every mutual contract of leasing.

INTEREST: Unliquidated Demands—When Allowable. Whether

5 interest is allowable on an unliquidated demand depends largely (a) upon the nature of the liability and (b) upon the defendant's duty in the premises. *Held*, in an action for damages for breach of an implied covenant for quiet enjoyment, that the lessee was entitled to interest on the damages from the time they accrued.

APPEAL AND ERROR: Assignment of Error—Sufficiency. Errors

6 not presented by "brief of points relied on for reversal," as required by Rule 53 of the rules governing the presentation of appeals, will be disregarded.

LANDLORD AND TENANT: Leases—Construction—Covenant for
4, 7 Quiet Enjoyment.

Appeal from Des Moines District Court.—OSCAR HALE,
Judge.

WEDNESDAY, APRIL 10, 1916.

SUPPLEMENTAL OPINION TUESDAY, JUNE 19, 1917.

ACTION to recover damages alleged to have been sustained by reason of being wrongfully evicted from leased premises. Judgment for plaintiffs, in the court below. Defendant appeals.—*Affirmed*.

Blake & Wilson, for appellant.

Power & Power and Charles Willner, for appellees.

GAYNOR, C. J.—On the 4th day of September, 1913, the plaintiffs filed a petition in the district court in and for Des

Moines County, alleging: That, prior to February 6, 1913, they were engaged in the retail furniture business in Burlington, Iowa; that they were occupying and carrying on their business in a place leased for a term of years; that, on the 6th day of February, they entered into a written contract of lease with the defendant, by the terms of which she undertook to and did lease to the plaintiffs certain premises on Jefferson Street in the city of Burlington, for the term of three years, at an agreed rental of \$80 per month, to be paid in advance on the first day of each and every month; that plaintiffs entered into possession and paid the rent, as required by the lease, until the 17th day of April, 1913; that the leased premises were subsequently sold by referee in a certain partition proceeding; and that, thereafter, the purchaser instituted proceedings of forcible entry and detainer against these plaintiffs, and they were removed from and dispossessed of said premises under a warrant issued in said proceedings. Plaintiffs further allege that they expended large sums of money preparing the leased premises for the business and in advertising their new location; that, by reason of the ejectment, such expenditures were a total loss; that, subsequent to the making of the lease, they purchased a large quantity of new goods to be placed in said building; that they expended large sums of money in moving to and from the building; that, in moving, the stock was greatly damaged; that the actual rental value of such premises was \$125 a month for the term of the lease; that they have been damaged in the difference between the amount they agreed to pay and the actual value of the premises. Plaintiffs claim other damages, which it is not material to set out.

Defendant, for answer, admits the execution of the lease, but alleges that, at the time the lease was made, the plaintiffs had both actual and constructive notice that partition proceedings were pending with reference to the

property; that they entered into the lease with full knowledge that, under these partition proceedings, they might be expelled and ousted from the premises, and they assumed such risk; alleges that the defendant had nothing to do with ousting the plaintiffs, but alleges the fact to be that the lease was mutually cancelled by the parties and had become of no effect prior to plaintiffs' entering upon said premises, and she denies all personal liability under the contract; alleges that the property rented belonged to the estate of Susan Hayden, deceased; that this defendant was one of the executors of her will; that the plaintiffs negotiated the lease with her as executor, and not with her as an individual; that the plaintiffs knew that the property was not her individual property, and knew that she executed the lease simply as executrix; that the lease was written "Perle L. Hayden, Ex.," and so signed, and was and is the contract of the estate, and not of this defendant as an individual. Defendant further says that there were five heirs to said estate, all adults; that one of the heirs resided with this defendant, and was not able, because of physical conditions, to transact business; that the other heirs were nonresidents of the state; that this defendant, as such executrix, transacted all the business connected with the real estate of her deceased mother; that, as such executrix, she executed leases upon the real estate; received rent and profits from all the real estate, including the real estate described in the lease, and was the only heir or devisee present and competent in the city of Burlington to take possession of said real estate; that, at the time the lease was executed, the plaintiffs well knew and understood that she was acting as executrix in making the lease. Defendant further alleges that she notified plaintiffs, before they entered into possession, that the lease was of no validity; that, when the plaintiffs tendered her the first month's rent, she declined the same for the reason aforesaid, and refused

to accept it; that the plaintiffs, after being so notified, and before the first of March, moved into said premises; that \$80 was afterwards paid to the plaintiff, after a full discussion of the situation, and was made subject to the partition sale; that the \$80 was not accepted under the written lease, but as rental for the month during which plaintiffs occupied the premises; that, after the payment of said \$80, and about the 1st of April, plaintiffs sent this defendant another check for \$80; that, after the partition suit was determined, and the property sold, the defendant returned \$32 of the \$80 to the plaintiffs, as the unearned portion of said April rent, and this was received and retained by the plaintiffs; that the plaintiffs have neither paid nor offered to pay any further rent. Defendant denies all items of damages claimed by the plaintiffs, and asks that the plaintiffs' petition be dismissed.

The plaintiffs, for reply, admit that they had notice of the partition proceedings pending in the district court, but aver that they were orally assured by the defendant that said proceedings were merely formal, and for the purpose of ascertaining and fixing the value of the real estate, and that she and the other joint owners, her brothers and sisters, would purchase said premises at the partition sale, and that said partition would in no manner interfere with the lease, or with plaintiffs' peaceable possession of the property under and by virtue of the lease. Plaintiffs further allege that the defendant was one of the devisees under the terms and provisions of the will of Susan Hayden, and as such, was competent to take possession of the real estate; that she was also trustee for one of her sisters, to whom one fifth of the estate was devised, including the property in controversy. Plaintiffs deny that they had knowledge that, under said partition proceeding, they might be expelled or ousted, and aver that they were told

and assured by the defendant that they would be protected in the peaceable possession of the premises.

Upon the issues thus tendered, the cause was tried to a jury and a verdict returned for the plaintiff. Upon this verdict, judgment was entered, and defendant appeals, and assigns error. Under "Brief of Points Relied on for Reversal," the defendant says:

"First. A lease may be mutually surrendered by the action of the parties.

"Second. Oral testimony is admissible to show the facts as they occurred at the time of the signing of the lease.

"Third. Where a party is acting in a representative capacity, and all the facts as to the capacity are known, he will not be bound personally.

"Fourth. An executor or administrator, in the absence of other heirs, has the right to rent and lease, and, having such authority, cannot be held personally liable.

"Fifth. A warranty will not be implied in a deed or a lease unless some words of warranty are made use of, particularly if all the facts are in the contemplation of the parties at the time, in which event it is subject to outstanding equities.

"Sixth. Interest should not be allowed on an unliquidated demand."

As to the first point under brief of points relied upon for reversal, we have to say that the question as to whether there was a mutual surrender of the lease by the parties was a question of fact, and was fully and properly submitted to the jury, and, as there is a dispute in the evidence, we will not review their finding.

As to the second proposition, all the testimony was admitted that was offered, showing, or tending to show, all that was said and all that occurred at the time of the signing of the lease, and all facts touching the knowledge

of either party concerning the pending partition proceedings and defendant's authority to act.

As to the third and fourth propositions, we find the authorities against defendant's contention as applied to the facts of this case. On these propositions, we have to say, generally, that, where one acts in a representative capacity as the agent of another, and there is another who may be bound by his act, and this fact is known to the party with whom the dealing is had, the agent does not personally bind himself by a contract so entered into. The rule is that an agent is not bound by contracts made by him as agent in his representative capacity, where he has authority to bind another by his act and the fact of his agency is disclosed. There, the parties both have knowledge that one is acting for another, who is to be personally bound by his act, and he becomes only the instrumentality through which the contract is made with his principal. This implies authority to act for another, and it is bottomed on the thought that he is acting for another, and has authority to bind another by his act. But if one assumes to act for another and has no authority to so act, and no power to bind the other by his act, his assumed authority does not release him from the obligation of the contract made by him. Or, in other words, if one assuming to be an agent and to be acting for another has no authority to act for the other, or to bind him by his acts, he will be held to have acted for himself, and be bound by the contract entered into. This is the rule, broadly stated.

There are well recognized exceptions to this general rule. These exceptions are set out and exemplified in *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, and require no further exemplification at our hands.

1. PRINCIPAL AND
AGENT: Liability
of agent:
liability on con-
tract.

2. EXECUTORS AND
ADMINISTRAT-
ORS: real prop-
erty: leases:
personal liabil-
ity.

In all cases in which it is held that an agent, acting as such, having a principal who may be bound by his act, and having authority to act for a principal and bind him, does not bind himself, there is a principal to be bound by his acts, or one who is bound by his acts. See *Lacy v. Dubuque Lumber Co.*, 43 Iowa 510.

These general rules touching agency and the liability or non-liability of an agent are not controlling in a case such as we have here presented. Agency implies that there is a principal for whom the party is an agent. In the instant case, the property was the property of Susan Hayden at the time of her death. She left five children, and a will, in which she bequeathed her property in equal shares to her five children. Defendant was one of the children. The real estate in controversy passed under the will to these children in equal shares. Defendant had an undivided one-fifth interest in this property at the time the lease was made; was a tenant in common with the other heirs; was trustee for one of the heirs. Prior to the making of this lease, she had taken possession of this property and rented it and collected the rents, and, we must presume, accounted to the proper parties for the rental collected. She was one of the devisees of the will present and able to take possession, and had a right to the possession and control of the property as tenant in common with the other devisees. As executrix, therefore, she had no authority to take possession of this real estate, or to collect the rents and profits. Section 3333 of the Code, 1897, provides:

"If there is no heir or devisee present and competent to take possession of the real estate left by the decedent, the executor or administrator may do so, and demand and receive the rents and profits, and do all other acts relating

thereto which may be for the benefit of the persons entitled to the same."

The defendant in this case was a part owner of the property, a tenant in common with the other heirs; was in possession of and controlled all the property, presumably with the consent of the other devisees; had rented it prior to the making of this lease, and collected the rents and profits. However, that she assumed to act for the estate does not add to or take from her authority. It is not claimed that, in any controversy she had with the plaintiffs prior to the time of the making of the lease, she claimed or said to them that she was acting as executrix of the estate. Nor does it appear affirmatively from the record that she was acting as executrix of the estate at this time, except as it may be inferred from the fact that she attached the word "Ex." to her name in signing the lease, and to her name as it appears in the granting clause. She testifies: "I collected the rents. I rented the buildings. I executed leases when we needed them"—all prior to the time when the lease in controversy was made by her. She further testifies that, when she heard that Cohen would rent the property, she went to him and talked about fixing up a lease. She said: "There is a partition sale of the building. Do you know that?" They both appeared to know this. She said:

"Well, I have to write to my brother and find out about making the lease. He is the other executor.' Then I said: 'You had better wait until after the partition sale, and then you can move in. I would prefer to make the lease afterwards.' They didn't want to wait. I said, 'I will make a two years' lease with you.' They said it might just as well be three. I said, 'I will write to my brother and find out about it.'"

She testifies further that, upon the suggestion of the party, she telegraphed her brother; that her brother an-

swered, directing her to make the lease; that the partition suit was discussed at the time the lease was made; that, after she got word from her brother, she made out a couple of leases and took them down and had them signed. She said: "After I heard from my brother and he was satisfied, the lease was prepared."

Plaintiff testified that, at the time the lease was made, and at the time the partition sale was discussed, defendant told him that the devisees would not let the building go from them; that they would buy it in. Defendant testified that she said to him that they would try to keep the building in the family. In subsequent conversations, she said, when the question was discussed:

"I said I didn't think that the Hayden heirs would let that building go out of the family. I didn't think that there would be anyone to bid against us."

She further testified:

"At one time, I told him that I thought there would not be any individuals who would want the building, because they would want to buy a new building, with modern improvements, if they had the amount of money necessary to buy the building. After the lease was executed, we discussed the lease. I told them it wasn't good. He always seemed to think it was all right."

She further testified:

"At the time the lease was made, I told Cohen I didn't think the Hayden heirs would let the building go out of the family; that I wanted it kept in the family, and that the rest of them wanted it—every one of them."

In *Peoria Steam Marble Works v. Hickey*, 110 Iowa 276, it was said:

"An executor or administrator cannot, in the absence of authority given by the will of the decedent, or by statute, make an executory contract binding on the estate he represents. If he assumes to make such contract on a new and

independent consideration, it is his personal obligation, and he will be bound thereby, although the debt was incurred for the benefit of the estate (citing authorities). Another general rule is that, when an agent contracts without authority, or assumes to have authority when he has none, or for any reason fails to bind his principal, he is himself bound."

Referring to *Winter v. Hite*, 3 Iowa 142, the court proceeds to say:

"It is there said that contracts with executors, etc., should not be confounded with those entered into by agents. The plain reason for this distinction is that there is no principal to be found. A trustee, guardian or executor is not the agent or hand of the court concerning those contracts that he has no authority to make, but acts on his own responsibility, and is individually liable to perform them. * * * If it is not the contract of the individual, it is no contract."

In *Winter v. Hite*, supra, it is said:

"If it does not appear upon the paper that he acted as agent, or if he had not authority, he renders himself personally liable. * * * An executor, administrator, or guardian is not an agent in any such sense as above indicated. He is so in a general sense, it is true, but his virtual and real character is of another class. With him, it is not a mere question of fact whether he have authority, for there is no one to give it, but it is a question of law, and the law denies the authority."

As sustaining the proposition that the administrator of an estate or an executor has nothing to do with real estate unless expressly authorized by the provisions of the will, and that the title and right to the possession pass immediately to the devisees named in the will, see the following authorities, bearing more or less upon the question: *Gray v. Myers*, 45 Iowa 158; *Hodgin v. Toler*, 70 Iowa 21;

Brundage v. Cheneworth, 101 Iowa 256, 258; *Valley National Bank v. Crosby*, 108 Iowa 651, 656; *In re Estate of Acken*, 144 Iowa 519, 528; *Hatton v. Wheaton*, 158 Iowa 460, 464. That an executor becomes personally bound by a lease executed without express authority, see *Winter v. Hite*, 3 Iowa 142; *Peoria Steam Marble Works v. Hickey*, 110 Iowa 276, 277.

2. LANDLORD AND
TENANT: quiet
enjoyment cov-
enant: breach:
defense: pend-
ing partition.

The court instructed the jury that, by the terms of the lease, the defendant was personally bound to deliver to plaintiffs the possession of the rented premises, and that, upon entering possession, plaintiffs were entitled to the quiet enjoyment of the same; and the fact that a partition suit was pending at the time the lease was entered into was wholly immaterial, and the knowledge of the plaintiffs of the pendency of the suit was immaterial, because the defendant, with knowledge of the pendency of the suit, made the written contract of lease by which she bound herself to give possession to the plaintiffs, with an implied covenant therein for quiet enjoyment. The court further, in substance, said that it was the duty of the defendant to deliver possession of the premises and to secure to the plaintiffs the quiet and peaceable possession of the same, as against anyone acquiring and holding title superior to that of the defendant during the term of the lease. The fact of the pendency of the suit, and that the premises might be sold at partition sale, was wholly immaterial.

We are not prepared to say that being advised of a pending proceeding that might affect the power to give possession is "wholly" immaterial. It might be material on the question of whether certain damages may be allowed. But the record here is such that we do not have the question for decision. On that record, the instruction cannot be held erroneous.

4. LANDLORD AND
TENANT: leases:
construction:
covenant for
quiet enjoyment.

When the defendant entered into the written lease, she gave to the plaintiffs the right to the possession of the property described therein, for the term provided.

This they became entitled to. This right, by the lease, she guaranteed to them. The possession is what she gave them by the lease. The possession is what they were entitled to under the lease. The lease itself was an assurance to them both of the possession and the right to the enjoyment of the possession during the term of the lease. As executrix, she had no authority to make the lease. As tenant in common, she had the authority. She exercised it, and bound herself, in the exercise, to the performance of the conditions of the lease. When a written lease is entered into between two parties competent to make a lease, the purpose of it is to give to the lessee the possession, or the right to the possession, of the property leased, for the period provided in the lease. That is what the lessee contracts for. That is what he is entitled to under his contract. By the making of the lease, this right is guaranteed to him by the assumed lessor. Take this away from the lessee, and you take away all that he has contracted for, and destroy the efficacy of the lease as an assurance of the right to the enjoyment of the premises.

This brings us to the fifth proposition: Is there implied in the lease a warranty of quiet enjoyment? Upon this proposition, we are not without authority. In Kerr on Real Property, Vol. 2, Section 1213, page 1065, the author says:

"The covenants usually implied on the part of the grantor are that he has a title, and therefore a right to make the lease, and that, in consideration of the rent to be paid him, the lessee shall not be disturbed in the possession by the lessor or those claiming under him, during the term of the lease."

At Section 1214, the author says:

"There is implied an undertaking on the part of the lessor that the lessee shall not be dispossessed or disturbed in his quiet enjoyment of the premises by the lessor, or by any persons claiming under him, or by anyone having the legal title or right of entry to the land (citing authorities). But there is no implied covenant to indemnify the lessee against the wrongful acts of a trespasser or other person, or against an action in ejectment brought by a third person not having legal title or right of entry."

See also *Pickett v. Ferguson*, 45 Ark. 177; *Shaft v. Carey*, (Wis.) 83 N. W. 288; *Kane v. Mink*, 64 Iowa 84; *Milheim v. Baxter*, 46 Colo. 155 (103 Pac. 376, 133 Am. St. Rep. 50), and cases cited; *Harmont v. Sullivan*, 128 Iowa 309.

Clearly, there was an implied covenant for a quiet enjoyment in the lease in question, and this covenant was broken by ouster. It is the very meat of the contract; it is the very purpose, essence and spirit of the contract; it is what one agrees to give for the consideration to be paid; and it is what the other agrees to pay the consideration for.

The sixth proposition involves the right to interest upon the damages from the date when they accrued. Complaint is made of the allowance of this. This contention is disposed of in *Chamberlain v. City of Des Moines*, 172 Iowa 500.

Some complaint is made touching the introduction of evidence, and of the amounts allowed by the jury upon the several items of plaintiffs' claim. These complaints were not presented in the manner required by Rule 53 of the rules of this court. We do not find them under brief of points relied upon for reversal, and therefore do not consider them in the case for discussion in this opinion.

5. INTEREST: unliquidated demands: when allowable.

6. APPEAL AND ERROR: assignment of error: sufficiency.

Upon the points submitted, we find no reversible error, and the case is—*Affirmed*.

LADD, EVANS and SALINGER, JJ., concur.

SUPPLEMENTAL OPINION ON REHEARING.

LADD, J.—A rehearing was granted on
 7. LANDLORD AND TENANT: lessors: the contention of appellant that, from the construction of the covenant for quiet enjoyment, mere renting or leasing of the premises for a term of years, a covenant of quiet enjoyment is not to be implied. There are many respectable authorities so holding. See *Adams v. Gibney*, 6 Bing. 656; *Lovering v. Lovering*, 13 N. H. 513; *Baxter v. Ryerse*, 13 Barb. (N. Y.) 268; *Mershon v. Williams*, 63 N. J. L. 398 (44 Atl. 211); *Frost v. Raymond*, 2 Caines (N. Y.) 188 (2 Am. D. 228).

Anciently, estates were created by donation to the tenant, and thereupon, reciprocal relations arose by implication; from the tenant were due homage and feudal services, and in return, the donor or chief lord was bound to assure to the vassal the enjoyment of the estate. These duties were held to arise, however, not from express obligation or contract, but from the nature of the tenure. They were imposed upon the tenant by his acceptance of the estate, and might be exacted by the lord, who employed the term "*dedi*," or other term of donation by which estates were created. Lord Coke says:

"Where *dedi* is accompanied with a perdurable tenure of the feoffor and his heirs, there *dedi* importeth a perdurable warranty for the feoffor and his heirs to the feoffee and his heirs." 2 Inst. 275.

Upon the enactment of the statute *quia emptores*, destroying the practice of subinfeudation, and cutting off the tenure, the correlative obligation of warranty could not be raised against the heir of the feoffor; but the feoffor himself was supposed to be bound by his gift and the

warranty for life. From this is derived the principle that, whenever an estate is created by the word "give," it implies a warranty for the life of the grantor. When it became the practice to authenticate the transfers of land by deeds, a warranty was held to be implied from the words of feoffment, *dedi* or *concessi*; and, as these words were uniformly employed by conveyances in the preparation of deeds, and the courts declared a warranty of quiet enjoyment to be implied therefrom, it was said that "no other verb in the law doth make a warranty but *warrantizo* only." Co. Litt. 384a. And the law seems still to obtain that, in the absence of express words of warranty, a covenant will not be implied from a conveyance of land unless *dedi* or *concessi* or their equivalent in meaning is found therein.

Up to this point, there seems to be no conflict in the authorities. This arises in determining whether a like doctrine is applicable to leases, and whether the use of certain words, as "*demisi*" or "*concessi*," is essential to the implication of a warranty of quiet enjoyment in a lease for a term of years. In *Young v. Hargrave's Admr.*, 7 Ohio 427, the court says:

"In leases for years, the case is different. They were not originally regarded as estates in the land, but as contracts for the perception of the profits. The possession of the lessee was not regarded as in his own right, but as the possession of the grantor, and the destruction of the freehold was attended with the destruction of the lease. The lessee had no means of redress or indemnity except upon the contract. The words of the lease, 'yielding and paying,' etc., were construed a covenant by the lessee to pay rent; and the words 'grant, devise,' etc., were held to imply a covenant on the part of the lessor to pay damages to the tenant if the possession was lost. A warranty, therefore, is implied in a lease in a different sense from the implied

warranty of a freehold. The latter depends on tenure, the former on contract. The remedies, too, were originally different. In the latter, the disseisee recovered the value in land; in the former, damages only for the breach of the contract. Hence, a warranty is implied from any contract for the possession of lands amounting to a lease for years, no matter in what words it is framed; but the warranty of a freehold is not implied, except from the feudal term of donation."

In *Hamilton v. Wright's Admr.*, 28 Mo. 199, the lease recites that "the said Wright leases unto the said Dilfey," and the court concluded that there was an implied covenant for quiet enjoyment, saying:

"It is almost an axiom in the law that the words '*demisi*,' '*concessi*,' or demise and grant, in a lease for years, contain an implied covenant for quiet enjoyment, and that the lessor had power to demise; but it is insisted that no other words have that technical operation. In many of the early cases, which discuss the force of particular words on this subject, the leases were in Latin, and, as the words '*demisi*' or '*concessi*' were always employed, it was only necessary to decide on the effect of these words; and as, in England, leases are drawn by professional conveyancers, who use established forms or follow stereotyped phrases that contain the words 'grant' and 'demise,' their courts have not been called on to decide whether other equivalent words would not have the same force and imply the same covenants. Whilst, therefore, the adjudged cases assume or decide that the use of the word 'demise' of itself implied a covenant, it cannot be inferred that no other translation of '*demisi*' has the same operation. The case of *Lovering v. Lovering*, 13 N. H. 517, is the only case we have seen which denies that such an effect can be implied from the words 'let and lease,' and the reasoning of the court is founded solely on the absence of these words in the older cases. But

Rawle, in his learned treatise on Covenants for Title, properly observes that the only difference would seem to be that they used the Latin word '*demisi*,' of which he thinks 'lease' is a fair translation; and the law now seems to be that the implied covenants arise, not from particular or fixed terms, but from the words of leasing. * * * The lessor must have intended that the lease should be beneficial to the lessee, and the latter had the right to require of his landlord that the quiet enjoyment of it should be secured to him against eviction or disturbance by his act or the act of those who claim under or paramount to him. (Smith, Land. & Ten. 262, 268.) We think, then, that the lease in this case contained a covenant for quiet enjoyment implied by law, which ran with the land, and for the breach of which an action accrued to the assignee of the term."

In *Maule v. Ashmcard*, 20 Pa. 482, Black, J., thus states the court's conclusion:

"It is not denied that the word '*demisi*' in a lease implies a covenant for quiet enjoyment during the term. That word was not used here, for the lease was made by parol, and the parties did not understand Latin. But the word 'lease' is a fair translation of '*demisi*,' and ought to be and is interpreted in the same way by the courts."

Hart v. Windsor, 12 Mees. & W. 68, 85; *Baughner v. Wilkins*, 16 Md. 35; *Wade v. Halligan*, 16 Ill. 507; *Ellis v. Welch*, 6 Mass. 246 (4 Am. D. 122). A covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land. *Mack v. Patchin*, 42 N. Y. 167 (1 Am. Rep. 506); *Black v. Gilmore*, 9 Leigh (Va.) 446 (33 Am. D. 253); *Maxwell v. Urban*, 22 Tex. Civ. App. 565 (55 S. W. 1124).

In *Hanley v. Banks*, 6 Okla. 79 (51 Pac. 664), the correct rule is thus laid down, as approved by Wood, Land. & Ten., Sec. 354:

"Although there is in this lease no express covenant

for quiet enjoyment, the law implies such a covenant from the contract of leasing. The rule is that whether a lease contains a covenant for quiet enjoyment or not is, so far as the rights of the tenant are concerned, immaterial, as, in all cases, unless otherwise expressly provided, the law implies such a covenant. A covenant for quiet enjoyment is implied in every mutual contract for leasing, by whatever form of words the agreement is made; and, for the breach of such covenant occasioned through the fault of the lessor, the lessee has his remedy for such damages as result to him therefrom."

In a great number of cases, collected in a note at Section 79, 1 Tiffany on Landlord and Tenant, the law is assumed to be as above stated. A recent decision in England is to the effect that an undertaking for quiet enjoyment as against the acts of the lessor and those claiming under him is to be implied from the mere relation of landlord and tenant. *Budd-Scott v. Daniell*, 2 K. B. (1902) 351. It is said in Rawle on Covenants for Title, (5th Ed.) Section 274:

"In the absence of words of leasing, as, for instance, where the lease is by parol, it is well settled that the law will imply a covenant for quiet enjoyment from the mere relation of landlord and tenant."

This court so held in *Harmont v. Sullivan*, 128 Iowa 309. There is no reasonable ground for any other conclusion. One who rents or leases land or urban realty for a term at a stipulated monthly or yearly rental is as much bound to furnish the property for use during the term as the lessee is to pay the rent during such term. The use for the term is the subject of the contract, the thing negotiated; and the loss of this use for any portion of or all the period stipulated, through acts of the landlord or those claiming under him, or owing to a paramount title, would be a breach of his undertaking, regardless of the use of technical words,

such as "demise," in the contract. The covenant was clearly to be implied from the renting of the premises for the period specified. Other features of the petition for rehearing require no further attention.

There was no objection to the instruction on measure of damages prior to its being given, and for that reason, exceptions thereto cannot be considered. Section 3705-a, Code Supp., 1913.

We adhere to the opinion as originally filed, and the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

FRITZ FRANKE, Appellee, v. T. L. KELSHEIMER, Appellant.

FRAUD: Fraudulent Representations—Opinion (?) or Fact (?)

1 The following are fact representations:

1. That certain land was a good farm, and as good as the average in that locality.
2. That the land was level, not rough nor hilly, and lay well.
3. That the land was tillable and in a good state of cultivation.
4. That the land was capable of producing a certain number of bushels of grain per acre, and would, in its production, equal the average of farms in that locality.
5. That a certain number of acres had been fall plowed.
6. That the land was free from noxious weeds.

LANDLORD AND TENANT: Leases—Fraudulently Induced Leases

2 —Measure of Damages—Pleadings. The difference between the value of what a tenant did raise on the leased premises and what he would have raised had the premises been in the condition represented by the landlord, is not the measure of damages for fraudulent representations as to the condition of the premises; therefore, allegations relating thereto are properly stricken.

EVIDENCE: Parol as Affecting Writing—Fraud-Induced Contract. Allegations of the fraudulent representations which induced a written contract are provable even though they contradict said writing.

FRAUD: Deception Constituting Fraud—Duty to Investigate—In-

4 adequate Opportunity—Preventing Examination. One may not avoid the effect of fraudulent representations by the plea that his victim did not exercise an *inadequate* opportunity to examine the subject matter of the contract, before executing the contract, especially when the wrongdoer discouraged the making of an examination. So held where lands were deeply covered with snow.

WITNESSES: Competency—Belated Objection. One may not am-

5 bush his opponent by withholding his objection to the competency of a witness until the making of a motion for a directed verdict.

LANDLORD AND TENANT: Leases—Fraudulently Induced Leases

6 —Measure of Damages. The measure of damages for fraudulently inducing a lease of lands by false representations as to its condition is the difference between the rent reserved and the value of the use of the premises had the lands been in the condition represented.

APPEAL AND ERROR: Jurisdiction—Notice of Appeal—Recitals

7 in Abstract—Presumption. A general statement in the abstract that appellant perfected an appeal by due service and filing of notice thereof, *without any statement as to what was specifically appealed from*, creates the presumption, under Section 4139, Code Supplement, 1913, that said notice is comprehensive enough to confer jurisdiction on the appellate court to review every appealable matter appearing in the abstract, unless appellee, ten days prior to submission, by specific printed objections, shows to the contrary. So held on the question whether a refusal to discharge certain property from an attachment was appealed from.

ATTACHMENT: Dissolution—Motion—Sufficiency of Showing. A

8 clear, satisfactory and undisputed showing, by motion, that attached property is exempt from levy, should be sustained. Section 3929, Code, 1897.

Appeal from Ida District Court.—F. M. POWERS, Judge.

TUESDAY, JUNE 19, 1917.

Suit to recover on balance due for rent. Landlord's attachment issued. There was a counterclaim, based on a claim that lessor induced defendant to contract by means of

fraudulent representations concerning the character of the farm and land. The court dismissed the counterclaim, and directed verdict for plaintiff. Defendant appeals.—*Reversed and remanded.*

C. R. Metcalfe, for appellant.

Johnston Bros., for appellee.

SALINGER, J.—I. There was error in striking out allegations that fraudulent representations were made, to the effect that the land leased was free from noxious weeds. That is cured because substituted pleading upon which the case was tried has such allegations.

II. A number of other representations alleged were stricken out. It was done on motion, in substance, that they were not actionable, were mere statements of opinion, and laid foundation for damages that were too remote and speculative. The motions should have been overruled. But as to some of these allegations, evidence tending to sustain them was permitted on the trial without objection. For that reason, we will not consider their striking. This leaves for consideration whether it was error to strike out the following allegations: It was represented that the land was a good farm, and as good as the average one in the vicinity in which it was located, when in truth it was old, run down, its soil was nearly exhausted, and the whole farm had only about 27 acres of fairly good land; that it was level and "laid well;" that it was neither rough nor hilly, when in truth 80 acres of it was so rough and hilly that it could scarcely be farmed; that it was tillable, was in a good state of cultivation; that it was falsely represented the farm was capable of producing and would produce 50 to 60 bushels of corn per acre without extra care or attention; that it would raise as much of a crop of oats, wheat and other crops as was ordinarily raised in the vicinity;

1. **FRAUD:** fraudulent representations; opinion (?) or fact (?).

that there were 80 acres of fall plowing done in workman-like manner, when all the plowing was much less than that, and all of it poor, owing to the presence of weeds when the plowing was done. It has been held that a false representation that a stated portion of the land is tillable, may be actionable. *Brett v. Van Auken*, 99 Iowa 553. So of one that land is free from weeds and properly drained. *Hetland v. Bilstad*, 140 Iowa 411, 419. Or one that a farm is not wet. *Dennison v. Grove*, (N. J.) 19 Atl. 186. So of one that a furnace will heat a house leased. *Pryor v. Foster*, (N. Y.) 29 N. E. 123. False and material representations as to the quality of land may be actionable. *Mitchell v. Moore*, 24 Iowa 394. The seller has the right to exalt the value or quality of his own property to the highest point credulity will bear, provided his efforts stop at puffing or praise; but statements of value or of quality may be made with the purpose of having them accepted as of fact, and, if this is done and so relied on, they are to be treated as representations of fact. *Hetland v. Bilstad*, 140 Iowa 411, 415. It was error to strike these allegations.

2-a

Allegations were stricken that defendant planted 120 acres of corn which produced but 1,700 bushels, most of it a very poor quality and light and chaffy; that 50 acres put in wheat produced 400 bushels, 65 acres of oats, about 550 bushels, and 35 acres of meadow, about 35 tons of hay. Also, allegations that, if the land had been as represented, the same lands would have produced 6,000 bushels of corn, 800 to 1,000 bushels of wheat, and 2,600 bushels of oats; that this deficiency in crops was due to the poor quality of the farm, and defendant thereby damaged in a sum stated. We think the striking was justified. See *Dilly v. Paynsville Land Co.*, 173 Iowa 536.

2. LANDLORD AND
TENANT: leases:
fraudulently
induced leases:
measure of
damages:
pleadings.

2-b

A motion to strike certain allegations

3. EVIDENCE: parol was sustained, on the grounds that they as affecting writing: fraud- were sham, irrelevant and immaterial, and induced con- tract.

state no cause of action because they would tend to vary, alter and modify the terms of the written lease. The objections were not good. The allegations stricken were of fraudulent representations that induced the making of a lease. Such may be proved in parol, even though they contradict the written lease. The rule excluding evidence contradictory of a written instrument does not apply when fraud is the gravamen of the action or gist of the defense. *Humbert v. Larson*, 99 Iowa 275; 6 Encyc. of Ev. 24, 25.

III. The cause was tried on a complaint that the lessor fraudulently represented that the land was free from noxious weeds. The jury could find that there was a representation that the land was free from such weeds, except some cockleburrs on a small part thereof, and find that it was known to be false when made. Under the evidence, it could not find otherwise than that it was in fact false, and that practically all of the farm was full of noxious weeds to an extraordinary extent. The representation is neither "trade talk," mere puffing nor a mere expression of opinion, but, if false, an actionable representation. In so far as sustaining the motion to direct verdict rules otherwise, its sustaining was error.

IV. Another ground of the motion that

4. FRAUD: decep- was sustained asserts that defendant has tion constitut- ing fraud: duty failed to prove that plaintiff made any false to investigate: or fraudulent representations upon which inadequate op- defendant had any right to rely, because portunity: pre- venting exam- ination.

no attempt was made by plaintiff to defraud or prevent defendant from making his own independent investigation of the premises, and the affirmative and undis-

puted evidence shows that, if he had made investigation, either physical or by inquiries in the neighborhood, he could readily and easily have ascertained the true condition of the farm, and so the damages, if any, have arisen by his own negligence. It should not have been sustained.

The jury could find that lessee lived 20 miles from the farm, and was 14 miles from it when the lease was made. Under the evidence, it would be compelled to find that, at the time and for a month after lessee moved on the farm, it was covered with snow to a depth of 2 to 5 feet, and that, when the lease was made, lessor said there was no use for lessee to go and see the farm, because there was all the way from 2 to 5 feet of snow on it, and lessee couldn't see the farm if he went there. It is demonstrated, moreover, that this was the fact until after the lessee had been on the farm for some time. And the motion errs in stating that there is evidence that lessor asked lessee, prior to renting, to go and look it over. Lessee testifies that the representations induced him to enter into contract and to move upon the farm.

If the vendor dissuades the vendee from examining the property on the assurance that it will be a useless expense to do so, and such representations are relied on by the vendee, the representations of the vendor as to value may constitute such fraud as to subject him to liability in damages. *Mattauch v. Walsh*, 136 Iowa 225. And when he makes representations as to the character of the land which he offers to sell, and insists on the consummation of the contract within such time as not to allow defendant an opportunity to inspect the land, he is bound to know that defendant relies on his representations, and it is immaterial whether the representations were knowingly false, if they were false in fact. *Brett v. Van Auken*, 99 Iowa 553.

We think the court confused this with a case wherein

one examines a farm and finds it is not as represented, and yet goes upon and farms it without objection, and sues for damages caused by deceit. Then, he may not recover, because the deceit did him no injury. He suffers because he voluntarily chose to suffer by acting after he was no longer deceived. That is not this case. Plaintiff falsely represented the farm to defendant; told him he could not make efficient investigation. Defendant believed him, and could not, with any effort within reason, ascertain the truth until after he had changed his position. In such a case, he could rescind, but was not compelled to. At his election, he could sue for damages and recover the difference between the actual and the represented value of the farm in rental. *Humbert v. Larson*, 99 Iowa 275, at 281. He may make the claim by counterclaim when sued for rent. *Sisson v. Kaper*, 105 Iowa 599; *Herrin v. Libbey*, 36 Me. 350; *Dennison v. Grose*, (N. J.) 19 Atl. 186; *Barr v. Kimball*, (Neb.) 62 N. W. 196; *Peck v. Brewer*, 48 Ill. 54. This, though he has paid the rent in part. *Pryor v. Foster*, (N. Y.) 29 N. E. 123; *Reger v. Henry*, (Okla.) 150 Pac. 722. One who buys is not estopped to recover damages caused by showing the wrong tract of land, upon the theory of failure to exercise ordinary diligence, if the truth could have been learned only by employing a competent surveyor. *McGibbons v. Wilder*, 78 Iowa 531. In *Hale v. Philbrick*, 42 Iowa 81, *Carmichael v. Vandebur*, 50 Iowa 651, and *State v. McConkey*, 49 Iowa 499, we say that one may rely upon representations as to the ownership of property, its location and the like, though it is not shown that he instituted inquiry by consulting records or plats. In *Ladner v. Balsley*, 103 Iowa 674, the question of ordinary care was held to be for the jury, when the tenant testified that, before the leasing of a farm, he and the landlord's agent went to examine the farm, but that they found it too muddy to go over it, and so he relied on the agent's statements as to the number of

acres under cultivation. In *Dennison v. Grove*, (N. J.) 19 Atl. 186, an action for rent and defense of false representations inducing the lease, whether the representations of the lessor were fraudulent was held to be for the jury, where the representation was that the farm was not wet, whereas, though the surface appeared to be dry, it was wet and miry at the depth of a few inches and unfit for farming, though it appears that, before accepting the lease, the lessee personally examined the premises. While, in *Bell v. Byerson*, 11 Iowa 233, and *McGibbons v. Wilder*, 78 Iowa 531, we approve the rule stated in 5 Am. & Eng. Ency. of Law (1st Ed.), 340, that "It is the duty of every person in transacting business to use ordinary care and prudence. If false representations are made regarding matters of fact, and the means of knowledge is equally open to both parties, and then one party, instead of informing himself, sees fit to put himself in the hands of the other, whose interest it is to mislead him, the law will give him no remedy for his injury,"—we say, in the *McGibbons* case, that yet "A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn,"—and Kerr, *Fraud & Mistake*, 80, is cited in support. It was error to sustain this part of the motion to direct.

V. The contract was that \$4.50 an acre rent was to be paid for 205 acres, and half the crop for the rent of 115 acres. The sustained motion to direct verdict against defendant asserted: (1) That the damages attempted to be proved are not actionable because they are remote, indefinite and uncertain; (2) defendant "has not shown any standard" by which court or jury can measure or determine his alleged damages; (3) he has failed to prove any dam-

5. WITNESSES:
competency:
belated objection.

ages; and (4) the record shows affirmatively, and without conflict, that the land, as it was, was worth as much as the rental agreed to be paid.

We are at a loss to understand how the motion could have been sustained on these grounds. So far from appearing without conflict that the farm in its actual condition was worth all that is paid for rent, it appears without dispute that it was not worth so much. One witness on the point, Reyman, at first said he did not know what the reasonable rental value of this farm was, and that he couldn't give an estimate of it; but was allowed then to add, without objection, that, if it had not had any Russian thistles, sunflowers or cockleburrs on the north 40, it would probably have been worth \$4.50 an acre rent. He said later that he is acquainted with the reasonable rental value of farms to a certain extent. The defendant testified, without any objection, that the reasonable rental value of the farm in the condition it was actually in, was about \$1 an acre, and that, if it had been as represented, its value would have been \$5 or \$6 an acre. When the witness finished his testimony, there was no motion to strike. Thereafter, three witnesses testified for defendant, and he rested, and still no objection was made to the testimony on comparative value given by defendant as a witness. It was only as part of the motion to direct verdict that it was moved to strike his testimony, with claim that his cross-examination disclosed that he had no knowledge or information such as entitled him to express an opinion; that he knew nothing of rental value of lands in the neighborhood, knows of no similar farms rented in the neighborhood for that or previous years; and that, in giving this value, he was giving his own individual opinion. The objection came too late, even if the record sustained what it asserts, and it does not. The only shadow of ground for making the claim is that defend-

6. LANDLORD AND
TENANT: leases:
fraudulently in-
duced leases:
measure of
damages.

ant testified that he had great difficulty in giving an opinion as to what the rental value of the farm was as based on farms in the neighborhood generally, because he knew of no other farm that was so thickly covered with Russian thistles, cockleburs and sunflowers. Of course, this difference in rental value was a proper measure of damages. *Adair v. Bogle*, 20 Iowa 238.

VI. Before the trial was begun, but
 7. APPEAL AND RE- after the petition was filed, defendant filed
 BOR: jurisdiction notice of a motion, supported by affidavit, asking that
 tion: notice of appeal: recitals in abstract: presumption. property claimed to be exempt be discharged
 from the landlord's attachment that had
 been levied. The motion was overruled, and the ruling
 duly excepted to. To sustain the ruling, the appellee
 urges: First, that the notice of appeal does not give us
 jurisdiction to review this order; second, that the motion
 and affidavit were not sufficient proof to warrant sustain-
 ing the motion.

The notice of appeal set out in the abstract does not state what was appealed from, but does say that "plaintiff perfected an appeal to the Supreme Court of the state of Iowa," by duly serving the counsel who appeared for the plaintiff, and the clerk of the district court of the county in which the motion and the suit for rent and counterclaim thereto were at one time pending and determined. Few of our decisions, if any, give much light on whether such a state of the record brings up a collateral matter, and, in a sense, independent matter, disposed of in or in connection with a suit which goes to final judgment. And whether this record does that is the exact question. Where the notice is specific enough to limit the appeal to being "from the judgment," it is presumed that nothing but the final judgment and intermediate rulings and orders in the suit which culminates in such judgment are brought up. *Searles v. Luz*, 86 Iowa 61, at 62; *Geyer v. Douglass*, 85 Iowa 93,

at 96. On that reasoning, we held, in *Lesure Lbr. Co. v. Mutual Fire Ins. Co.*, 101 Iowa 514, at 516, that an interlocutory judgment on a plea of abatement, which did not affect the defense as far as same went to the merits, was not brought up by a notice of appeal "from the judgment in the above-entitled case," which notice was served more than six months after the interlocutory judgment was rendered. In a way, we grounded the dismissal in *Weiser v. Day Bros.*, 77 Iowa 25, at 26, upon the indefiniteness of the notice. There, the appeal was taken from "the decision" at a certain term, and we held that this could not be held to be an appeal from the final judgment, because the language of the notice does not so declare, nor bear an interpretation to that effect, and because, since, while there may be but one final judgment, there may be many decisions, it may not be said that all decisions have been appealed from. Wherefore, the notice should have indicated what decision was appealed from. This, too, is of little value here. *Augustine v. McDowell*, 120 Iowa 401, at 405, and *Dolan v. Midland B. F. Co.*, 126 Iowa 254, at 260, are more helpful, and yet scarcely decisive. In the first, the notice advised "that intervener in the above cause has appealed to the Supreme Court of the state of Iowa." We found that there were practically two judgments, one for possession of corn, and the other a dismissal of the petition of intervention, and held that this notice was specific enough to bring up both actions of the trial court. In the last, the abstract recited:

"Appellant gave notice of appeal to the Supreme Court to defendants and to the clerk of the district court of Lee County, Iowa, at Keokuk, in which court the case was heard, and secured the clerk his fees."

We held that, in the absence of setting out the notice in full, or an amendment asserting that no appeal was taken from any order or judgment of the court, we would sus-

tain the appeal against the objection, among others, that it could not be determined from what order or judgment an appeal had been taken. And we have held that the notice need not be set out in full. But what we have cannot be decided without a consideration of Section 4139, Code Supplement, 1913. That provides that a jurisdictional defect must be raised by specific, written objections. Here, none such were filed. Under the construction given this statute in *Sawyer v. Iowa Cons. Pro. Amend. Association*, 177 Iowa 218, in the absence of such objections as the statute requires, it is no longer material that the abstract show affirmatively that we have a specified controversy for review. The mere paucity of the recitals in the abstract are no longer of consequence. A notice of appeal having been duly served, we indulge the presumption, in the absence of such objections, that the record presents nothing but that which we have power to review. It is for the appellee to show affirmatively, and by amendment, that we may not review all or part of what the abstract presents. Some language is used in *Yockey v. Woodbury County*, 130 Iowa 412, that gives some color to this claim on part of appellee. But what this case decides is that, where the main judgment in an action is distinct from a judgment for costs, then, if the notice of appeal is from the main decree simply, this excludes a consideration of the judgment for costs. The appeal was "from the judgment of said district court entered on the 10th day of April, 1905, in favor of said plaintiff appellant, sustaining his objection to the assessment of a certain tax against his land." It is merely a case where that which is distinctly enumerated is held to exclude that which is not enumerated. We are of opinion that we must entertain the complaint lodged against the overruling of the motion.

6-a

R. ATTACHMENT:
dissolution:
motion: suffi-
ciency of
showing.

But it is urged that, though we do this,
the ruling below is justified on the merits.
The statute that governs is:

"A motion may be made to discharge
the attachment or any part thereof, at any time before
trial, for insufficiency of statement of cause thereof, or for
other cause making it apparent of record that the attach-
ment should not have issued, or should not have been levied
on all or on some part of the property held." Section 3929,
Code, 1897.

The case of *McLaren v. Hall*, 26 Iowa 297, at 300, is
the foundation case in dealing with this statute provision,
and it merely holds that the testimony should be clear and
entirely satisfactory; otherwise, the party should be left
to the ordinary means of proper action for testing the lia-
bility of the property levied upon to be seized under the
writ. *Cox v. Allen*, 91 Iowa 462, and *Union County Inv.
Co. v. Messia*, 152 Iowa 412, hold just that. None of these
attempt to say what is a sufficient making apparent of rec-
ord, nor what is necessary to make evidence so clear and
satisfactory as that the movent should not be remitted to
the ordinary form of action. The appellant proceeded by
filing motion supported by affidavit. We think he made
both his complaint and his proof "apparent of record." And
we perceive no good reason why the affidavit in this case,
contradicted by nothing, and clearly setting out what prop-
erty was claimed to be exempt, and the facts which in law
constitute its exemption, was not clear and satisfactory
proof. It is, therefore, our judgment that it was error to
overrule the motion.

The judgment and the order on the motion to discharge
must be reversed.—*Reversed and remanded.*

GAYNOR, C. J., LADD and EVANS, JJ., concur.

G. B. HADDOCK, Administrator, Appellant, v. M. R. MEAGHER, Trustee, et al., Appellees.

IN RE ESTATE OF BRIDGET J. MEAGHER.

EVIDENCE: Opinion Evidence—Time of Death. When a person
1 died is not the subject of opinion evidence.

DEATH: Evidence of Death—Absentee—Proceedings for Admin-
2 **istration.** An *ex parte* order for letters of administration on the estate of an *absentee* (Section 3307, Code Supplement, 1913), not being granted on any finding of the death of the *absentee*, is inadmissible, in another and subsequent proceeding, to prove death.

DEATH: Evidence of Death—Partition—Share of Absentee—Ad-
3 **judication as to Death.** An order turning over partitioned property to a duly appointed trustee to be held for an *absentee* does not work a constructive delivery to such *absentee* and an adjudication that he was not then dead, when the order and the proceeding relating thereto demonstrates that the interest of the *absentee* was treated as contingent (depending on whether he was then alive), and when the court at no time assumed to determine whether said *absentee* was alive or dead. See Section 4243, Code, 1897.

DEATH: Evidence of Death—Unexplained Absence—When Pre-
4 **sumption Arises.** The presumption of death, from the unexplained and continuous absence of a person for seven years, without knowledge of his whereabouts on the part of his family and other relatives, arises only at the *expiration* of said period. With the aid of facts and circumstances in addition to the *absence*, a *prima-facie* presumption of death at an earlier period may be established. Evidence reviewed, and held not to justify such earlier presumption.

Note: Whether the *absentee* died *prior* to the expiration of said seven-year period appears to be quite immaterial in this case, but reference to the arguments and briefs reveals the fact that it was treated as material in the lower court and on appeal, and the opinion is in response thereto. Reporter.

DEATH: Evidence of Death—Unexplained Absence—Presumption
5 —Statute in re Absentees—Effect. The seven-year period of continuous and unexplained absence of a person from his usual place of residence as a basis for the common-law presumption of death is not lengthened to ten years by the statute (Section 3307, Code Supplement, 1913,) relating to administration on the estates of absentees.

Appeal from Taylor District Court.—THOMAS L. MAXWELL,
Judge.

TUESDAY, JUNE 19, 1917.

ACTION to have a will construed, and another action against a trustee for money in his hands which was alleged to belong to plaintiff's decedent. The will was construed, the plaintiff's petition dismissed, and the moneys, after payment of a legacy, ordered to be distributed among certain devisees of testatrix. The plaintiff appeals.—*Affirmed.*

William M. Jackson, for appellant.

James R. Locke, for appellees.

LADD, J.—Bridget J. Meagher died testate, May 11, 1904. Her will was duly admitted to probate, and an administrator with will annexed duly appointed. After devising certain lots to her daughter, she directed that the executor should manage the remaining estate, saying:

"I direct that my property other than as above mentioned shall be kept as a whole until the youngest of my said children shall arrive at full age, and shall be managed by my said executor, and the rents, income and profits thereof, over and above the amounts specified in item one hereof, and such as may hereafter be provided, be kept invested in good, safe, income-producing property, until such time of final division, and that at such time the whole thereof shall be sold, or distributed in kind to my children then living, in equal shares, except as hereafter provided, and in

case any of my said children shall die before the time for such distribution, leaving children surviving, then the share which would have gone to the child so deceased shall descend to such surviving children, the same as though my said child had lived to come into possession thereof under the provisions of this my will. It is my will, however, that, in the case of my son William F., that if he shall not live to come into the possession of his share of my property when the same shall be ready for distribution as above provided, the sum of \$1,000, and no more, shall be paid to his child known as Iolene, if she be then living, and if she be not living, then the said sum so bequeathed to her shall remain a part of my estate, and be distributed to the survivors in equal shares as above mentioned."

Nine children survived her, the youngest being Veronica Meagher, who attained her majority on August 14, 1911. This, then, was the day the property was ready for distribution under the will, and the main issue is whether William F. Meagher died before or after that time. Shortly after that, the real estate left by testatrix was partitioned, and one ninth of the proceeds turned over to M. R. Meagher to be held for William F. Meagher, whose whereabouts were then unknown. This amounted to \$3,765.65, December 20, 1914. In that year, G. B. Haddock, on petition of Maud Meagher, wife of William, was appointed administrator of his estate, and, as the trustee did not pay over the funds in his hands on demand, Haddock, after qualifying, began this suit against said trustee and his bondsman. Subsequently, suit to construe the will was begun by Haddock as administrator, joined later by B. F. Ginn as guardian of the said wife of the absentee, William F. Meagher, and his only daughter, Iolene Meagher. These two actions were consolidated. Several matters may be disposed of before passing on the main issue.

I. Several witnesses, with respect to the facts as recited above, expressed the opinion that the absentee died soon after last heard of. These facts were not the subject of expert testimony, the witnesses merely drawing their inferences from the evidence, precisely as the court must have done. It amounted to submitting the controlling issue to persons having no special qualifications to decide—precisely what the court must have passed on in deciding the cause. As holding that this was not permissible, see *Erwin v. Fillenwarth*, 160 Iowa 210; *State v. Bennett*, 143 Iowa 214; *State v. McGruder*, 125 Iowa 741.

II. A petition by Maud Meagher, wife of the absentee, was filed in September, 1914, and in the same month, G. B. Haddock was appointed administrator of his estate, in pursuance of Section 3307 of the Code Supplement, 1913. The order of appointment recites that William F. Meagher died in 1914. This record is said to be some evidence of his death at the time recited. But the proceeding was *ex parte*, and whether William was dead was not in issue, and, therefore, neither the issue as to whether he was dead nor when he died was involved in the appointment of the administrator. *Werner v. Fraternal Bankers' Reserve Society*, 172 Iowa 504. The finding, then, cannot be regarded as an adjudication, and is without weight as evidence.

III. Suit to partition the real estate of testatrix, other than that left to her daughter Mary, was begun in August, 1911, by M. R. Meagher against the other heirs, service being had on William F. Meagher by publication. Decree of partition was entered in September following. That decree expressly found that, if William F. Meagher were living, he and each of the other

1. EVIDENCE: opinion evidence: time of death.

2. DEATH: evidence of death: absences: proceedings for administration.

3. DEATH: evidence of death: partition: share of absentee: adjudication as to death.

devisees were entitled to one ninth of the estate, and that, if he were then dead, the other devisees would each be entitled to one eighth of said estate. The referee appointed by this decree sold the land, and made final distribution of the proceeds thereof on May 9, 1912. Prior thereto, on April 24, 1912, on motion of the administrator, M. R. Meagher had been appointed trustee to receive funds belonging to the absentee, and he gave the bond, as such trustee, sued on. Several days later, the administrator was ordered to pay over to the clerk of the district court the sum of \$150, which had been garnished as the property of the absentee, to be held to abide further orders of the court, and in said order, the court expressly disclaimed deciding whether said absentee was dead or alive. The referee paid over to this trustee a ninth part of the proceeds of the real estate, and it is contended by appellant that in some way this transferred the constructive possession thereof to the absentee, and constituted an adjudication that he was living and entitled thereto. There are two answers to this contention:

(1) That the court did not undertake to determine in the partition proceedings, to whom the ninth share belonged, but treated the absentee's interest as contingent, reserving the same for subsequent determination, under Section 4243 of the Code, which provides that:

"Persons having apparent or contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested."

(2) The order appointing the trustee does not purport to pass on the ownership of the funds to be held by him, and this might not be done on an ex-parte application of the referee for such appointment. The real parties in interest were not parties to that proceeding, and therefore

not bound thereby. *Ivers, Admr., v. Ivers*, 61 Iowa 721, 722; *Barto v. Harrison*, 138 Iowa 413, at 417; *Brown v. Lambe*, 119 Iowa 404, at 405; *In re Estate of Morgan*, 125 Iowa 247; *Criley v. Cassel*, 144 Iowa 685, at 687; *Butler v. Secrist*, (Neb.) 138 N. W. 749, 750. There was no adjudication as to whom the funds in the hands of the trustee belonged to.

IV. When did William F. Meagher die? William F. Meagher left Lenox in 1902. He had been incorrigible in school, and had become addicted to the excessive use of intoxicating liquors, indulging in periodical sprees, during which he was violent and abused his wife. He had lived apart from her for several months. They had separated. His habits had not improved prior to his departure for the West. The evidence shows, however, that his relations with his mother and brothers and sisters were agreeable, and that he entertained genuine affection for his mother, his brother Thomas, and his sister Veronica. He kept up a correspondence with the family, writing once in 3 or 4 weeks until the latter part of May or fore part of June, 1904, in the meantime being in Colorado, Nevada and California. A telegram was received from him shortly before his mother's death, stating that he was very ill in a hospital at Reno, Nevada, and, after being notified of the death of his mother, he wrote (and this was the last letter ever received from him) concerning it, and that, if he got to feeling better, he planned to go into the mountains. This was not later than the fore part of June, 1904. Thereafter, every effort to locate him failed—search for him through inquiries of attorneys, advertisements in newspapers, and by personal efforts of a sister and a brother. The hospital had no record of his death. No trace of him was ever found. Had he lived until the time of trial, he would have been 42 years of age. He may be

4. DEATH: evidence of death: unexplained absence: when presumption arises.

alive, for only a presumption to the contrary authorizes the inference that he had departed this life. An accepted rule of evidence at common law was that, when a person has not been heard from for many years by those likely to hear, the presumption of the duration of life ceases at the end of seven years. This presumption is only that the person is then dead, not that he died at any particular time during that period. In the absence of anything indicating an earlier death, it cannot be found that death occurred prior to the lapse of the entire period. But the termination of life at an earlier date may be found from circumstance so indicating, as those "relating to the character, habits, condition, affections, attachments, prosperity and objects in life, which usually control the conduct of men, and are the motives of their actions." *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa 170; *Seeds v. Grand Lodge*, 93 Iowa 175; *Magness v. Modern Woodmen*, 146 Iowa 1; *Sherod v. Ewell*, 104 Iowa 253; *Carpenter v. Modern Woodmen*, 160 Iowa 602.

The presumption of life continues until overcome or displaced by a more potent presumption, i. e., that of death; but this latter presumption has no retroactive force. To warrant the inference that death occurred earlier than presumed, there must be proof of such facts and circumstances connected with the person whose life is the subject of inquiry as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period. *Cox v. Ellsworth*, 18 Neb. 664 (53 Am. R. 827); *Garden v. Garden*, 2 Houst. (Del.) 574; *Boyd v. New England M. L. Ins. Co.*, 34 La. Ann. 848; *Ryan v. Tudor*, 31 Kan. 366; *White v. Mann*, 26 Me. 361; *Hancock v. American Life Ins. Co.*, 62 Mo. 26; 2 Chamberlayne on Evidence, Sec. 1105 et seq. Judge Sanborn well states the rule in *Northwestern Mut. Life Ins. Co. v. Stevens*, 71 Fed. 253:

"The established presumption of fact from the disap-

pearance of an individual under ordinary circumstances, from whom his relatives and acquaintances have never afterwards heard, is that he continues to live for seven years after his disappearance. If this presumption was unaffected by countervailing facts, it would continue in the case at bar until August 22, 1899; but this presumption of fact is not conclusive. It may be overcome, not only when the testimony of those who saw the insured die or saw his body after his death is produced, or when he was last seen in a peril that might probably cause his death, but also when all the facts and circumstances of the case—the possible motives, if any, of the lost one to absent and conceal himself in view of approaching failure, disgrace, or punishment, his possible motives, if any, for returning to his family and occupation, his attachments to the members of his family and his friends, his interest and prospects in his business or occupation, and the extent of the unavailing search that has been made for him—are such that they would take the case out of the category of an ordinary disappearance, and would lead the unprejudiced minds of reasonable men, exercising their best judgment, guided by the established rule that life is presumed to continue seven years after an unexplained disappearance, to the conviction that death had intervened at an earlier date."

The evidence in this case is meager. The absentee's social relations were not such as to impel his return to Lenox. His wife had left him. His habits had been such as to require interference by the local peace officers. His course of life among his neighbors and his relatives, and with his wife, had not been such as were likely to induce him to return, and, in leaving, he is not shown to have expressed any such purpose. He was aware that his mother was dead, and his attachment to brothers and sisters had not been strong enough to restrain him from wandering. Though he wrote about being ill at the hospital, no record

thereof could be found, and no trace of him at Reno could be discovered. If he went into the mountains, no inference of an earlier death than presumed is to be drawn therefrom. Though he must have known that his mother had property, there was no showing that he was aware of how it was disposed of in the will, and, if he were, the delay of over seven years before he might enjoy his share would not be likely to appeal to a man of his character. The circumstance that, in the two years since leaving home, he had wandered in three states tends to explain the failure of the search made, and warrants the inference that he might have continued going from place to place, and this is strengthened by the circumstance that no trace of him or his remains could be found at Reno. In his last letter, he refers to his sickness only with reference to his plan if he should get better. He was not shown to have had any organic disease, and no ground appears for inferring that his illness proved fatal, other than his omitting to write. We are of opinion that the evidence was not sufficient to justify a finding that he departed this life earlier than presumed by law.

V. Appellant contends that, under

6. **DEATH:** evi-
dence of death:
unexplained ab-
sence; pre-
sumption: stat-
ute in re
absentees: ef-
fect.

Section 3307 of the Code Supplement, 1913, death is not to be presumed in a case like this in seven years, but only on the unexplained absence of ten years. That section reads:

"When a resident of this state owning property therein, or any person who may have been a resident of this state, has acquired or may hereafter acquire property or property rights within the state, absents himself from his usual place of residence and conceals his whereabouts from his family without known cause for a period of seven years or any such person who has gone to parts unknown for a period of ten years, a petition may be filed in the district court of any county where such property or a part thereof is sit-

uated, setting forth such facts, by any person entitled to administer upon such absentee's estate if he was known to be dead, and setting forth the names of the persons who would be the legal heirs of the absentee if he were dead, so far as known, and praying for the issuance of letters of administration upon such estate; thereupon, said court shall prescribe a notice addressed to such absentee and heirs named, and order the same to be published in a newspaper published in said county to be designated by the court, once each week for eight consecutive weeks, and which shall be served personally upon all the heirs residing within the state in the manner, and for the length of time as is required for the service of original notices, proof of the publication and service of which in manner and for the time ordered shall, at the expiration of said period be filed with said petition, and thereupon if such absentee fails to appear, the court shall hear the proof presented, and if satisfied of the truth of the facts set forth in the petition concerning the absentee, shall order letters of administration upon the estate of such absentee to issue as though he were known to be dead. The court shall also hear proof and determine who the legal heirs of such absentee are and their respective interests in such estate."

Two classes are contemplated by this statute: (1) One coming within the description of him who "absents himself from his usual place of residence and conceals his whereabouts from his family without known cause for a period of seven years;" and (2) one coming within the description of him who "has gone to parts unknown for a period of ten years." Plainly enough, the absentee is in the first class. Though he may have departed without purpose of returning, he kept up correspondence with his family until shortly after his mother's death, and, though his wife and daughter and a brother and sister continued to live at Lenox, none knew of his whereabouts. He then absented

himself from his usual place of residence in this state, and he thereafter concealed himself from his family without known cause. But when any person, a resident, or who may have been a resident, without more, even though there were none who would be likely to hear from him or know his whereabouts, "has gone to parts unknown for a period of ten years," then the presumption of death so far arises that an administrator may be appointed for property had or by him acquired in this state. In such a case, the presumption of death might not arise under the common-law rule of evidence, and this portion of the statute was evidently enacted in order to conserve any property for those who would be entitled thereto in event of the absentee's death. The section does not purport to deal with the rule of evidence fixing the period of absence within which death might be presumed, but merely the conditions on which administration will be granted and distribution ordered. As William F. Meagher departed this life some months before the estate was ready for distribution, the court rightly decreed that his daughter, Iolene, was entitled to \$1,000 only, and that the remainder of the estate should be distributed to the other children of testatrix, and to the heirs of any who are dead.—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

J. W. McCANN, Appellant, v. E. W. CLARK et al., Appellees
(and one other case).

FRAUD: Ratification by Principal—Evidence. Evidence reviewed, and held insufficient to show ratification by defendant of the fraudulent acts of an assumed agent.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

TUESDAY, JUNE 19, 1917.

ACTION for damages for fraud. It is averred that the alleged fraud was actually perpetrated by the defendants Barnes Brothers and by one Northup, as purported agents of the defendant Clark; that the defendant Clark, as the purported principal, ratified the acts of the alleged agents by accepting the benefits of the contract fraudulently obtained by such agents. At the close of all the evidence, there was a directed verdict for the defendant Clark and for the defendants Barnes Brothers. Northup had originally been made a party defendant, but the plaintiff voluntarily dismissed the action as to him before trial. This case was before us on a former appeal of the plaintiff's and was reversed and remanded. See 166 Iowa 705. Pursuant to such remand, the cause was again tried, with the result here indicated. Our first impressions of the present record were that our former holding would necessitate another reversal and remand of the case. An examination of this record, however, discloses a materially different state of the evidence from that contained in the former record, and requires us to pass upon the merits of this appeal regardless of the former reversal.—*Affirmed.*

A. A. McGarry, for appellant.

F. H. Helsell, J. W. White and Hunn & Jones, for appellees.

EVANS, J.—1. On and before April 12,

FRAUD: ratifica-
tion by princi-
pal: evidence.

1911, the plaintiff was the owner of a general store in the little town of Cummings, in Warren County. Defendants Barnes Brothers were real estate agents in Des Moines. Former defendant Northup was also a real estate agent in Des Moines. Defendant E. W. Clark was a resident of Sioux Rapids. Plaintiff McCann was embarrassed with debts, and was anxious to sell his stock of goods. This desire was shared by the Bank of Cummings, a creditor, which held an unrecorded mortgage for \$1,300 against such stock.

Cassady was the vice-president of this bank, and Glynn, its cashier. On April 12, 1911, Cassady and McCann came to the office of Barnes Brothers at Des Moines and, in effect, listed the stock of goods with Barnes Brothers for sale or trade. A commission of \$200 had previously been agreed on between McCann and Cassady, and it was then agreed with the Barnes Brothers that such commission should be split between them and Cassady. Two days later, Barnes Brothers found a prospective customer in Northup, who claimed to have the agency for a sale or trade of 80 acres, located on the Skunk River in Jasper County, and belonging to the defendant Clark. On April 16th, Northup and Clyde Barnes and plaintiff McCann went upon the land for examination. The land being satisfactory to McCann, the parties met at the Cummings Bank on April 17th, and a contract of exchange of the land and the stock of goods was entered into in the names of Clark and McCann. Clark's name was signed by Northup as a purported agent. At the same time, a bill of sale was executed by McCann to Clark, and delivered either to Barnes or to Northup. This bill of sale warranted the title. After the execution and delivery of these papers, Cassady disclosed the fact that the bank held a \$1,300 mortgage on the stock. He thereupon delivered the mortgage to Barnes to be delivered to Clark when Clark executed a deed of the land. The bank retained the \$1,300 note. At the same time, McCann assigned to the Cummings Bank all his interest in the land contract above referred to, and directed that the deed of the land pursuant thereto should be made to Glynn, the cashier. A formal transfer of possession of the stock of goods was made to Northup in this manner: McCann delivered the keys to Northup, and Northup delivered the same to Miss Mizner, the clerk who had been in charge of the store for McCann during his entire ownership thereof. These formalities were observed because of fear of interference by

creditors, several of whom were wholesale houses. The bill of sale was put into the hands of Barnes, to be delivered to Clark when a deed should be received from Clark. But Cassady requested that, for the protection of all parties, the bill of sale should be recorded at once. This was agreed to by Northup, and the same was accordingly done. Northup had in fact no authority to sign Clark's name to any contract. He had no authority to sell or trade the land in question. He had ascertained from Clark that the land was for sale or trade, and that Clark would accept a stock of goods in trade if he was satisfied therewith. The utmost that could be implied from the foregoing would be that Northup had authority to find a customer for Clark. Clark came to Des Moines on April 21st, and then learned for the first time of the proposed trade. In his conversation with Northup on the subject, it developed that Northup was mistaken in his conception of the boundary lines of this eighty. There were no improvements on the land, and its boundaries were not readily ascertainable. There was an old fence extending eastward from the highway on the west. At the time of the visit of the parties to the land, this fence was taken to be the north line of the land, described as the north half of the northwest quarter of Section 24. In truth, this fence was located 10 or 15 rods farther south than the north line. In looking over the land, therefore, and estimating its extension toward the south from such fence, their estimates took in land adjoining on the south, which was deemed to be better land. This mistake having come to light in the conversation at Des Moines between Northup and Clark and the Barnes Brothers, Clark refused to have anything further to do with the matter until the mistake should be brought to the attention of McCann. The parties went to Cummings and met McCann and Cassady at the bank, and there advised them of the mistake. At the same time, Clark expressed

his willingness to deed the land described in the contract and to accept the stock of goods in payment therefor, if McCann so desired after being informed of the mistaken boundary. It is undisputed that both McCann and Cassady elected not to accept Clark's land and to rescind the Northup contract. Cassady testified as follows:

"Mr. Clark said he was willing to give him the bill of sale back for the stock or fix it any way satisfactory, and I said I thought, under the circumstances, that Mr. McCann had better take the bill of sale back and call the deal off. Mr. Clark gave me the bill of sale he had then. I said that before and I say it now."

In every legal sense, this ended Clark's connection with the transaction. The only pretense of dispute with Clark arose afterwards, as to the form in which his apparent interest under the bill of sale should be relinquished. Clark expressed himself as ready and willing to sign any paper deemed reasonably necessary to that end. Cassady prepared for his signature a formal bill of sale, with covenants of warranty. Clark asked that a provision should be inserted to the effect that such bill of sale was made by him in cancellation of the previous bill of sale. Cassady testified at this point as follows:

"He said he would make a bill of sale back to the man that he got it from, and that he wanted to put in the bill of sale that this was made to nullify a bill of sale that had been made to him. Mr. Clark did not sign the bill of sale after I made it out. Exhibit 3 is the bill of sale that was written out by my stenographer in that bank. I did not put that in the bill of sale, that 'this is to nullify a certain bill of sale given by Mr. McCann to E. W. Clark, dated April 17, 1911.'"

Cassady was not willing to insert this clause because of its possible effect upon creditors. Naturally, Clark was not willing to become involved in any manner with Mc-

Cann's creditors. Cassady then proposed that Clark execute a bill of sale in blank as to the grantee and leave the same in the hands of Barnes for future use. Clark was not willing to do this. Such a course would necessarily involve him in liability to an innocent grantee, whose name might thereafter be inserted. The final outcome of this negotiation was that Clark took the bill of sale prepared by Cassady and inserted therein the following: "This bill of sale is to nullify a certain bill of sale between J. W. McCann and E. W. Clark, dated April the 17th, 1911;" and on the same day, executed the same in such form, duly acknowledged, and left it with Barnes for the plaintiff, and returned to his home. Clark never assumed any dominion over the property and never received a dollar of benefit from the transaction in any way. He was clearly right in his insistence that the paper to be executed by him should show openly the purpose for which it was executed. He was clearly right, also, in refusing to execute a bill of sale to a blank grantee.

This action is for damages predicated upon alleged fraud and deceit upon the part of Northup and Barnes in representing to plaintiff the subject matter of the contract. Confessedly, Clark did not participate in the original fraud. The petition connects Clark therewith by the following allegations:

"And that plaintiff, acting thereon and relying on the statements and inducements aforesaid and representations aforesaid, delivered, transferred and conveyed to defendants and to E. W. Clark the certain stock of goods aforesaid, and the bill of sale thereof was taken by said Clark and placed of record in Warren County, Iowa, and said Clark took possession of and managed and controls said stock of goods and owns same, thereby ratifying, approving and confirming all acts and transactions of said Barnes Brothers and said Northup, and still refusing to deed, con-

vey and transfer to said plaintiff the said lands so shown or any lands or real estate whatever; that by these means, acts and transactions aforesaid, the said defendants have defrauded, cheated, swindled the said plaintiff out of his stock of goods aforesaid."

If Northup was guilty of any fraud, then the conduct of Clark was the very reverse of a ratification. The evidence, therefore, wholly fails to sustain the petition in this respect, in that it fails to show any ratification by Clark of the alleged fraud or mistake of his alleged agents. The allegation that Clark received the benefits of the contract is wholly unsupported in the evidence. The fact is that the stock of goods remained in the same building, the possession of which was in McCann under a lease from his landlord until it was levied upon and sold under process against McCann in favor of his creditors. It was thus all subjected to the payment of his debts. We think it clear that the evidence wholly fails to sustain the petition in its declaration of liability on the part of Clark.

2. Did the evidence warrant a finding of liability against the Barnes Brothers? The plaintiff assumes that the Barnes Brothers were acting as agents for Clark. Even the evidence on behalf of plaintiff is wholly to the contrary. They were confessedly employed by McCann and Cassady. The question, however, whose agents they were is not controlling, under the allegations of the petition. If they were guilty of deceiving the plaintiff, their liability surely could not be minified because they were acting as his own agents. Does the evidence show any fraud or deceit on their part? We think it does not. The only testimony on the subject is that Clyde Barnes, who went with McCann and Northup, had never been upon the land before, and knew nothing about its location except what he ascertained from Northup. Northup had been upon the premises before. We have no occasion to consider whether

the evidence would have been sufficient to go to the jury as to the liability of Northup. The plaintiff himself dismissed as to him. We reach the conclusion that the trial court properly directed the verdict for all the defendants.

3. The Cummings Bank brought action against the same defendants, predicated upon the same state of facts, and upon the further fact that it was a mortgagee of the stock of goods. This case was, by stipulation, tried in the district court upon the same evidence as in the case of *McCann*. The trial court directed a verdict therein for the defendants upon the same grounds as in the *McCann* case. An appeal being taken therein, both appeals were submitted together. Our foregoing conclusions in the *McCann* case are decisive also of the appeal in the second case. The judgments below will be affirmed in both appeals.—*Affirmed.*

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

BLANCHE McWILLIAMS, Appellant, v. M. M. ROBERTSON
et al., Appellees.

PROCESS: Original Notice—Service—Overcoming Return. The

1 strong presumption of verity which attaches to a return by the sheriff of service of an original notice is only overcome by clear and satisfactory evidence to the contrary. Evidence reviewed, and held insufficient to set aside a default judgment on the plea that the return of service was false.

PROCESS: Original Notice—Service—Non-Essential Recitals. A

2 return of service of an original notice which recites service on the defendant by name, by serving a member of defendant's family, need not again repeat the name of defendant in the recital that defendant was "not found in the county of his residence."

PROCESS: Original Notice—Service—Verity—Evidence. The fol-

3 lowing facts are, in some degree, corroborative of the truthfulness of a return of service of an original notice:

1. The positive testimony of the officer that he never made a false return.

2. That the notice and copy were delivered to the officer with the addresses of the defendants indorsed thereon, and that the officer went to that address to make service.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

TUESDAY, JUNE 19, 1917.

MOTION to vacate a default judgment, on the alleged ground that the defendants in the principal action were never served with notice, and that the return of service made by the sheriff is false. There is a resistance, which denied the allegations of the motion and relied upon the return of service made by the deputy sheriff. Motion was sustained, the judgment vacated; hence this appeal.—*Reversed.*

Royal & Royal, for appellant.

Hunn & Jones, for appellees.

SALINGER, J.—I. Appellant filed a petition in said district court on December 24, 1914, seeking judgment against appellees on a certain promissory note. A judgment on default for want of appearance was entered upon the return of service made by the sheriff, made through C. M. Miller, deputy, certifying that he personally served the same on the within named Cora E. Robertson; also that he served same on the within named M. M. Robertson by leaving a copy at the house of M. M. Robertson in Des Moines Township, Polk County, Iowa, the same being his usual place of residence, with Mrs. M. M. Robertson, a member of his family over 14 years of age, and reciting further that said _____ was not found in Polk County, Iowa, after diligent search. The trial court set aside the judgment, thus holding that service of notice was not made.

1. Process: original notice: service: over-coming return.

2. Process: original notice: service: non-essential recitals.

It will be noticed that, as to the husband, while the return recites substituted service on him by name, the name is not repeated in the further recital of not finding him in the county after diligent search. We are not inclined to give much weight to this failure to repeat. There is no statute that requires naming the person again in the recital of failure to find. As to this being nonessential and not required, *Ringstad v. Hanson*, 150 Iowa 324, has some applicability, especially as there is no question that the return as a whole can be construed to refer to none other than the one named in the first part of the same.

There is a confusion which, to some extent, adds strength to the claim that no service was made. The return certifies that service on the wife was made on the 23d of December, and the substituted service made by serving the wife on the 24th of December. The officer has no personal recollection on whether he made service twice, and on the 23d and 24th. He admits that, ordinarily, when he serves a notice on husband and wife, he serves both at the same time, and, while he will not be positive, he thinks he did make both services at the same time. He does remember he made two trips, but will not say whether he served the woman one day and returned and served her again, and admits that, notwithstanding the return, he may have made both services on one day. We find the probabilities to be that he went there at some time during December 23d, when no one was at home. There was no one at home between two and five o'clock in the afternoon of December 23d. Had the officer called then, he had occasion for a second call. As he says he made the service in the evening, after the lamps were lighted, if that was the evening of the 24th, we have no occasion to go into where the Robertsons were on that day before evening of the day. On that evening, the husband arrived home about 7:30, and after that

time, all three were at home all evening. Mrs. Robertson says they had a Christmas tree, and were not disturbed. In so far as there is a claim that the notice was served on her that evening and at the door, and after she identified herself, her testimony conflicts with such claim. But she is not corroborated, and, as we think, weakened. It is very significant that the daughter says no one came there during the *day* of the 24th and read or left any paper with her mother. This, of course, does not corroborate Mrs. Robertson in the claim that no paper was served that evening, and, on the contrary, tends to weaken her testimony; because, if it were the fact, the daughter would not have limited herself to denial of service in the daytime of December 24th, but would at least have added her own to the statement of her mother that no one disturbed them on that evening. It is even more significant that the husband, who was at home that evening, is not made a witness. It is not even made clear that the daughter could affirm or deny service. If the service was made at the door on calling out the mother, the daughter might know nothing about it, because she admits that she does not always go to the door when one calls to see her mother, and would not always know when there was a knock or ring, or what went on with one who went to the door in response.

Though the officer says he does not now
 8. PROCESS: orig- recognize the wife, he does say that he
 inal notice:
 service: verity: asked for her by name; that a woman came
 evidence.
 to the door and said she was the named
 person; that he served that person, and served her but
 once; but that, as to details of the circumstances of mak-
 ing service, he must rely on the return. He adds that
 he is positive he never made a return unless he had made
 the service certified to. In a way, *Shchan v. Stuart*, 117
 Iowa 207, holds that this deduction furnishes a corroborat-
 ive circumstance for the claim of service.

It is quite natural that an officer in a city like Des Moines finds it difficult to give a clear account, based upon personal recollection, of the details of serving all original notices served by him. There is no reason why Mr. Robertson and the daughter should not be able to speak clearly as to whether or not one particular notice was served on the mother of the household, on a Christmas Eve, when the family was celebrating with a tree.

The attorney for the plaintiff delivered to the sheriff notices and copies for the Robertsons and endorsed their address upon the copies; the sheriff went to that address. This, according to *Wyland v. Frost*, 75 Iowa 209, is some corroboration for the claim that service was made.

1-a

"The truth of the return is proven by the signature of the sheriff or his deputy, and the court shall take judicial notice thereof." Code Sec. 3524.

It is elementary that public policy requires clear and satisfactory proof, before a judgment will be set aside against the return of the sheriff that notice of suit was duly served. While in none of them the facts are exactly alike, or yet like the facts in the instant case, the following of our decisions, despite differences as to facts, establish such a rule of evidence. See *Hoitt v. Skinner*, 99 Iowa 360; *Shehan v. Stuart*, 117 Iowa 207; *Ketchum v. White*, 72 Iowa 193; *Mosher v. McDonald*, 128 Iowa 68, at 70; *Miller v. Minneapolis & St. L. R. Co.*, 119 Iowa 41; *Galvin v. Dailley*, 109 Iowa 332; *Farnsley v. Stillwell*, 107 Iowa 631; *Wyland v. Frost*, 75 Iowa 209; *Bowden v. Hadley*, 138 Iowa 711.

We are of the opinion that an application of this rule, and a fair analysis of the testimony pro and con, *aliunde* the return, make it clear that the evidence was insufficient

to warrant setting aside the judgment of appellant. Wherefore, that action must be set aside and—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

MARY MEYERS, Appellant, v. JOSEPH WONICK et al., Appellees.

HIGHWAYS: Establishment—Boundaries—Evidence. Evidence as to the true line of a highway reviewed, and held insufficient to justify the decree of the trial court.

Appeal from Johnson District Court.—R. P. HOWELL, Judge.

TUESDAY, JUNE 19, 1917.

CONTROVERSY over location of a highway. On hearing, the petition was dismissed. Plaintiff appeals.—*Reversed*.

Bailey & Murphy, for appellant.

Otto & Otto, for appellees.

LADD, J.—Plaintiff owns Lot 3 of Section 5 in Township 80 North, Range 6 West of the 5th P. M., as surveyed by the government, and defendants Frank and William Lovetinsky, Lot 1 of Section 8 to the south. Between these tracts is what is known as the Sugar Bottom Road. Owing to a controversy as to whether defendants were encroaching on this road with fences, they called out the other defendants as trustees of Newport Township, to fix the lines where fences should be located, and had a survey made by Ott, to ascertain the section line. The trustees ordered the fences removed to a line 20 feet each way from the line as established by this surveyor. The only issue is whether the section line was as staked and platted by this surveyor, though considerable evidence was adduced tending to show that the fences as now existing were in the highway. Holt

HIGHWAYS: establishment: boundaries: evidence.

surveyed the line at the instance of plaintiff. The highway record describes the road as "commencing at a point on the east bank of the Iowa River, where the section line dividing Sections 5 and 8, Township 80, Range 6 West, crosses said river, from thence on said section line west to northeast corner of Section 8 aforesaid, etc., said road being 40 feet wide." The northeast corner of Section 8 is not in dispute, and Ott testified:

"As I went along west, I found a stone at the half mile, three-quarters and mile, half-section line, three-quarters and mile stone. The half-mile stone is located 1,122 feet south of the true line. I determined that by running a line from the northeast corner of Section 8 clear across the section and back by the rock, and I found that rock too far south by 17 links, or 11.22 feet. The quarter-section stone is imbedded on the west slope of a hillside with heavy timber surrounding. This is the one I referred to. That is called the quarter stone, but it is the half-section stone. The mile stone is out in the open and clear ground. After I made the survey of the center of the road, I made the plat showing the location of the fences on the north and south side of the road in question. By referring to the plat, the Myers fence at the west end near the river about the edge of vegetation is 14.72 feet in the road. I took 5 measurements. At the starting point east end, the Myers fence is 2.3 feet in the road. Down near Mr. Myers' gate, he was 4 feet in the road. The next angle, the same distance. The last angle, 8.12 feet, and down near the river, as I stated before. The fence there turns very abruptly into the highway. The fence was all smashed down and drift wood piled on it. I think at a former time I recognized where the fence had been moved, but not this last time. I made a survey relative to that Sugar Bottom Road three times, and in making the survey, I followed the field notes as recorded in the auditor's office."

Cross-examination.

"In order to ascertain the true location of the section line between those portions of Sections 5 and 8 which lie east of the Iowa River, I ran a line from a stone on the east side of those two sections to a stone which I believed to be on the west side of those two sections. I believed the stone I found on the west line of those sections was at the northwest corner of Section 8. * * * I assumed, yes, sir; but the assumption was based on this by it lining up as it did with the other stones."

As the land had been cleared of timber, he did not look for bearing trees or their stumps, nor did he dig for marking stone in the vicinity. He—

"Saw it was useless to attempt to find anything to identify it. * * * I found the survey that had been made there some years previous, and I took up the line or stakes and ran them from the northeast corner of Section 8 to the center. I traced those stakes and took up this line and just continued that on as the random line. Then I corrected back and located the true line. * * * I reached the conclusion that the true line between Sections 5 and 8, as indicated by this plat, was reached by running a straight line due east and west between this stone on the west side of Sections 5 and 8 and the stone on the east side of Sections 5 and 8. This stone at the east side of Sections 5 and 8 is the stone included in the circle on the plat that is marked 4, 5, 8 and 9. The little portion of the survey running east of the circle has no bearing upon the matter at all. * * * Q. You also found a stone, did you, the quarter quarter section stone on the west of that section stone? A. Yes, sir. Q. Now, then, does your plat correctly indicate the location of that quarter quarter section stone? A. Yes, sir, that is its relation to the true line. Q. Your plat shows that that isn't right in that line, it seems to

be a little north? A. It is ten links north of it. I could readily see why that situation exists there, for the reason that the rock was planted on the north side of a ditch and it has been washed in and evidently someone has picked it up and set it on the bank."

Plainly enough, the stone found near the northwest corner of Section 8 was in no manner identified as that marking the corner. From the circumstance that it was about the necessary distance from the stone at the northeast corner, the witness inferred that it might be a stone set by the government. But this was merely a guess concerning a matter which might have been ascertained with some degree of certainty by running lines to the north and south to known corners. Again, the surveyor infers, without the slightest evidence on which to base an inference, that someone has moved the stone marking the quarter quarter corner. What he suggests may have happened, but it is unnecessary to speculate thereon in the absence of evidence. Holt testified to having examined the certified copy of the government field notes and plats in the county auditor's office; that he next found the principal object of his search:

"A stone, which marks the northeast corner of Section 8, and a stone which marks the quarter-section corner of the north line of Section 8. The next thing I did was to establish first by use of a random line then running to the random line a true line to establish a straight line between the stone which marks the northeast corner of Section 8 and the stone which marks the quarter-section corner on the north line of Section 8. The first line I run was of necessity a random line merely as a means of getting a true line between the two stones. I did finally locate a straight line between the two stones I have mentioned, as the fences were not, of course, straight lines, but the center of the highway, as near as could be determined by a slightly irregular fence

line, coincided with the line I ran. I made the survey in early part of May, 1915. The highway in controversy begins on the east bank of the Iowa River. This quarter-section corner I spoke of is some little distance west of the river. The stone at northeast corner of Section 8 is about 1,900 feet east of the river bank."

The witness then described measurements showing that both landowners had constructed their fences in the highway, and proceeded:

"I have since made a little further examination to convince myself that the stones between which I ran the line were true section corner and quarter corner. * * * I made a search for bearing trees as given by the original notes of the government survey. At the quarter section corner, I found the remains of a stump, which is evidently, or was evidently, the government bearing tree, one of the government trees at the quarter-section line. The bearing tree was an oak a certain distance in a certain direction from the stone at the quarter corner. I found there at that point the rotted and covered-over stump of a tree. Q. Were there any other bearing trees given at that point? A. In the original notes, an ironwood tree was mentioned. The ironwood tree itself could not be found. There were, however, several small ironwood saplings, from the size of a broomstick up to three inches, growing right around where this original ironwood tree had been."

He observed no other ironwood trees in the vicinity.

"I know that was the quarter section stone by the bearing tree, by evidence of its distance from the northeast corner, by evidence of adjoining landowners, and in a general way by the appearance of its location and in respect to the fence line. Q. What adjoining owner did you talk with? A. Particularly with Mr. Alt, who lives across the river from the road."

Both surveyors speak of the stone as marking the quar-

ter corner, and the evidence of Holt tends strongly to identify it as that originally planted as the quarter corner in the government survey. The line from this stone to the stone at the northeast corner of Section 8 corresponds with the fencing of the highway, and the court should have decreed that said line was the section line and in the center of Sugar Bottom Road, and that the boundary lines of said road were 20 feet each way from said center, and that the plaintiff and defendants Lovetinsky should remove their fences out to these lines. See *Quinn v. Baage*, 138 Iowa 426.

The costs in the district court will be equally divided between plaintiff and the Lovetinskys, and in this court will be taxed against the latter.—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

W. B. MURPHY, Appellant, v. JAMES WILLIAMSON, Appellee.

MASTER AND SERVANT: The Relation—Contract Creating—Im-

1 **plied Obligations.** One who contracts to furnish a home to another and his family impliedly agrees to treat such other and all members of the family with reasonable kindness and consideration. Evidence reviewed, and held to establish such harsh and inconsiderate treatment as to justify the other party to the contract in abandoning the same.

CONTRACTS: Construction—Entire or Severable Contracts. It is
2 persuasive that a contract is *non-severable* when the value of the different elements of benefit accruing thereunder cannot be separately determined with any fair degree of accuracy.

PRINCIPLE APPLIED: An employee contracted to furnish for 10 years, on the employer's farm, the services of himself, wife and minor son. The employer, in return, agreed to compensate the employee as follows:

1. To pay \$20 at the end of each month.
2. To pay, at the end of said 10 years, a sum equal to \$20 per month, with 4% interest on such deferred sums.
3. To pay, at the end of said 10 years, \$500 in addition to the above.

4. To furnish the entire family with a home and to pay for all living expenses except for clothing.

5. To furnish the said minor son with certain school advantages.

Held, the contract was non-severable.

MASTER AND SERVANT: Services and Compensation—Non-Severable Contract—Breach—Measure of Damages. A breach by a master of a non-severable contract of employment arms the servant with the right to recover the *reasonable value* of the services already performed, irrespective of the compensation provided by the breached contract.

PRINCIPLE APPLIED: See No. 2.

APPEAL AND ERROR: Review—Parties Entitled to Allege Error
4 —**Pleadings—Belated Objections.** A party may not face an indefinite and ambiguous pleading in the trial court, make no objection thereto, permit the trial court to place an allowable construction thereon, and, on appeal, for the first time, raise an objection of insufficiency.

MASTER AND SERVANT: Compensation—Contract Providing for
5 **Compensation—Quantum Meruit—Pleading.** An allegation that services for which recovery is sought were rendered under a contract *which specified the compensation receivable*, does not necessarily exclude evidence of the reasonable value of the services. So held where the services were rendered under a non-severable contract wrongfully breached by the master.

Appeal from Iowa District Court.—R. P. HOWELL, Judge.

TUESDAY, JUNE 19, 1917.

ACTION for damages for breach of contract. The defendant denied the breach on his part, and counterclaimed against the plaintiff for damages for breach on his part of the same contract. There was a verdict for the defendant on the counterclaim, and the plaintiff appeals.—*Affirmed.*

W. E. Wallace, for appellant.

Popham & Havner, for appellee.

EVANS, J.—Plaintiff's petition was in two counts. The first count declared upon a promissory note, which was admitted by the defendant in his answer. Plaintiff's second count pleaded a written contract,

1. **MASTER AND SERVANT.** the relation: contract creating: implied obligations.

whereby the plaintiff contracted for the services of the defendant and of his wife and son for a period of 10 years; alleged that the defendant, after rendering services thereunder for a period of $9\frac{2}{3}$ months, breached and abandoned the same, and that the plaintiff was thereby damaged in the sum of \$1,100. The defendant admitted the execution of the contract; denied breach thereof on his part; and averred that the plaintiff himself breached the same by conduct rendering its performance impossible. The issue of fact towards which the evidence was principally directed was whether the conduct of the plaintiff was such, during the period of partial performance of this contract, as to justify its abandonment by the defendant.

The contract was entered into on February 15, 1913. Under its provisions, the defendant Williamson and his wife and son were to work for the plaintiff Murphy at his home and upon his farm for a period of 10 years. Murphy undertook on his part to pay a compensation of \$20 per month at the end of each month, and the further sum of \$20 per month at the expiration of the 10-year period, with 4 per cent interest on deferred payments, and an additional lump sum of \$500 at the expiration of such 10-year period. He further agreed that the son, then a boy 11 years of age, should have certain school privileges, and that he would provide a home for the family, and would pay all their living expenses except for clothing. The parties operated under this contract from February 15th to the close of the corn husking season, December 5, 1913, on which date Williamson and his family left. The principal complaint of Williamson against Murphy was that of harsh and unwarranted treatment of the boy.

On the theory that Williamson breached the contract, the plaintiff claimed, as his measure of damage, the difference between the contract price and the market value of the future service. In support of such measure of damage,

he introduced testimony to the effect that such future service would have been worth from \$45 to \$55 per month. On such basis, he claimed damages to the extent of \$1,100.

On the other hand, on the theory that Murphy breached the contract, the defendant Williamson elected and claimed to recover as on *quantum meruit* the value of the services rendered by him under the contract. He also introduced evidence to the effect that the services of himself and wife were worth approximately the same amount as was shown by the testimony for the plaintiff.

The decisive questions, therefore, were: (1) Who breached the contract? (2) If Murphy breached it, what was the proper measure of recovery on the counterclaim?

1. The jury found for the defendant, and allowed him a recovery of the value of the services, regardless of the contract price. It is earnestly urged, on behalf of the plaintiff, that the verdict was a grave miscarriage of justice, and was without support in the evidence. The amount of the verdict is consistent with the evidence on both sides, and was not excessive in any sense, unless such amount should have been limited by the contract price. This question will be discussed in the next paragraph hereof. The argument of insufficiency of the evidence is directed principally to the proposition that the contract was not breached by Murphy.

Murphy appears to have been a single man, whether a bachelor or a widower does not appear. He lived on a farm. His mother had previously lived with him, but had died shortly prior to the date of this contract. He had a housekeeper, who had been in the family for many years, and who remained with him. There were no other members of the family. The Williamsons were taken into this home. Mrs. Williamson did work both inside and outside upon the farm. Mr. Williamson engaged in the general farm work on the place, and did also carpenter and mason work.

No friction arose over the work of either Mr. or Mrs. Williamson, nor has their efficiency been questioned in any manner by plaintiff. Both Williamson and his wife were grieved over the conduct of Murphy toward the boy. Each of them took occasion to speak to him on the subject at different times, but met only with rebuff. "Son of a bitch" and "bastard" were names which Murphy frequently applied to the boy. On some occasions, he also "jerked" him and "choked" him. As a witness, Murphy denied that he had ever called the boy harsh names or had ever laid his hands upon him. The jury, however, must have found against him at this point. Such fact being found against him, needless to say that his conduct would operate as a great strain upon the father and mother, and would render it exceedingly difficult, if not impossible, for them to continue in the contract relations. Inasmuch as the contract provided for a home for the family, reasonably considerate treatment of each member of the family was an implied obligation thereof. Not only was the evidence legally sufficient to sustain the finding of the jury in that respect, but the testimony of the Williamsons has much corroboration in the circumstances. The testimony of Murphy himself discloses a misconception of his obligation under the contract. He testified:

"I had treated Mr. Williamson all right. Mr. Williamson never claimed I had mistreated him. * * * I told him I was not in any way responsible for his wife, and I did not contract with her."

Concerning an interview with Mrs. Williamson, he testified as follows:

"I think the boy told Mrs. Williamson something, for she jumped on to me about it, and I told her to just tend to her own business and there would be no trouble. I think she charged me with scolding or trying to choke him, and I told her I never did it. I think Mr. Williamson sat on the steps of the house at that time."

The record clearly indicates that Murphy was of dominant spirit, while Williamson and his wife were the very contrary. Williamson was a man wholly without means, and therefore wholly dependent. He came from California to enter upon this service for Murphy. The expense of the trip was advanced by Murphy, and the note sued on herein was given for such expense money. Williamson was, therefore, under great disadvantage to cope with Murphy, even in defense of his own son. Murphy doubtless had his good qualities, but other moods are quite prominent in this record. He was concededly a profane man, though he introduced witnesses who testified that they had never heard him swear. From some of his own witnesses, it appeared that "son of a bitch" was not an unusual epithet for him, though one witness testified that he never heard him use it except as applied to "machinery" and "horses."

On the morning of the day of final separation, Murphy staged a scene which must be regarded as furnishing some index to his capacity for sarcasm. He called the Williamsons into a room, and called in others also, as witnesses, who were without interest or business in the controversy. He there read the contract to the Williamsons, and followed this by reading a chapter from the Bible. This latter was confessedly not done as an act of piety. His own testimony concerning this circumstance was as follows:

"I think I asked Mr. Williamson that morning to stay. The morning they left, I got the Bible and read to them the twenty-second chapter of Matthew. Mr. and Mrs. Williamson and Isaac were present; also Robert Batty and young Nicewander. I did not make any remark to them about the passage, except I told them that my brother, who was a Methodist minister, had recommended the reading of the Bible in the family, and I had selected that chapter as a very appropriate one for that occasion. That was the first time I had read it to them since they came, but I read it

quite often myself. This occurred at the same time we were all talking about the Williamsons' leaving. * * * I thought the chapter in Matthew in reference to the betrayal of Peter was most appropriate. I told them my brother had recommended the reading of the Scripture, and I thought Mr. Williamson was just as big a traitor as Peter. My brother is a Methodist minister, and is a great friend of Mr. Williamson. My brother lived at the same place in Kansas as Mr. Williamson did."

No useful purpose can be served by pursuing further the details of the evidence. It is sufficient to say that we have no doubt of its sufficiency to sustain the finding of the jury that Murphy's conduct amounted to a breach of the contract, and therefore justified the abandonment thereof by Williamson.

2. As already indicated, the trial court
2. CONTRACTS : allowed Williamson to prove the value of
construction :
entire or sever- the service rendered, regardless of the pro-
able contracts. visions of the contract. The contention for
the appellant at this point is that the contract was a sever-
able one, and that, therefore, it amounted to successive con-
tracts month by month, and thereby fixed the compensation
for all past services rendered. If this were a case of sever-
able contract, providing for a fixed rate per month, there
is much authority for saying that the value of past services
rendered and paid for would be controlled by the terms of
the contract. It is very clear, however, to our minds that
the contract before us is not a severable contract in such
sense. In *Pacific Timber Co. v. Iowa Windmill Co.*, 183
Iowa 308, we said :

"As a general rule, it may be said that a contract is
entire when, by its terms, nature and purpose, it contem-
plates and intends that each and all of its parts and the
consideration shall be common each to the other and inter-
dependent. On the other hand, it is the general rule that

a severable contract is one in its nature and purpose susceptible of division and apportionment. The question whether a given contract is entire or separable is very largely one of intention, which intention is to be determined from the language the parties have used and the subject-matter of the agreement. The divisibility of the subject-matter or the consideration is not necessarily conclusive, though of aid in arriving at the intention. * * * Where it reasonably appears from the language of the contract or from its terms that the parties intended that a full and complete performance should be made with reference to the subject-matter of the contract by one party in consideration of the obligation of the other party to the contract, it is said to be entire. It is very difficult to lay down a rule which will apply to all cases, and consequently each case must depend very largely upon the terms of the contract involved."

In *Hanson & Linehan v. Consumers' Steam Heating Co.*, 73 Iowa 77, 79, we said:

"It is very clear, we think, that the contract was severable. Plaintiffs undertook to deliver so much coal as defendant might require in its business during the time covered by the agreement. The coal was to be delivered from time to time, as it would be required in the business, and defendant undertook to pay on the 10th day of each month, at the stipulated price per ton, for such coal as should be delivered during the preceding month. At the end of any month, the rights and obligations of the parties, so far as they related to the coal delivered during the month, were settled and determined by the contract, and they were not dependent upon whether anything further should be done under it or not. Plaintiffs were entitled absolutely to be paid for the property on the 10th day of the following month, and they could maintain an action at that time for the recovery of the stipulated price."

2. MASTER AND
SERVANT: ser-
vices and com-
pensation, non-
severable con-
tract: breach:
measure of
damages.

It will be noted that the contract before us was not simply a contract for \$40 per month for 10 years, payable monthly. A home was to be provided, and all the expenses of the family, save for clothing, were to be paid; payment of \$20 per month was to be deferred until the end of the 10-year period; a lump payment of \$500 was to be made at the end of such period; schooling privileges were to be had for the boy. The benefits to accrue to the defendant could not be apportioned by any mathematical process. If they were apportioned at all, evidence would have to be taken on the question of the value of home privileges and the expense attendant thereon. This would be an uncertain field. We think, therefore, that the contract should be deemed an entirety. The defendant having been deprived of its benefits by the wrongful acts of the plaintiff, he should not be prevented thereby from showing the fair market value of the services rendered. Testimony in support of such measure of recovery could be much more intelligent and satisfactory and definite than any testimony could be which would attempt to measure the value of home and school privileges. The question here presented has not been heretofore expressly discussed by us. But the rule adopted by the trial court was impliedly approved at least in *Barr v. Van Duyn*, 45 Iowa 228, *Thompson & Son v. Brown*, 106 Iowa 367, 372, *Hemminger v. Western Assurance Co.*, (Mich.) 54 N. W. 949, 950.

Appellant urges that the trial court held the contract to be severable, and that such holding is binding upon the appellee on this appeal. The trial court did not purport in terms to hold that the contract was severable. Appellant points to Instruction 13 given by the court, and argues that its necessary effect was to hold that the contract was severable. By this instruction, the trial court charged the jury that, if the defendant was not justified in abandoning

the contract, then he could not recover in excess of the rate of compensation provided by the contract, and that he could recover only the present worth of the payments deferred under the terms of the contract. Such instruction carries no implication or inference as to whether the contract was entire or severable. Whichever it was, the defendant's measure of recovery would be the same in the event that he himself breached the contract.

3. Much emphasis is laid in appellant's argument upon the insufficiency of the defendant's pleading of his counterclaim to sustain any allowance thereon in his favor. The defendant's pleading is fairly subject to much of the criticism made upon it. It does not in direct terms plead a breach of the contract by the plaintiff. It does, however, allege the acts of misconduct of plaintiff which would constitute a breach, and these acts are put forth as the reasons of the abandonment of the contract by the defendant. The pleading is also somewhat indefinite and ambiguous as to whether it was intended therein to plead a mutual abandonment of the contract by consent of the plaintiff or whether it was intended to justify the abandonment against the will of the plaintiff by reason of his wrongful acts. The plaintiff might well have assailed the pleading and required that it be made more definite and specific. But it was in no manner assailed in the trial court. The trial court construed the counterclaim as a demand for damages, based upon breach of the contract by the plaintiff, and instructed the jury on that theory. The pleadings would bear such construction. If it had been assailed, the trial court would have construed it more strongly against the pleader, and would have required an amendment accordingly. In the absence of attack in the trial court, it is our duty on appeal to construe the pleading most strongly in support of the

4. APPEAL AND
ERROR: re-
view, parties
entitled to al-
lege error in
pleadings:
belated objec-
tions.

judgment. The plaintiff was not privileged to reserve his fire and to make an initial attack upon the pleadings in this court. True, the plaintiff, as appellant, claims that the evidence received on such theory was irrelevant and immaterial. Of course it would be such if his attack upon the pleading should be sustained. His brief here characterizes the pleading as an "attempt to plead a counterclaim." That it was such an attempt is very manifest upon the face of the pleading, whatever its shortcomings. If the court improperly construed it, no question of that kind was raised at the trial. The trial proceeded upon the theory here indicated. The plaintiff did object to the evidence of *quantum meruit* as irrelevant and immaterial. If this was intended to reach the insufficiency of the pleadings, it was mere ambush. Furthermore, the evidence thus objected to was in fact both relevant and material, if for no other reason than that it was responsive to the evidence which plaintiff had introduced in support of his own claim for damages.

5. MASTER AND
SERVANT: com-
pensation: con-
tract provid-
ing for com-
pensation:
quantum mer-
uit: pleading.

4. It is further urged that the defendant in his counterclaim pleaded that the services rendered by him were rendered *under the contract*. It is argued, therefore, that this allegation, of itself, would forbid proof of a *quantum meruit* as a basis of damages. It appears that this point was first sustained by the trial court. Later, after an amendment, the ruling was withdrawn, and the evidence was permitted to stand. We think the later ruling was clearly correct, and would have been correct in the first instance. The services *were* rendered under the contract, without any dispute. It was for that reason that the defendant was entitled to recover damages for breach of the contract on the part of the plaintiff. The fact that one party breaches a contract after it has been partly performed by the other party does not preclude such other party from

pleading such performance, nor from proving his damages for such breach upon a basis of *quantum meruit*.

The foregoing presents the principal questions argued in the briefs. While we have not dealt in detail with all the assignments of error, what we have here said is decisive of them all. We find no prejudicial error. The judgment below is, therefore,—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

GUST AHLSON, Appellee, v. HIGH BRIDGE COAL COMPANY,
Appellant.

NEGLIGENCE: Actions—Trial, etc.—Jury Questions. The ade-

1 quacy of inspections of a known dangerous place of work, and not the number of inspections, is the material inquiry on the question whether the master was negligent because of a failure to adequately inspect; therefore, repeated inspections by the master, just prior to an accident, of an admittedly treacherous mine entry roof, do not necessarily establish the master's freedom from negligence. Record reviewed, and held to present a jury question.

NEGLIGENCE: Evidence—Admissibility—Statements of Mine

2 Foreman. Statements of a mine foreman to his subordinate employee as to the reason for delaying the timbering of the entry to a mine do not constitute a mere admission of an agent, but may tend to show negligence on the part of the master in that the master "took chances" on the falling of a known dangerous roof.

TRIAL: Instructions—Applicability to Evidence, etc.—Negligence.

3 Instructions non-applicable to evidence or pleadings are properly refused. So held where requested instruction bore on the effect of plaintiff's failure to reasonably inspect his place of work, the evidence conclusively showing that plaintiff had fully exercised his opportunity and means of inspection.

MASTER AND SERVANT: Damages—Physician Called by By-

4 stander—Ratification. One wrongfully injured by another may recover the value of services rendered by a physician called, at

the time of the injury, by a bystander on his own motion. The act of attempting to recover therefor is a ratification of the bystander's unauthorized act.

EVIDENCE: Opinion Evidence—Value of Services—Values Manifestly Moderate. Testimony placing the value of services, in view of the record, at a manifestly moderate figure, affords no just basis for complaint, even though the witness did not fully qualify as an expert.

Appeal from Dallas District Court.—WM. H. FAHEY, Judge.

WEDNESDAY, JUNE 20, 1917.

ACTION for personal injuries sustained in a coal mine accident. The plaintiff was an employee, and was severely injured by a fall of slate while engaged in his work. There was a verdict for the plaintiff, and the defendant has appealed.—*Affirmed.*

Stipp, Perry, Bannister & Starzinger for appellant.

Jno. T. Clarkson, for appellee.

EVANS, J.—The defendant is a corporation engaged in coal mining. It was not operating under the Workmen's Compensation Law. The plaintiff had been in the employment of the defendant for only a few months, at the time of the accident. He was not a coal miner in the usual sense of the term, but was a common laborer engaged as a helper in doing work here and there about the mine. At the time of the accident, he was engaged in loading dirt into a car in an entry of the mine. The entry roof was not timbered at the place of the accident. The duty of inspection and timbering the entry was primarily upon the timber men. The two timber men were present in the entry within a few feet of the plaintiff at the time of the accident.

1. **NEGLIGENCE:** charged in the petition was that the defend-
actions: trial,
etc.: jury
questions.
 1. One of the grounds of negligence
 ant had failed to make an adequate inspec-
 tion of the entry roof. The trial court sub-
 mitted the question by an instruction. It is contended by
 the defendant that this instruction should not have been
 given, because the undisputed evidence shows repeated in-
 spections every few hours on the day of the accident, and
 that such showing fully met all the requirements of the
 law pertaining to inspection. The roof was of slate. This
 slate contained many "lime seams." These seams consisted
 of white streaks through the slate, and were supposed to
 contain more or less lime which slacked by contact with
 the air. The evidence on both sides shows that such a con-
 dition of the slate roof is very treacherous, in that the
 disintegration is not observable, and that there is no fixed
 time for its taking place, nor much warning of its loosen-
 ing effect. The roof, upon tapping, may sound firm, and
 yet fall within a few moments thereafter. The timber men
 testified that they inspected the roof at half past seven in
 the morning, and twice thereafter, at appropriate intervals.
 The accident happened at 2:30 P. M. Half an hour before,
 the plaintiff himself tested it by tapping with his shovel,
 and discovered nothing wrong. The plaintiff, however, was
 inexperienced in such an inspection, and was unable to form
 any judgment as to the safety of the roof, except as to small
 pieces which might appear to be loosening on the surface.
 It is urged that the inspections here referred to should
 be deemed conclusive on that question. The question of
 the adequacy of these inspections, however, was something
 clearly to be considered by the jury. This entry was eight
 feet wide, and ought to have been timbered, in the ordinary
 course of the practice of mining in that locality. The pres-
 ence of lime seams was a recognized danger, and empha-
 sized the need of the timbers. The entry had been once

timbered, but the timbers at this particular place had been blown out by some shot firing in the course of turning a room at such place. The shot firing always occurs at night, and frequently results in blowing out timbers. The timbers thus blown out are ordinarily replaced in the morning. The first timbers that were blown out at this place were replaced the following morning. Subsequently, they were again blown out. Their replacement was then delayed for a period of from four days to a week. The lime seams disintegrate more rapidly in an entry than in a room, because of the circulation of the air currents therein. One of the sure evidences of a settling roof is a cutting at the angle between roof and rib. This cutting was manifest in this entry for a day or two prior to the accident. It was observed by the timber men in their inspections, but the warning thereof was ignored. The duty of inspection necessarily involves the question of its adequacy. The state of the record would justify a finding by the jury adverse to the defendant on the question of adequate inspection. There was, therefore, no error in submitting the instruction complained of.

2. NEGLIGENCE: evidence: admissibility: statements of mine foreman. 2. The witness Williams was one of the timber men whose duty it had been both to inspect and timber the entry in question.

His testimony tended to show some reasons why he had delayed the timbering of the entry at this place. The reasons thus indicated were that, by reason of having raised the floor of the entry in a dip, it became necessary to take down a part of the roof in order to make such an entry high enough for the mule. He also testified in effect that such were the instructions from the assistant foreman, Joplin. Objection was urged to his testimony concerning any statements or instructions of Joplin, on the general ground that the mere admissions of an agent are not binding upon his principal. The general legal prop-

osition thus urged may be conceded. It is not applicable, however, to the testimony herein. No effort was made to show a subsequent statement or admission of Joplin's. The instructions referred to were those given in advance of the accident, and pertained to the very duties imposed by law upon the defendant company and imposed by the defendant company upon its foreman, and through him upon its timber men. We think the testimony was pertinent to the inquiry whether the delay in the timbering was justifiable or unjustifiable. Such evidence tends to show that the purpose of the timber men was to take down a part of the roof at this point as soon as it became loose enough. They appreciated the possibility of its falling by the natural process of disintegration, but they deemed that as more likely to happen at night, as a result of the shot firing. We think the evidence had a clear tendency to show negligence, in that they knowingly took chances of a falling roof which they could readily have avoided by the use of temporary timbers.

8. TRIAL: instructions: applicability to evidence, etc.: negligence.

3. The defendant requested three instructions on the question of contributory negligence. The substance of Numbers 1 and 2 thus requested was given by the court in Instruction Number 8. This instruction charged the plaintiff with the duty to exercise ordinary care for his own safety, and advised the jury that a failure on his part in that regard would be contributory negligence, and as such should be taken into consideration by the jury in reduction of his damages, if any. The third instruction requested by the defendant bore also upon the question of contributory negligence, and instructed that:

"If you find that the plaintiff failed to examine the place where he was working as a reasonable man would, under the same or similar circumstances, then the plaintiff himself was negligent," etc.

Except as bearing somewhat more specifically upon the express provisions of the statute, this instruction added nothing to what was requested in Instructions 1 and 2, and which was given, as above stated. There was no basis in the pleading or in the evidence for the instruction in this particular form. The evidence is undisputed that the plaintiff did examine the roof as far as his limited experience would permit. He had been sent to this place from another part of the mine in the middle of the day to load the dirt in question. The timber men were in charge of the entry and were engaged in timbering the neck of a room turned therefrom. The usual method of testing a roof is by the knock of a hammer or sledge or pick. The plaintiff was equipped for his work with none of such tools. He had simply a shovel, which was not naturally adaptable to tapping. It may well be doubted whether this entry could be deemed "his" working place, within the meaning of the statute. The room of a miner is his working place. The duty of inspection and timbering is upon him continuously. The entry is not his working place, even though he must pass through it in order to enter his room. He has no duty of inspection nor of timbering therein. True, he is required to exercise reasonable care for his own safety at all times and places. But the specific duties enjoined upon him by the statute do not have reference to the entry. The care of the entry, including its timbering, rests with the company itself. Whether a different rule should apply to such an employee as the plaintiff because he was actually at work therein may present a somewhat different question. We need not pass thereon herein. The plaintiff was under no duty of repair or of timbering. His only duty was to use reasonable care for his own safety. The court so instructed. The evidence is undisputed that he was inexperienced, and that he did examine the roof; that the experienced timber men were present at that time, and that there was no sign

of danger then observable to an inexperienced man. In this state of the record, we would not be justified in saying that there was error in the failure of the court to give an instruction in the form asked by the defendant.

4. MASTER AND NERVANT: damages - physician called by bystander: ratification.

4. The plaintiff was severely injured, and was for a time unconscious. He was extricated from the debris and brought to the surface. Somebody called Dr. Shaw, a physician of Madrid. Dr. Shaw came and administered first aid. The plaintiff was hurried to the hospital at Des Moines. Dr. Shaw came with him. A surgical operation was immediately performed by Dr. Lincoln, with the aid of Dr. Shaw. As bearing upon the amount of his recovery, the plaintiff was permitted to introduce evidence of the value of the services of Dr. Shaw. Dr. Shaw was not a witness. The value of Dr. Shaw's services was testified to by Dr. Lincoln as a witness. This testimony was objected to by the defendant on two general grounds: (1) That it was not shown that Dr. Shaw was ever employed by the plaintiff or with his authority; (2) that Dr. Lincoln failed to show that he was acquainted with the value of Dr. Shaw's services.

It was not shown who sent for Dr. Shaw, nor was it shown that anyone was expressly authorized by the plaintiff to send for him. The emergency was one which would justify any well-meaning person in assuming authority from the plaintiff to call a physician to his aid. Such assumption of authority might thereafter be challenged by the plaintiff, or it might be ratified by acquiescence. The very act of attempting to prove the value of the services was itself an express ratification of the authority. Only the *defendant* repudiated it. Such objection was not available to the

defendant. As to the competency of Dr. Lincoln, he did testify at first that he did not know what Dr. Shaw considered his services worth. Thereafter, he testified to what he called a *minimum* value of \$25. He was surely competent to testify to such minimum value, even though it would have been open to Dr. Shaw to prove greater value. The defendant was not injured by the minimum figure thus adopted. The amount thus fixed was so manifestly moderate, in the light of common experience, as to destroy the substance of appellant's complaint at this point. *Reutkemeier v. Nolte*, 179 Iowa 342. We reach our foregoing conclusions the more readily because of the clear merit of plaintiff's case. Under the statute, the defendant was presumed to be negligent. Such presumption is not overcome by the evidence. On the contrary, we think that the affirmative evidence of negligence is practically conclusive. The verdict was for \$4,800. In the light of the injuries and disabilities resulting therefrom, as shown by the undisputed evidence, the amount of the verdict is very moderate.

We find no prejudicial error in the record, and the judgment below is accordingly—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

R. W. BRADEN, Appellant, v. O. H. HOLLEN et al., Appellees.

BROKERS: Compensation—When Compensation Earned—Broker Becoming Purchaser. A broker may not base a claim to commission on the finding of a purchaser for his principal's property on terms materially different from those authorized by the principal, nor on a manipulation of the deal without the knowledge or consent of the principal, by which he (the broker) was to become both purchaser and seller of the property.

Appeal from Decatur District Court.—THOS. L. MAXWELL,
Judge.

WEDNESDAY, JUNE 20, 1917.

SUIT by plaintiff to recover a commission for finding a purchaser for the sale of real estate. The answer was a general denial. The cause was tried to the court without a jury. Judgment for the defendant, and the plaintiff appeals.—*Affirmed.*

C. W. Hoffman and J. S. Parrish, for appellant.

O. M. Slaymaker, for appellees.

BROKERS: compensation: when compensation earned: broker becoming purchaser.

EVANS, J.—The plaintiff was a real estate agent, and the defendant Hollen was the owner of a farm of 120 acres. Hollen listed his farm with Braden for sale, giving him an exclusive agency for the period of 30 days. The terms of the agency were that the farm should be sold at the price of \$90 per acre net to the owner, and that the commission of the agent should be the surplus over such net price, sale to be subject to an encumbrance of \$4,800, and the balance of \$6,000 to be paid in cash or within 30 days. Before the expiration of 30 days, the plaintiff entered into an oral contract in the name of his principal for the sale of the farm. The proposed purchaser was the Humeston State Bank, a corporation organized under the banking laws of Iowa. The agreed price was to be \$136 per acre, and in payment thereof, the purchaser was to convey a certain hotel property at the price of \$8,000. This would leave a margin of \$3,520 to be paid in money. The plaintiff stipulated also with the purchaser that \$5 an acre should be allowed as rent of the land until March first following. He agreed also to furnish an abstract of title, and to procure the execution of the contract at the town of Weldon. The plaintiff thereupon notified

the defendant that he had sold the land, and asked for a conveyance. It does not appear that he at that time advised the defendant of all of the terms of the alleged contract of sale. He did advise him in effect that the defendant would receive \$90 net per acre. The defendant had in fact previously sold the land to Armstrong, but had failed to notify Braden. When Braden requested a conveyance, Hollen advised him that he had sold the land to Armstrong. Some effort was made to induce Armstrong to accept the purchaser, which he refused to do. Hollen likewise refused. Plaintiff brought this action to recover the difference between \$90 an acre and \$136 an acre, being \$5,520. Several reasons were put forward in the trial court why the defendant should not be deemed liable, including the following: (1) That the previous sale by Hollen terminated the agency as a matter of law, regardless of notice; (2) that the Humeston State Bank was not authorized by law to enter into the contract which it proposed, and that such contract could not have been enforced against it; (3) that the terms of the proposed sale were not in accordance with those authorized by the defendant, in that the defendant never agreed to accept the hotel property at \$8,000, nor did the proposed purchaser ever agree to pay to the defendant a sum of \$6,000 over and above the encumbrance. There was further alleged excess of authority in that the plaintiff agreed to furnish an abstract of title and agreed to a particular place of performance and to a provision for paying interest or rent, all of which were beyond the authority of the agent to promise.

We need not pass upon all the questions thus raised. What is plain is that the purchaser which the plaintiff produced had never agreed to the terms of sale which the defendant had made; and the defendant had never agreed to the terms of purchase which the Humeston State Bank offered. That is to say, the proposed purchaser and the

owner never agreed to the same terms, nor did the proposed purchaser ever agree to such terms as the plaintiff was authorized to make as an agent for the defendant. What was really in the mind of the plaintiff was that he himself would comply with defendant's terms as owner and with the bank's terms as a purchaser, and that he himself would accept the respective proposals of each. He would thereby accomplish the sale by two contracts instead of one, and he would become a party to each contract. It was not competent for him so to do. He was an agent of his principal, and not a party to the contract. Though he had an exclusive agency, he could not become a purchaser without the consent of his principal. His compensation was to be a commission, and not a profit. According to his own testimony, he proposed to take the hotel property and to mortgage the same for an amount sufficient to make up the purchase money due to the defendant. But, confessedly, he could not do this until he obtained a conveyance from the bank; and he could not get a conveyance from the bank until he got a conveyance from Hollen. It was in this sense that he claims to have tendered to Hollen payment of the full amount due. Indeed, the plaintiff did not, in the first instance at least, advise the defendant of all the terms of his oral contract with the bank, nor did he advise the bank of the terms upon which he was authorized by the defendant to sell. If Hollen had conveyed to the bank, he would thereby have ratified the acts of his agent, and would have assumed all obligations arising therefrom. Clearly, the position assumed by plaintiff was that of a party in interest attempting to make a profit out of two contracts and proposing to become a party to each and to perform them both. This was clearly inconsistent with his agency relation to his principal, and could be assumed by him only by the consent of his principal. *Chezum v. Kreighbaum*, 4 Wash. 680 (30 Pac. 1098); *Turn-*

ley v. Micheal, (Tex.) 15 S. W. 912; *Kramer v. Winslow*, (Pa.) 18 Atl. 923; *Blanchard v. Jones*, 101 Ind. 542. In the *Chezum* case it was said:

"That an agent authorized to sell property at a sum not less than a certain amount, which is to be net to the seller, acts in making the sale thereunder as the agent of the seller, and not as principal, seems to us clear. The owner of the property has fixed in his own mind the least sum which he is willing to take, and he, therefore, contracts with the agent that, in acting for him, he must have that sum in view as coming net to him. But it does not at all follow that the agent acting under such power is entitled to other benefit of the good bargain which he may make for the owner than that thereby his commission or other compensation under the contract may be increased. That such a contract, when it shows upon its face that an agency is created thereby, must be construed as above, is too clear to require the citation of authorities. If the party acts simply as agent, then his principal must get the benefit of his good bargain; and the fact that the conditions upon which he is forced to make the sale provide for a net, instead of a gross, amount to the owner, can have no influence in changing the character of the relation established by the contract. Courts are inclined to construe a contract of this kind to be that of agency, rather than a simple option on the part of the person acting thereunder; and, however strong the language used by the owner may be, yet if there is anything in connection with the contract which shows an intent to create an agency, rather than to make a sale of the property, the person acting thereunder will not be allowed to get any benefit therefrom other than such compensation as may be awarded to him by the contract."

Our conclusion at this point is necessarily decisive of the case. The judgment below is accordingly—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

MATTIE CAMPBELL et al., Appellants, v. F. M. DAVIS,
Appellee.

APPEAL AND ERROR: Briefs—Disregard of Rules. Total disregard of the rules governing the preparation of briefs on appeal justifies a total disregard of the appeal. Rule 53.

Appeal from Adams District Court.—THOMAS L. MAXWELL,
Judge.

WEDNESDAY, JUNE 20, 1917.

FOR reasons stated later, a statement of the case in brief, the issues, and their determination, is not made here.
—*Affirmed.*

J. H. Ritchey, for appellants.

Stanley & Stanley, for appellee.

SALINGER, J.—Rule 53 requires the
APPEAL AND ERROR: briefs: disregard of rules. brief of appellant to contain “a short and clear statement disclosing:”

- A. “The nature of the action.”
- B. “What the issues were.”
- C. “How the issues were decided.”
- D. “A brief and concise statement of so much of the facts as fully presents the errors and exceptions relied upon.”
- E. “The errors relied upon for a reversal.”

The rule provides further that:

“Following this the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them. * * * No alleged error or point, not contained in this statement of points, shall be raised after-

wards, either by reply brief, or in oral or printed argument, or on petition for rehearing."

We are of opinion that this rule provides that, if its requirements are totally not met, appellant has no right to review. In the case we have, there was literally no attempt to comply or compliance with any requirement of said rule. We could not state the nature of the action, what the issues were, or how they were decided, without making a thorough and complete examination of most of the abstract and all of the argument for appellant. It is doubtful if a study of all the argument would help on these heads. We could not venture to make "a brief and concise statement of so much of the facts as fully presents the errors and exceptions relied upon," without study of all the record. Appellant makes no attempt to make such statement. There is no statement of any errors relied on for reversal. There is neither a statement of error nor any separate or other heading of any error relied on; no statement of points under such heading or any other. The argument is precisely such as was the vogue before our said rule was made. It is a running mixture of abstract and argument. The first break comes on page 27; all that follows is on page 27. Assume that we could ascertain what our judgment is invited upon by a careful study of the whole of the argument, it is surely true that we could not ascertain this without such study. The rule is simple and of long standing. The disregard of it by appellant is absolute. If we shall consider this appeal on the merits, it were better to abrogate the rule. Its retention would serve no purpose.

The judgment of the trial court must be—*Affirmed.*

GAYNOR, C. J., LADD and EVANS, JJ., concur.

M. R. HIGBY, Appellee, v. W. H. BAHRNFUSS et al.,
Appellants.

PLEADING: Amendments—When Properly Rejected. An amend-
1 ment is properly rejected which is offered at the close of all the
evidence and which, if allowed, would not be supported by the
evidence.

BILLS AND NOTES: Holder in Due Course—Evidence. Evidence
2 reviewed, and held to show that plaintiff was a holder in due
course.

**BILLS AND NOTES: Negotiability and Transfer—"Without Re-
3 course"—Effect.** Indorsements "without recourse" do not de-
stroy or impair the negotiability of a negotiable instrument.

**BILLS AND NOTES: Holder in Due Course—Past-Due Interest—
4 Effect.** Notice of dishonor of a negotiable instrument is not
imparted to a purchaser by the fact that the interest thereon is
past due.

Appeal from Hamilton District Court.—R. M. WRIGHT,
Judge.

WEDNESDAY, JUNE 20, 1917.

Action to recover interest on a promissory note. De-
fense, that the note was without consideration; that plain-
tiff, as indorsee, took it with notice of infirmities. Judg-
ment for the plaintiff in the court below.—*Affirmed.*

Wesley Martin and D. C. Chase, for appellants.

McGrath & Archerd, for appellee.

GAYNOR, C. J.—This action is brought to recover inter-
est on a certain note for \$1,500, given by the defendants to
one William Greenwood, which appears to have been in-
dorsed without recourse by Greenwood to one Bair, and by
him to the plaintiff. The petition is in the usual form.

The answer admits the execution of the note; alleges that the note is collateral to a certain mortgage of even date therewith; that there was a contemporaneous written agreement between Greenwood and these defendants, at the time of the execution of the note and mortgage, that there should be no personal liability on the note and mortgage, and that the land covered by the mortgage should be the full measure and limit of defendants' liability on the note; that this agreement was either written in the mortgage or attached to the mortgage, and was understood by all the parties to be a part of the agreement covered by the note and mortgage; that said note was without consideration; that the consideration has wholly failed; that the note was obtained by false and fraudulent representations; that defendants were deceived, and received no value; that the note was given as a part of the purchase price of certain land in Dakota; that the land was not worth to exceed \$500, and was, at the time, mortgaged for \$1,000. The defendants further say that the plaintiff is not a good-faith purchaser of the note; that he had knowledge of the infirmities in the note, or notice thereof. The defendants also filed a cross-petition in equity, asking that the contract be reformed so as to express the real agreement of the parties. The cause was tried as an equity action. The court entered a decree dismissing defendants' cross-bill, and entering judgment against the defendants for \$286.10. From this judgment, defendants appeal.

After the evidence was all in, the defendants offered to file an amendment to their cross-petition, setting up that the contract sued on, or the mortgage given as a part of the same contract, had been materially altered, in that the agreement that the defendant should not be bound personally for the note had been erased. This was refused, or, if filed, was stricken out on motion of the plaintiff. for

1. PLEADING:
amendments:
when properly
rejected.

the reason that it was filed too late. This is the first error relied upon for a reversal.

It appeared upon the trial that the clause limiting liability was not in the mortgage or attached thereto. It is contended that the court, in furtherance of justice, should have allowed the amendment charging an alteration to have been made in the instrument, and that this should have been permitted to conform the pleading to the proof. It is true that to allow amendments is the rule; to reject them, the exception. It is also true that the law authorizes amendments to conform the pleadings to the proof. It was discovered, upon the presentation of the mortgage, that this agreement was not in the mortgage or attached thereto. This must have been known to defendants at the time of filing the cross-petition. It was because of this that the cross-petition asking reformation of the instrument was filed. The only evidence that this contract was ever in the mortgage is found in the following testimony: Bahrenfuss testifies to the effect that he told Greenwood that he must protect him in some way. He says: "We agreed that we would put it on the land only. I was not to be personally liable on the note." He asked the scrivener to put it in, and relied on him to do so. His statement that it was in, we think, has its foundation in the belief that the scrivener did as he agreed to do, or on what the scrivener told him.

The scrivener testified that he remembered that the defendant insisted on the mortgage's being drawn so that the land only should be liable for the debt; that there should be no personal liability; that the talk was in the presence of Greenwood; that that talk was the first time they came to his office; that he, as scrivener, was directed to insert that clause in the mortgage. He testified:

"I would say that I put it in the mortgage if I hadn't seen the mortgage. If I had been asked if I put it in be-

fore the mortgage was presented to me, I would say that I did."

The scrivener examined the mortgage, however, and found no evidence of any erasure. Mrs. Bahrenfuss testified:

"The mortgage was to fall back on the land in Dakota. That was the conversation. Mr. Tucker wrote it in the mortgage with pen and ink. It was read over. I heard this part read, that only the land should be holden on the note. The mortgage was to be on the Dakota land only." She further testified: "I was with my husband and Mr. Greenwood when they went to tell Mr. Tucker, the scrivener, how to draw the mortgage. They were drawn and ready for signature when I came to sign. I didn't read them. What he wrote in there was that the mortgage was to be on the Dakota property only. That is the statement that was to have been put in there. That was what we talked about in the office. The mortgage was to be upon the Dakota property only."

She also says that she saw the clause in controversy in the instrument, but this, we think, cannot be true in the light of all she testifies to.

On the question of alteration or erasure, a chemist was called, who said he was acquainted with the action of chemicals; that there is a chemical that will remove the evidence of ink writing; that he had removed ink by the use of this chemical; that the mortgage bears no evidence of an alteration or erasure. The evidence may tend to show that there was an agreement to have this incorporated in the mortgage, but the evidence is not clear and satisfactory, as the rule requires. There is no evidence that anything had been erased. It was not found in the mortgage, and no trace of its ever having been there was discovered by anyone. The amendment offered, the rejection of which is complained of, did not, however, go to the fact that this agreement

should have been in the mortgage, and that the writing ought to be reformed so as to show that fact. That issue was tendered in the original cross-petition. This amendment was intended to present the issue that the mortgage, at the time of its execution, contained the clause, but it had been wrongfully erased; that it had been altered by having this clause removed after the execution of the instrument. This pleading would not conform to the proof, nor, if it had been admitted, would the proof sustain it. We think there was no error in refusing to accept this amendment, or in striking it from the files, if filed.

2. **BILLS AND NOTES: holder in due course: evidence.** The second error complained of is that the court erred in holding the plaintiff to be a good-faith purchaser. What constitutes a good-faith purchaser—a holder in due course—is defined by the uniform Negotiable Instruments Law, found in Section 3060-a52, Code Supplement, 1913:

“A holder in due course is a holder who has taken the instrument under the following conditions:

“1. That the instrument is complete and regular upon its face.

“2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

“3. That he took it in good faith and for value.

“4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.”

Section 3060-a56 provides:

“To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such

facts that his action in taking the instrument amounted to bad faith."

Section 3060-a26 provides:

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

Section 3060-a25 provides:

"Value is any consideration sufficient to support a simple contract."

Applying the above statutes to the facts disclosed in this case, it is apparent that the defendants are not entitled to be relieved from the obligation expressed in their note. The plaintiff testified that he deeded some land in Wisconsin; that, before taking the note, he inquired as to the solvency of Mr. Bahrenfuss, and got reports that he was perfectly good for the note; that, at the time he took the note, he did not know that the defendants were making any claim that they were not individually liable upon the note; that he notified Mr. Bahrenfuss that the interest was due, and received no answer. In fact, Bair was not a witness on the trial.

Section 3060-a24 provides:

"Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

8. BILLS AND
NOTES: nego-
tiability and
transfer:
"without re-
course:"
effect.

The defendants have signally failed to bring home to the plaintiff a knowledge of any defects in or defenses to the instrument in question. The mere fact that it was indorsed without recourse does not impair the negotiable character of the instrument. See Section 3060-a38.

In *Kelley v. Whitney*, 45 Wis. 110, 117, the court said:

"The note * * * was indorsed by the payee

* * * 'without recourse.' But that 'is not sufficient to charge the assignee with notice of a defense against the note on the part of the maker, nor is it sufficient to put him on inquiry in reference thereto.' *Stevenson v. O'Neal*, 71 Ill. 314."

Section 3060-a57 provides:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Assuming, as we do, the correctness of the rule laid down in *City Nat. Bank v. Jordan*, 139 Iowa 499, *Iowa Nat. Bank v. Carter*, 144 Iowa 715, *Arnd v. Aylesworth*, 145 Iowa 185, and *Stotts v. Fairfield*, 163 Iowa 726, 738, that the holder of a note having its inception in fraud has the burden of proving that he is a good-faith holder in due course, yet the record in this case discloses affirmatively that the instrument is complete and regular on its face; that it was negotiated before it was overdue; that there was never any agreement that the provision limiting its liability should be incorporated in the note; that the plaintiff is a good-faith purchaser for value; that, at the time it was negotiated to him, he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it; had no knowledge of any facts to put him on inquiry, or that would suggest that the taking of the note was in bad faith. Defendants' second contention must be overruled.

The only suggestion of dishonor in the note is that the interest was past due at the time the note was negotiated to this plaintiff. In *Kelley v. Whitney*, 45 Wis. 110, the rule was laid down that a promissory note matures only when it becomes due by its terms, and that one who purchased it in good faith, for value, before it matures, is

4. **BILLS AND NOTES:** holder in due course: past due in interest. effect.

within the protection of the law merchant, although interest is overdue at the time of such purchase. .

In this case, the authorities are collated pro and con, and the doctrine held to as above stated.

In *National Bank of N. A. of B. v. Kirby*, 108 Mass. 497, the court used this language:

"If, as it is argued, it be true that the failure to pay interest ever as a matter of law amounts to a dishonor of a note, it can only affect one who has knowledge of the fact. Payment of interest is not always indorsed, and other evidence is often relied on to prove it. Want of indorsement does not always apprise the party, to whom such note is transferred, that there has been no payment. * * * The fact that overdue interest is not indorsed might have slight interest in putting the purchaser on his inquiry. * * * But in its effect upon the credit of a note, it is manifest that a failure to pay interest is not to be ranked with failure to pay principal. Interest is an incident of the debt, and differs from it in many respects. It is not subject to protest and notice to indorsers, or days of grace according to the law merchant. Interest is not recovered on overdue interest; and the statute of limitations does not run against it until the principal is due. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand it; and he has the election to do so, or wait and collect it all with the principal. * * * We are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon the principal security upon which it is due, as to subject the holder, to the full extent of the security, to antecedent equities. * * * While nonpayment of interest is not to be allowed the effect here claimed for it, it is still a fact proper to be considered by the jury, in connection with other circumstances,

on the question whether the holder is entitled to the position of one who has taken in good faith and without actual or constructive notice of existing defences."

In the case of *McPherrin v. Tittle*, (Okla.) 129 Pac. 721, 723, the court said:

"Is the fact that interest is overdue and unpaid, of itself, sufficient to affect the purchaser of a negotiable note with notice that the instrument is dishonored? There are decisions so holding (citing authorities). * * * The better rule, and the one supported by the text writers and the weight of authority, is that a note is not overdue by reason of a failure to pay interest prior to the maturity of the principal, in the absence of a stipulation to that effect, because the interest is a mere incident to the debt" (citing authorities).

This case holds to the doctrine announced in *National Bank v. Kirby*, supra. See also, as bearing upon this question, *Morgan v. United States*, 113 U. S. 476 (28 L. Ed. 1044); *Indiana & Illinois Cent. R. Co. v. Sprague*, 103 U. S. 756 (26 L. Ed. 554); *Cromwell v. County of Sac*, 96 U. S. 51 (24 L. Ed. 681). The *McPherrin* case, supra, holds to the doctrine that the presence of such unpaid coupons is considered a material circumstance, bearing on the question whether the purchaser acquired them in good faith and without notice, and is a fact to be considered by the jury upon that issue; but the mere fact that negotiable bonds, not due upon their face, have attached to them coupons past due and unpaid, does not show dishonor upon the face of the bond. See also, *McLane v. Placerville & S. V. R. Co.*, 66 Cal. 606 (6 Pac. 748); *Cooper v. Hocking Valley Nat. Bank*, 21 Ind. App. 358 (50 N. E. 775, 69 Am. St. Rep. 365).

The third and fourth assignments of error are involved in the questions hereinbefore discussed.

The result of this litigation may be unfortunate for the

defendants, but we see no escape for them in the record before us. The judgment is, therefore,—*Affirmed*.

LADD, EVANS and SALINGER, JJ., concur.

PETRUS PETERSON, Appellant, v. PEREGOY & MOORE Co., Appellee.

MALICIOUS PROSECUTION: Civil Actions—Bankruptcy Proceed-

1 **ings Against Firm—Damage to Partnership Member.** Maliciously and without probable cause filing a petition in bankruptcy against a *partnership firm only*, with no seizure or threatened seizure of the individual property of the members of the partnership, affords no basis for an action for damages in favor of an individual member of the partnership, even though the petition alleged the names of such members.

BANKRUPTCY: Jurisdiction and Course of Procedure—Partnerships and Members Thereof.

2 Principle recognized that a partnership and the individuals composing it are distinct legal entities, and proceedings in bankruptcy against one do not of necessity involve the other.

Appeal from Pottawattamie District Court.—O. D. WHEELER, Judge.

WEDNESDAY, JUNE 20, 1917.

To an amended and substituted petition of plaintiff a demurrer was interposed and sustained, and, as the plaintiff elected to stand on the ruling, judgment was entered dismissing the petition. Plaintiff appeals.—*Affirmed*.

Kimball & Peterson and Killpack & Northrop, for appellant.

Mayne & Green, for appellee.

LADD, J.—About March 25, 1915, the de-

<p>1. MALICIOUS PROSECUTION: civil actions: bankruptcy proceedings against firm: damage to partnership member.</p>	<p>fendant and others filed a petition in bankruptcy against a firm known as "The Peterson Company," doing business at Weston, Iowa, and therein alleged that said company was a copartnership, was insolvent and</p>
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bankrupt, and that this plaintiff was a member thereof, and caused a subpoena to be issued on said petition and served on plaintiff, requiring him to appear in response thereto. About April 8, 1915, the matter came on for hearing before a referee in bankruptcy, and thereupon, plaintiff was finally discharged and held not to have been a member of said firm. In his amended and substituted petition, he alleged these facts, and that the defendant, in what it did, acted maliciously and without probable cause, and in pursuance of a conspiracy with others to wrong and injure plaintiff; that the latter had, for a long time prior to the filing of said petition, been engaged in the business of retail merchant at Weston, enjoyed a good line of credit with wholesale houses, amounting to \$5,000, and, by use thereof, was enabled to keep up his stock and maintain his business, which was yielding an annual profit of \$1,200 or \$1,300 a year; that, by reason of the filing of said petition in bankruptcy, plaintiff lost time in preparing for the defense, and employed an attorney at an expense of \$250; and that, in consequence of the charge of bankruptcy against said firm, and alleging plaintiff's membership thereof, his credit with wholesale houses with which he dealt was entirely destroyed, and he was forced out of business, all to his damage in the sum of \$5,000, and he demanded judgment for sums named as actual and exemplary damages. A copy of the petition in bankruptcy was attached to the amended and substituted petition, and to this, the defendant filed a demurrer on several grounds: (1) That the suit is for malicious prosecution of a civil action, and no seizure of property belonging to plaintiff is alleged; (2) that the damages alleged may not, in any event, be recovered; and (3) that there is no allegation in the petition in bankruptcy that plaintiff was insolvent or a bankrupt, the only allegation being that he was a member of The Peterson Com-

pany. The demurrer was sustained, and the only question is whether a cause of action was stated.

2. **BANKRUPTCY:**
jurisdiction
and course of
procedure:
partnerships
and members
thereof.

Conceding, without deciding, that an action for malicious prosecution may be maintained for maliciously filing a petition in bankruptcy without probable cause (26 Cyc. 14), such a petition was not filed against plaintiff. The petition was leveled against the partnership known as The Peterson Company only, and not against its members, the prayer being that it only be adjudged a bankrupt. Section 5 of the act of Congress approved in 1898 expressly authorizes such a proceeding against a partnership during its continuance in business or after its dissolution and before final settlement, irrespective of any adjudication against its individual members. *Strause v. Hooper*, 105 Fed. 590; *In re Meyer*, 98 Fed. 976 (39 C. C. A. 368).

Under the bankruptcy laws, a firm may be bankrupt and the individuals composing such firm solvent. *In re Sanderlin*, 109 Fed. 857; 5 Cyc. 413. Doubtless the members of the firm might be included with it in the petition, asking that all be found insolvent; but, before the individual members could be so found, in involuntary bankruptcy, one or more of the enumerated acts of insolvency must have been alleged and proven to have been committed by such members. *In re Meyer*, supra. And where no act of bankruptcy is charged against the members of a firm, and the proceedings are solely against the partnership as a legal entity, the individual members are not entitled to a discharge in bankruptcy. *In re Hale*, 107 Fed. 432.

Under the allegations of the petition in bankruptcy, then, plaintiff might not have been adjudged a bankrupt, and about the only purpose that could have been served by reciting in the petition who were members of the partnership was to identify it, and point out to whom the subpoena

should be issued, and upon whom it should be served. In any event, the plaintiff was not charged therein with being a bankrupt, nor was his property seized or threatened with seizure or sequestration. The case does not come within the rule of those sustaining actions for maliciously and without probable cause instituting bankruptcy proceedings. The most that can be said is that the allegation in the petition that he was a member of the firm was in the nature of a civil suit, without any interference or threatened interference with his property, and it is well settled in this state that an action for the malicious prosecution of a civil action such as this suit cannot be maintained. *Wetmore v. Mellinger*, 64 Iowa 741; *Smith v. Hintrager*, 67 Iowa 109; *White v. International Text Book Co.*, 156 Iowa 210.

As contended, there is a tendency to liberally construe actions as interfering with property in order to avoid a denial of this remedy (see *Luby v. Bennett*, 111 Wis. 613 [56 L. R. A. 261, 87 Am. St. 897]); but there is nothing in the case at bar justifying a departure from the doctrine of *Wetmore v. Mellinger*, supra. The authorities pro and con are reviewed in the case last cited, and in *Kolka v. Jones*, 6 N. D. 461 (66 Am. St. 615).

The ruling of the court in sustaining the demurrer has our approval, and the judgment is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

Mrs. AUGUST ROTHERT, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

JUSTICE OF THE PEACE: Writ of Error—Return—Non-Responsiveness—Procedure. A non-responsive return by a justice of the peace to a writ of error and the affidavit accompanying the same should be met by an order of court compelling an amended return, even, if necessary, to the certification, in accordance with the truthful recollection of the justice, of the evidence taken before the justice. Sec. 4574, Code, 1897.

APPEAL AND ERROR: Abstract of Record—Repetitions—Costs.

2 Unnecessary repetition will be penalized by the taxation of the cost thereof to the one offending.

Appeal from Clinton District Court.—M. F. DONEGAN, Judge.

WEDNESDAY, JUNE 20, 1917.

IN the district court, this case was pending on a writ of error issued therefrom to the justice of the peace before whom the case was originally tried. The return to the writ by the justice being incomplete and unsatisfactory to the defendant, it moved that the justice be required to amend his return and to make the same responsive to the affidavit for the writ. This motion was denied. From such order of denial, the defendant has appealed.—*Reversed and remanded.*

F. W. Sargent, Ellis & McCoy, and J. H. Johnson, for appellant.

F. L. Holleran, for appellee.

EVANS, J.—This case was originally brought in the justice court. Judgment was rendered for the plaintiff for the amount claimed, \$20. The defendant sued out a writ of error. The defendant's challenge to the judgment was predicated upon the general proposition that the action of the justice court in rendering judgment against the defendant was wholly arbitrary, and without the support of any evidence tending to show liability. The defendant appeared in the justice court at the trial, and contested liability. It caused all the proceedings and testimony therein to be taken down by a stenographer. The shorthand notes were immediately transcribed, and the transcript furnished to the justice. The affidavit in support of the writ of error purported to set forth all the testimony in

1. JUSTICE OF THE
PEACE: writ of
error: return:
non-responsive-
ness: procedure.

the case upon which the judgment was founded, and challenged the judgment as being without any support whatever. The writ having been duly served upon the justice, he made return thereto of his docket entries only. No response whatever was made to that portion of the affidavit which set forth the purported evidence. The purported reason for this refusal was that the justice had not preserved any record of the evidence, and that he could not certify to anything that did not appear upon his record. In support of its motion to require an amended return, the defendant introduced the stenographic report of the trial. He also examined the justice as a witness, whereby the justice testified as to the testimony introduced before him on the trial of the case. In such examination of the justice, the testimony was set forth quite fully. The court, nevertheless, denied the motion and certified the question here.

Code Section 4572 is as follows:

"A copy of the affidavit shall accompany the order and be served upon the justice, who shall, with the least practicable delay, make the return required."

Code Section 4574 is as follows:

"The court may compel a return to the writ, or an amended return when the first is not full and complete."

The manifest purpose of serving a copy of the affidavit upon the justice is to enable him to make his return responsive thereto. The purpose of Section 4574 is to compel him to do so. The justice is not bound to make the evidence in the case a matter of record at the trial. This, however, does not excuse him from certifying to particular evidence in accordance with his best recollection. The stenographic report was not binding upon him; nevertheless he was entitled to avail himself of it as an aid to his recollection. It was his privilege and duty to make such corrections in it as his recollection warranted. In his examination as a witness before the district court, the testi-

mony purported to be set forth quite fully by question and answer. We see no fair reason why the trial court should not have required the justice to amend his return in accordance with his own testimony, with any proper additions or corrections as should appear to the justice to be necessary to a true return. The motion for an amended return was improperly denied.

2. **APPEAL AND ERROR.** abstract of record; repetitions; costs. 2. The appellant has filed herein an abstract of 56 pages. It sets forth in detail all the proceedings in the justice court, including both evidence and opening statements of counsel. Such evidence is reprinted in the abstract as a part of the affidavit for writ of error; and the same is printed a third time as a part of the motion requiring an amended return. The result is that a grossly excessive expense is incurred in the preparation of the record here, and in a case involving but a few dollars. For the purpose of this appeal, a brief statement of the evidence was all that was necessary. No printing costs for the abstract will be taxed against appellee.

The order denying the motion for an amended return must be reversed.—*Reversed and remanded.*

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

MARY ROSE, Appellee, v. CITY OF FORT DODGE, Appellant.

MUNICIPAL CORPORATIONS: Defects or Obstructions in Streets,

1 **Etc.—Negligence—Icy Condition—Question for Jury.** Evidence that an accumulation of ice on a public sidewalk was "slippery" and "smooth" and "slick" does not, as a matter of law, show that the condition was solely a climatic one, there being evidence that the ice was "rough" and "lumpy."

MUNICIPAL CORPORATIONS: Defects or Obstructions in Streets

2 **—Icy Condition—Cause.** Evidence reviewed, and held to justify

the jury in finding that the condition which caused plaintiff's fall was due, not to a thawing of snow and ice, followed by sudden freezing, but to the negligence of the city in permitting the snow and ice to become, by reason of traffic, rough and uneven.

TRIAL: Instructions—Applicability—Paraphrasing Allegations of
8 **Negligence.** It is not error for the court in its instructions to paraphrase the allegations of the petition.

PRINCIPLE APPLIED: An allegation of negligence was:

"By reason of the traffic of pedestrians * * * said snow and ice had become and was in a dangerous, rough, rounded, irregular and uneven condition."

The court paraphrased:

"Snow and ice had been permitted to accumulate and become packed by travel thereon so as to become unsafe and dangerous."

Held, the court did not change the issues.

TRIAL: Instructions—Requisites and Sufficiency—Construction as a
4 **Whole.** The law is not so simple that all of it can be stated in any one sentence or paragraph. It is sufficient if instructions are correct as a whole. So held as to instructions in an action for the negligent accumulation of snow and ice on a public street, and the responsibility of the city in reference thereto.

MUNICIPAL CORPORATIONS: Defects or Obstructions in Streets
5 **—Notice of Injury—Specification of Negligence.** The "notice of injury" on account of defective streets, etc., required by Sec. 3447, Par. 1, Code Supplement, 1913, in order to permit the bringing of the action after the expiration of three months, need not specify wherein the municipality was negligent. Therefore, the pleadings as to negligence are not controlled by such notice.

EVIDENCE: Hearsay—For Purpose of Impeachment. Statements
6 incompetent as hearsay if offered to prove the fact, may be perfectly competent for purpose of impeachment.

WITNESSES: Cross-examination—Discretion of Court. In an ac-
7 tion for damages caused by the defective condition of a sidewalk, it is within the discretion of the court to permit evidence brought out on cross-examination to remain in the record, to the effect that a certain described defect in the sidewalk "exists at this time," the trial being a year after the injury.

TRIAL: Verdict—Excessiveness—\$5,000. Verdict of \$5,000 sustained. Plaintiff, a married woman, 61 years of age, in charge of her husband's household, was, at the time of trial, one year after the injury, walking only by the aid of a crutch, because of a fractured femur bone, broken in a fall on a defective sidewalk. She suffered great pain, and will substantially, but not fully, recover. The recovery of damages was solely for *personal injury and present and future pain*. No claim was made for loss of time, earning capacity and expenses. Apparently sustained with some reluctance.

HUSBAND AND WIFE: Actions—Personal Injury to Wife—Recovery—Effect. It is stated, *arguendo*, that a recovery by the wife for her own personal injury, *without claim for loss of time*, bars the husband's claim for such loss of time, in view of Sec. 2477-a, Code Supp., 1913, investing the wife with right to recover for loss of time, etc.

Appeal from Webster District Court.—C. G. LEE, Judge.

THURSDAY, DECEMBER 16, 1915.

REHEARING DENIED THURSDAY, JUNE 21, 1917.

ACTION for damages for personal injuries sustained by reason of a fall upon defendant's sidewalk. There was a verdict for the plaintiff, and defendant has appealed.—*Affirmed.*

Mitchell & Fitzpatrick, and *Kenyon, Kelleher & O'Connor*, for appellant.

Healy, Burnquist & Thomas, for appellee.

EVANS, J.—The accident in question resulted from an icy condition of the sidewalk. It occurred at an intersection of sidewalks, where the plaintiff was about to turn from one to the other. The plaintiff alleged in her petition that the walk at the place of the accident had become dangerous by reason of an accumulation of snow and ice, which had been permitted to become rough, rounded, irregular and uneven. The accident occurred on the evening of March 3, 1913. 10 or 11 days preceding such date, there

had been a considerable snow storm, and the intervening weather had been quite cold. The place of the accident was upon one of the main sidewalks of the city, and was necessarily subjected to considerable travel. The principal question in the case is whether the condition of the street was such that the city could be deemed responsible therefor as for negligence, or whether its condition was simply the result of recent climatic conditions, for which no responsibility could be attached to the city.

1. MUNICIPAL COR-
PORATIONS:
defects or ob-
structions in
streets, etc.;
negligence; icy
condition;
question for
jury.

I. The emphasis of the appeal is largely laid upon the proposition that the testimony on behalf of plaintiff failed to show that plaintiff's fall was the result of a rounded and uneven and rough condition of snow and ice. It is contended that her testimony shows to the contrary, and that it appears therefrom that she was caused to fall by the condition of the walk, caused by the natural conditions immediately preceding the accident.

Appellant's argument presents to us a very careful analysis of the testimony of plaintiff herself. The plaintiff testified that the surface of the ice was rough and "humpy." She also admitted, on cross-examination, that the ice was "slippery" and "smooth" and "slick." The argument at this point is made to rest very largely upon these particular terms. Strange to say, with all our familiarity with the subject, ice is not easily described in terms. The terms here employed originated in the questions put to the witness by the counsel for the defendant. It would be difficult to say that ice is not "slippery" and "slick" and "smooth" under almost any circumstances, and this is so even though it be "irregular and uneven and rounded and rough." It would not do, therefore, to say, as a matter of law, that the use of such terms was necessarily inconsistent with the claim that the condition of the ice

was as first described. The defendant was entitled to argue the point before the jury in the light of all the testimony in the case, and this right was undoubtedly exercised.

2. MUNICIPAL CORPORATIONS: defects or obstructions in streets: icy condition: cause.

Much of the appellant's argument at this point is based upon the proposition of fact that there had been a thaw in the course of the day, and that the resulting water had frozen in the course of the evening. It is contended, therefore, that the case is ruled by *Beirness v. City of Missouri Valley*, 162 Iowa 720. In the cited case, a verdict was directed for the defendant city, and the ruling was sustained here.

In the case at bar, the evidence that there was any thawing during the day is very slight indeed. Surely, the jury would have been justified in finding to the contrary. The official weather report was put in evidence by agreement. It showed that, for two days preceding the accident, the temperature had gone down to 15 degrees below zero. It also appeared that, at some time within 24 hours prior to 7:00 A. M., March 4th, the temperature had gone up to 39 degrees. Because such temperature was 7 degrees above freezing, the inference is claimed that there must have been a thaw. This, of course, would depend upon the length of time that such temperature continued. Manifestly, such temperature could not result in any appreciable melting of ice and snow in a brief period of time. One witness testified that it was "thawing most of the time" for the 10 days preceding March 3d. On the other hand, the official weather report showed rather severe weather during that entire period. These statements could be rendered consistent by assuming that the thawing was such as took place in protected places and in the sunshine. It is sufficient to say that the evidence was by no means conclusive that the condition of the walk which resulted in

the plaintiff's fall was caused by a recent thaw. The law applicable to this class of cases is quite well settled in this state. It has been fully announced and discussed in some of our recent cases, notably in the *Beirness* case, *supra*, and *Griffin v. City of Marion*, 163 Iowa 435, and *Pinnane v. City of Perry*, 164 Iowa 171. There is little occasion for our repeating the discussions contained in the cited cases. We think the evidence in the case is such as to bring it within the two cases last cited.

II. It is contended that the trial judge erred in instructions to the jury. It is said that the trial judge, in his instructions, changed the issues, and submitted the case upon a theory not put forth in plaintiff's petition. The theory of negligence put forth in the instructions was that "snow and ice had been permitted to accumulate and become packed by travel thereon as to become unsafe and dangerous." Particular criticism is directed to the expression "packed by travel." It is said that such expression was not justified by any allegation in the petition. The petition did allege that, "by reason of the traffic of pedestrians at and about said point on said sidewalk, said snow and ice had become and was in a dangerous, rough, rounded, irregular and uneven condition." We think that the language of the instruction complained of was, therefore, justified by the allegation of the petition herein set forth.

Complaint is made of the fourth instruction, and particularly of the first sentence thereof, which was as follows:

3. TRIAL: instructions: applicability - paraphrasing allegations of negligence.

4. TRIAL: instructions: requisites and sufficiency - construction as a whole.

"The defendant, at the time of the accident complained of, was required by law to use ordinary care to keep the streets and sidewalk at the place in question in a reasonably safe condition for public travel."

It is said that the effect of this instruction was to hold the city responsible for the unsafe condition of the sidewalk, even though such condition were caused by recent climatic conditions. This criticism, however, ignores the instruction as a whole, and ignores the other instructions in the case. This sentence standing alone holds the city only to "ordinary care." The instructions as a whole advised the jury that ordinary care would not require the city to protect pedestrians against the dangers of snow and ice resulting from mere climatic conditions. The instructions advised the jury of the distinction between the natural conditions of snow and ice and the artificial conditions which might subsequently act upon them and thus render them irregular and more dangerous.

III. At the time of the trial, the plaintiff filed an amendment to her petition, wherein she alleged that the sidewalk itself, underneath the snow and ice, was uneven and rough and defective, and that this aided in creating the rough condition of the ice and snow upon the surface. The defendant pleaded the statute of limitations against the amendment, and now urges the same upon our attention. The argument is that these facts were not recited in the notice served upon the city under the provisions of Subdivision 1 of Section 3447, Code Supplement, 1913.

The notice of the time and place and circumstances of the accident was served upon the city March 11, 1913. The action was begun about five months later. Because of the alleged omission from such notice of any reference to the condition of the sidewalk underneath the ice and snow, it is argued that any cause of action based thereon is barred within three months.

The statute does not require that the preliminary notice of the accident shall include the specifications of negli-

gence charged against the defendant. It does require that the notice state the time, place and circumstances of the accident. The very purpose of the notice is to enable the officers of the city to investigate the place and the circumstances promptly. Furthermore, the notice in this case did contain a description of conditions, including the following: "And because the said walk at said place was rough, uneven and rounded, and permitted the accumulation of water, ice and snow." The foregoing was of itself sufficient basis for the amendment complained of.

IV. Some complaint is made of rulings on the evidence. Evidence was introduced by the plaintiff, in rebuttal, of a statement made by one of the city commissioners

6. EVIDENCE:
hearsay: for
purpose of im-
peachment.

on the morning following the accident and at the place thereof. It is urged that this was hearsay; and it was. But it was introduced as impeaching evidence. The commissioner was a witness upon the trial, and his testimony was inconsistent with such statement. His attention was directed, on cross-examination, to his previous alleged statement, and he, in substance, denied making the same. Com-

plaint is also made of the testimony of the witness Rose, husband of the plaintiff. In his direct examination, he described what

7. WITNESSES:
cross-examina-
tion: discretion
of court.

he claimed to be the structural condition of the sidewalk at or about the place of the accident. Being pressed, upon cross-examination, he said that the same condition was to be found there "right now." In the light of the entire examination of the witness, we think it was within the discretion of the trial court to let the evidence stand.

V. Lastly, it is urged that the verdict was excessive. It was for \$5,000. Plaintiff was a married woman, living with her husband, and in charge of her household. The petition herein

8. TRIAL: verdict:
excessiveness:
\$5,000

made no other claim than for her personal injury, including pain and suffering, present and future. Her injury was a broken femur bone. She suffered much pain. She will never fully recover from the effects of the injury, although there will be a substantial recovery. She was 61 years of age at the time of the injury. At the time of the trial, one year later, she was still needing the help of a cane and crutch, in order to walk.

In view of the elimination of all questions of loss of time and earning capacity and expenses of treatment, we think it must be said that the verdict was a very large one. We are not wholly agreed as to whether we would be justified in ordering a reduction, as a condition of affirmance.

9. HUSBAND AND
WIFE: actions:
personal injury
to wife: recovery:
effect.

In this consideration, we are not unmindful that, under the provisions of Chapter 163 of the Acts of the Thirty-fourth General Assembly, the plaintiff could have recovered for loss of time, as well as for her pain and suffering, and that, by reason of such statute, there can be no outstanding claim against the city in favor of the husband for such item.

Under all the circumstances appearing in the record, the view prevails with a majority that we ought not to interfere with the verdict. The judgment below is accordingly—*Affirmed*.

DEEMER, WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. E. L. TOWNE, Appellant.

HOMICIDE: Self-Defense—Evidence—Jury Question. Evidence reviewed on the question whether a homicide was in self-defense, and held to present a jury question.

EVANS, J., dissents.

HOMICIDE: Manslaughter—Defining Murder—Effect. It is not error to define murder in instructions covering a charge of manslaughter, the instructions covering the latter offense being unobjectionable.

HOMICIDE: Manslaughter—Instructions—Careless Handling of
3 **Gun.** The court may properly explain to a jury when and under what circumstances the negligent or careless handling of a dangerous weapon may constitute manslaughter, even though the indictment does not specifically charge that there was such negligence.

HOMICIDE: Justifiable Homicide—Arrest by Private Person for
4 **Misdemeanor—Use of Deadly Weapon.** Instructions reviewed, and held correct as to (a) the circumstances under which a private party may make an arrest for a misdemeanor; (b) the acts necessary to constitute a valid arrest; (c) the degree of force permissible in effecting such arrest; (d) the arrestor's duty to refrain from using a deadly weapon in a deadly manner in making such arrest; and (e) the result, in law, to the arrestor if such a weapon was so used as to result in a homicide.

HOMICIDE: Self-Defense—Mental Condition of Deceased—Materiality. Under a plea of self-defense, evidence as to the mental condition of a deceased is material only on the question of the attitude of the deceased at the time of the fatal encounter.

HOMICIDE: Dying Declarations—Impending Death—Matters of
6 **Opinion.** Instructions reviewed, and held correct as to (a) the circumstances under which alleged dying declarations were such in fact, and could be considered at all; (b) the evidence proper to be considered by the jury in determining whether the deceased was under the full belief of impending death; (c) the duty of the jury to disregard all matters of mere opinion, if any, expressed by the deceased; and (d) the duty of the jury to consider only such dying statements of the deceased as pertained to the facts and circumstances attending the fatal shot.

CRIMINAL LAW: Trial—Misconduct in Argument—Withdrawal—
7 **Effect.** Statements of the respective counsel as to the extent of the punishment attending a conviction, resulting in a withdrawal by the county attorney of his statement, and the substitution of the statement that the jury has nothing to do with the punishment, which latter statement was confirmed by the court orally and in the formal charge, work no prejudicial error.

CRIMINAL LAW: Trial—Separation of Jury After Submission—
8 **Effect.** The separation of the jury, after submission in a criminal case, for the purpose of answering the calls of nature, or for other innocent purposes, without speaking to nonmembers

of the jury, results in no prejudicial error, especially when such jurors were usually attended by the bailiff or in his sight.

WITNESSES: Cross-Examination—Homicide. Testimony of a witness (a) that he arrived at the scene of a shooting immediately after it happened, (b) that he found the defendant near at hand, and (c) that defendant did not want him (the witness) to go to where the deceased was until more help arrived, does not authorize, under the claim of cross-examination, and under the question as to what further happened, testimony that the defendant said "he did not think it safe to go" (that is, to the place where deceased was).

CRIMINAL LAW: Opinion Evidence—Insanity—Form of Question.

10 A question to a nonexpert witness as to the insanity of a person must be confined to and based on the facts *previously detailed by the witness.*

HOMICIDE: Self-Defense—Evidence—Specific Quarrel with Others.

11 Under a plea of self-defense to a charge of manslaughter, defendant may not interrogate witnesses as to a specific quarrel had by deceased with other people.

HOMICIDE: Self-Defense—Character of Deceased as to Quarrel-

12 **someness, etc.** Under a plea of self-defense to a charge of manslaughter, witnesses may not be asked as to the "character" of deceased as to quarrelsomeness and viciousness, or as to his general "character" as to habit of attacking people generally. His general *reputation* in this respect should have been called for.

HOMICIDE: Self-Defense—Insanity of Deceased—Refusal to Per-

13 **mit Showing—Effect.** Under a plea of self-defense to a charge of manslaughter, defendant suffered no prejudice because denied the privilege of showing by opinion evidence that deceased was insane, when decedent's previous conduct was fully shown to the jury by evidence tending to show his unbalanced condition of mind, with attending delusions, and when there was no question as to who made the first assault at the time of the fatal encounter.

Appeal from Guthrie District Court.—J. H. APPLGATE,
Judge.

FRIDAY, NOVEMBER 24, 1916.

REHEARING DENIED THURSDAY, JUNE 21, 1917.

DEFENDANT was indicted, tried and convicted of the crime of manslaughter, and appeals.—*Affirmed.*

Milligan & Moore, for appellant.

George Cosson, Attorney General, *John Fletcher*, Assistant Attorney General, *C. H. Taylor* and *E. R. Sayles*, for appellee.

DEEMER, J.—I. The facts are not seriously in dispute, and the argument is largely directed to the sufficiency thereof to sustain the verdict.

Defendant was a business man, engaged in handling general merchandise in the town of Jamaica. He lived on the same street on which his store was located, and about five blocks due north thereof, his house being the last one on that side of the street. North of his house was a public highway, and north of this highway was a cornfield. At the intersection of the first street south of his house with the street on which the house is situated, there was a small wooden bridge, and just south of that, a small hill rising some 30 or 40 feet to the sidewalk on the west side of the street. Defendant's brother lived about midway between his (defendant's) house and his store, and on the same side of the street. At about 8:30 o'clock in the evening of March 13, 1915, three of defendant's children, a daughter, Gretchen, 19 years of age, and two boys, one about 15 and the other 12 years of age, left defendant's store and started for their home up the street which we have just described. They were followed by a stranger, who is described as a tall man, wearing a cap with the visor down and pulled over the eyes. This stranger followed the children as far north as defendant's brother's house, where he followed defendant's daughter into the yard. Defendant followed his children from the store almost immediately, and overtook them at the brother's house. He found his daughter

and his sons standing near the house, and the stranger standing 10 or 12 feet north of them. About the time the defendant arrived at the house, the stranger remarked to one of the boys: "Are you just coming home from school?" As the defendant passed on the sidewalk going north, the daughter went past the stranger to meet her father, and as she did so, this stranger leaned forward with his cap pulled down, took a step or two in advance, and made some remark to the young lady, which none of the bystanders heard or understood. The girl was frightened, and, with her youngest brother, ran past her father and on to her own home. Defendant and his oldest boy walked on together toward their home, and the stranger followed them until they reached their own house. As they approached their house, defendant instructed his son, who was with him, to run into the house and get his gun—a shotgun. The boy obeyed, brought the gun out and loaded it, and handed it to his father, near the south door of the house at the west end thereof. It should be remarked that the streets were not lighted in any manner, and that the night was dark. When defendant received the gun from his son, the stranger being in the yard of defendant's house and something like 15 feet away, and approaching him, he (defendant) ordered the stranger not to come any closer, and asked him what he was doing there. The stranger replied that "he had just gotten off the train and was walking around." He (defendant) asked him his name, and he responded by asking: "Who lives here?" He (defendant) then asked him what his business was, and, instead of answering, he asked another question and continued to walk toward the defendant. Defendant then told him not to come any closer or he would shoot, and at the same time, it is claimed, told him he would take him up town and turn him over to the marshal. Acting upon this suggestion, he ordered the stranger to go ahead of him down town. The

stranger started toward town, with defendant and his eldest son following him, the defendant with gun in hand. The stranger halted at times, but defendant pressed him on. When they got to the bridge south of defendant's house, the stranger stopped, and said to defendant that he did not intend to hurt them. Defendant again told the stranger to move on down town, and the stranger proceeded on across the bridge and on to the top of the little hill which we have described, and there stopped. Defendant, with his son, was then at the bottom of the hill. As he reached the top of the hill, the stranger stopped, screamed in a loud tone, "You fellows," and rushed back with arms extended to where defendant and his son were standing, and came within 8 or 10 feet of defendant, who had then leveled his gun upon the stranger, and, as he approached, defendant says he made a motion as if to grab the gun, when he (defendant) fired both barrels at the stranger, resulting in wounds from which the stranger died the next afternoon. This stranger was soon found to be a man named William Berry, an eccentric, if not insane, person, who had a brother living at Jamaica until a few days prior to the shooting. Berry had lived at Perry until a few months prior to his death, and, after leaving Perry, lived at Waukee, where he was working for his board. He was discharged by the people for whom he had been working, because of his peculiarities and eccentricities, and taken by them to the depot in Waukee on the day he was killed. Before he died, he told defendant that he (defendant) was in no way to blame; that he forgave him; and that, if he had not followed defendant's daughter, he would not have been hurt.

The court submitted the case to the jury to determine whether or not defendant was acting in self-defense, and instructed that the defendant was not justified in using a deadly weapon simply to effectuate an arrest of the stranger for violation of some town ordinance or for a misde-

meanor. Whilst these instructions are complained of, they seem to announce correct rules of law, and, on the whole record, the case was properly submitted to the jury for it to determine whether or not defendant's act was in lawful defense of his person.

We are of opinion that it was a fair question for the jury to determine whether or not defendant was justified, under all the circumstances, in taking the life of Berry. It cannot be said, as a matter of law, that the case is so plain for defendant as that a conviction should not be had under the circumstances disclosed. Defendant was bound to act as a reasonably cautious and prudent person would, under all the circumstances as they appeared to him at the time, and cannot excuse himself on the theory that, under the excitement of the moment, he acted with undue haste, or, because of other transactions of which he had knowledge, supposed something might happen which was out of the ordinary.

There is some doubt in the record as to whether defendant did those things which would constitute a lawful arrest of Berry, and there is also doubt as to whether or not Berry was guilty of anything more than committing a trespass on defendant's property. But, aside from these doubts, it was for the jury to say whether or not defendant's act was in the lawful defense of his person, and whether or not there was not some other reasonable course for defendant to have pursued rather than to take the life of Berry. It is true that defendant did not know the stranger until after he shot him, and did not know that he was an eccentric or partially insane person, and did not know that he was not of ordinary mind and ability; but there was nothing in his conduct, down to the time when he rushed back to where defendant was, after he was started on his journey down town, to indicate to defendant that

he intended anyone any physical harm. When he got to the bridge, he assured defendant that he did not intend to hurt defendant or his son, and he displayed no hostile purpose until he reached the top of the little hill, where, as defendant says, he rushed back upon him and his son. No one claims that he was armed at that time, or that he, by any action, indicated that he intended to do more than grab the gun when he got to where he could do so. We neglected to state that, during all the time defendant followed the deceased, he kept his gun leveled upon him, and there is some doubt about just where Berry was when defendant shot him.

- II. Some of the instructions are criticized. One of them simply defines murder according to the statutes of the state, but the instruction immediately says in terms "The charge in this case is of a crime of a lower degree of turpitude than that of murder, to wit, the crime of manslaughter," and manslaughter is then defined. There was no error in this instruction. Another says that one may, through negligence or carelessness in the handling of a deadly weapon, be guilty of manslaughter. This, too, is a correct statement of the law applicable to this case, although the indictment does not specifically charge negligence or carelessness in the handling of the gun.
2. HOMICIDE: manslaughter: defining murder: effect.
3. HOMICIDE: manslaughter: instructions: careless handling of gun.

- The following instructions are challenged:
4. HOMICIDE: justifiable homicide: arrest by private person for misdemeanor: use of deadly weapon.
- "If you find from the evidence in this case that said William Berry was at the time in any manner disturbing the peace and quiet of the defendant, or his family, within the town of Jamaica, then he was guilty of a violation of the provisions of said ordinance, and, if said offense was committed or being committed in the presence of the defendant, then

the defendant had the right under the law to arrest or cause the arrest of the said William Berry, and to turn him over to a peace officer of said town of Jamaica. You are instructed, however, that, in making such arrest, if he did make such arrest, or attempt to make such arrest, it was the duty of the defendant to in some manner give said William Berry to understand that he was so placed under arrest, and that said William Berry should submit to such arrest, and that it was the intention of the defendant to turn said William Berry over to a peace officer of the town of Jamaica. In making such arrest, the defendant had no right to use any other means or any greater force than was reasonably necessary to accomplish that purpose, and, in his efforts to make such arrest or to turn said William Berry over to a peace officer of the town of Jamaica, in accomplishing that end alone, he had no right to make use of a deadly weapon in a deadly manner to accomplish such purpose; and so the defendant cannot justify the taking of the life of said William Berry merely on the grounds that he, as a private citizen, had the right to arrest said William Berry, and was in the act of taking said William Berry to a peace officer of the town of Jamaica for the purpose of turning him over to such peace officer, and this feature of the case is submitted to you only for the purpose of your determination of the fact as to whether, under all of the circumstances disclosed by the proof, the defendant was at the time justified in being armed with a deadly weapon, and in using same in a deadly manner. And so, in the determination of this case, you will bear in mind that, so far as the mere making of an arrest by the defendant as a private citizen, of said William Berry, and in attempting to deliver him to a peace officer of the town of Jamaica, Iowa, however said William Berry may have resisted such an arrest, if it went no further than mere resistance to such arrest or attempt to flee from said defendant to avoid an arrest, the

defendant would not be justified in using a deadly weapon in a deadly manner; nor would he be justified in so using such deadly weapon in a deadly manner unless in doing so he was acting in necessary self-defense, as his right in relation thereto is more fully explained to you in subsequent instructions."

These announce correct, well-established rules of law, and no authorities need be cited in their support. The following instructions are also criticized:

5. HOMICIDE: self-defense; mental condition of deceased: materiality. "Certain testimony has been offered and submitted to you upon the trial of this case tending to show the condition of William Berry, deceased, covering a time about December 30, 1914, up to and including March 13, 1915, the day on which the wounds of which he died were inflicted upon him. This evidence is proper for you to consider in connection with all of the other facts and circumstances, in so far as it may throw light upon the attitude of the deceased at the time he received the fatal shot; but it would not be proper for you to consider said evidence so offered and submitted to you upon this trial for any other purpose whatever.

6. HOMICIDE: dying declarations: impending death: matters of opinion. "Certain evidence has also been offered and submitted to you upon the trial of this case with reference to statements or declarations claimed to have been made by said William Berry on the day following the evening he received the fatal shot. This testimony is proper for your consideration in the determination of this case only in the event that it is shown by the evidence offered upon the trial of the case that, at the time said alleged statements or declarations were made by said William Berry, if you find they were made by him, that said William Berry made same under the belief that the wounds which had been inflicted upon him were fatal, and that he could not recover

from the effects thereof. You are further instructed that, unless you find from the evidence in this case that, at the time said William Berry made any statements or declarations with reference to the matter of his being shot, made same under the belief that he would not get well, but that he would die from the effects of such wounds, it will not be proper for you in the determination of this case to consider or give weight to any of the statements or declarations claimed to have been made by said William Berry as testified to by the witnesses upon the trial of this case.

"If, however, you find from the evidence in this case that, at the time said William Berry made any statements or declarations with reference to the transactions in controversy in this case, he had been advised that he could not get well, and that at said time he entertained no hope of recovering from the effects of said wounds, then it will be proper for you to determine from the evidence offered upon the trial of this case what he in fact said with reference to said transactions, and, having thus determined what he in fact said with reference thereto, you may consider it in connection with all of the other facts and circumstances disclosed by the proof, and give same such credit and weight as you believe, under all of the circumstances, it is fairly and reasonably entitled to.

"In determining whether said William Berry, at the time he made the statement or declarations testified to by the witnesses upon the trial of this case, believed that he would not get well, but that he would die from the effects of the wounds inflicted upon him, it will be proper for you to take into consideration the fact, if it be a fact, that the attending physician informed him that he could not recover from the effects of said wounds, the nature and character of the wounds themselves that were inflicted upon him, together with all of the other facts and circumstances shown by the evidence that may throw light upon the question of

whether or not said William Berry, at the time he made the statements or declarations as claimed by the witnesses who have testified upon this trial, thought or believed that he would not get well.

"It will not be proper, however, for you to give any weight to any mere opinion that may have been expressed by William Berry; but you should consider only such statements as he is shown by the evidence to have made as to the circumstances under which he was shot, and as to what occurred at said time."

There was no error here. We need not notice the other instructions, as they were the usual ones given in such cases.

III. In the closing argument, counsel for the State told the jury, in answer to some suggestions made by defendant's counsel to the effect that, if defendant were convicted, he would have to go to the penitentiary, that, under the law, the punishment might be a fine. This statement was challenged by counsel for the defendant, and counsel for the State then withdrew the statement, and told the jury that they had nothing whatever to do with the punishment; that this was a matter within the discretion of the court. The court also told the jury that it had nothing to do with the punishment. It also so instructed in its formal charge. There was no error here.

IV. The jurors were permitted to separate, after they had retired to deliberate upon their verdict, sometimes to answer a call of nature, and sometimes on other errands, as to get a cigar; but, generally speaking, they were either accompanied by an officer of the court or were within sight of such officer, and they did not speak to anyone while so separated. There seems to have been no toilet room in the courthouse, and some of the jurors were permitted to go to one near the courthouse, which was used by the occupants

7. CRIMINAL LAW:
trial: miscon-
duct in argu-
ment: with-
drawal: effect.

8. CRIMINAL LAW:
trial: separa-
tion of jury
after submis-
sion: effect.

thereof to relieve themselves. They were gone but a few minutes, and had no conversation with anyone, save fellow jurors. There is no such showing of misconduct as will justify a reversal on this ground.

V. Certain rulings on testimony are complained of. A witness, who arrived on the scene immediately after the shooting, found defendant near at hand, and testified that defendant did not want him to go to where Berry was until more help arrived, and, in answer to a question as to what further happened, he said defendant told him he did not think it safe to go. The question was objected to, and the answer moved to be stricken for several reasons; among others, that it was not cross-examination. This latter objection was good, and the ruling sustaining it, correct. A nonexpert witness was asked to state whether Berry was sane or insane before the day of the killing, without confining the questions to the acts and circumstances detailed by the witness in his previous examination. The ruling was correct under all the authorities. A nonexpert's opinion on the subject must be confined to the facts detailed and considered by him.

Witnesses were asked as to a specific quarrel had by Berry with other people, but were not permitted to answer. The rulings were correct.

Others were asked as to his character as to quarrelsomeness and viciousness, or his general character as to habit of attacking people generally. Had these inquiries been directed to his general reputation as to quarrelsomeness, they might well have been answered. But, as will be observed, they went to his character in the first instance, and to his habit of attacking people in another. Consequently, there was no error here. Moreover,

9. WITNESSES:
cross-examina-
tion: homicide.

11. HOMICIDE:
self-defense:
evidence: spe-
cific quarrel
with others.

12. HOMICIDE:
self defense:
character of
deceased as to
quarrelsomeness,
etc.

enough went to the jury without objection or exception to prove all that defendant was entitled to in this connection.

A doctor who examined Berry while
 23. HOMICIDE: self-defense; insanity of deceased: refusal to permit showing: effect. he lived at Perry, and who told of what he saw of him there, was not permitted to answer whether he had an opinion as to his sanity. We here quote the following from the record:

"My call in the morning was after the trouble that had arisen between Berry and Shearer. He appeared to have lucid intervals in the morning. At times he was lucid and at times he was not. Q. Were you able to determine—did you know whether or not the man was sane or insane? Mr. Taylor: Objected to as incompetent, immaterial and too remote. The Court: Yes, I do not think that is material to any matter in this, except simply as to his actions and conduct at that time, and this will show to the jury the nature and characteristics of the man. The mere fact that he was insane would not justify this act, so I do not think that would be proper. Exceptions saved."

This presents the most doubtful question in the case. The doctor was permitted to describe Berry's conduct after a difficulty he had just had with a man by the name of Shearer, and the latter was permitted to tell of this difficulty. Other witnesses were permitted to show Berry's conduct at various times before the homicide. This tended to show that he was of unbalanced mind, and at times had delusions. Defendant had no knowledge of these things, and there is really no dispute as to his conduct on the evening of the day he was shot. In view of the fact that his previous conduct was fully explained, we do not think the defendant suffered any prejudice in not being permitted to show by opinion evidence that the man was insane. If defendant knew that fact, the case was worse for him than if he did not know it. If he did not know, he had the right

to judge him a sane man and to govern himself accordingly. Whether sane or insane, if he acted in such a manner as to justify the defendant in taking his life, he (defendant) had the benefit thereof in the instructions. There was really no question in the case as to who made the first assault, and Berry's conduct is not a matter of dispute. The question was: What was defendant's conduct in view of Berry's actions as reasonably understood by defendant?

We reach the conclusion that no prejudicial error was committed by the trial court, and the judgment must be, and it is,—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

EVANS, J., dissenting. The evidence in this record is overwhelming that the defendant acted under actual apprehension of danger. Upon this record, I think there was no warrant for a finding by the jury that the defendant did not act in reasonable self-defense. The killing was regrettable, of course, but the circumstances leading up to it were quite beyond the control of the defendant, and their real nature, as later discovered, was not then known to him. There was no malice or ulterior purpose of any kind in the conduct of the defendant, and none is claimed; nor do I think that there is any warrant for holding that his conduct was reckless under the circumstances confronting him. Undue timidity is the utmost that can be claimed against him. To hold this defendant as a felon upon the evidence presented in this record is to my mind almost as appalling as the killing with which he is charged.

J. A. BARTEMEIER et al., Appellants, v. CENTRAL NATIONAL FIRE INSURANCE COMPANY, Appellees (and two other cases).

INSURANCE: Forfeiture—Change of Title—Assignment for Benefit of Creditors—Non-Acceptance by Assignee. No change of title or interest in insured property is effected by the execution and recording by the insured of a general assignment for the benefit of creditors *without any delivery of said deed to, or acceptance by, the assignee*. It follows that a policy providing for forfeiture in event of such change of title or interest is not voided by such execution and recording.

PRINCIPLE APPLIED. A lumber company held policies of insurance on its plant, which policies provided that, in event of any "change in the title or interest" in the insured property without the consent of the insurer, the policies should be void. On May 15th, the company, at a meeting of the stockholders, ordered the making of an assignment for the benefit of its creditors, and the same was prepared, signed, acknowledged and recorded by the company's attorney. Two assignees were named in the deed. One assignee was a stockholder, and attended the meeting which ordered the assignment and voted to authorize the assignment. The other assignee learned of the assignment on the evening of its execution. Both assignees swore positively that they did not accept the trust until they did so in writing on May 18th. On May 17th, the plant of the lumber company was wholly destroyed by fire. There was evidence that, prior to the fire, the assignee, who was a stockholder said he would accept the trust if the other assignee would, and that such other assignee then said that, owing to his inexperience, he "must think the matter over" before deciding whether he would accept. This latter assignee did go through the plant on May 16th and examined it. Neither assignee took possession of any of the property until May 18th, and there was evidence that in the meantime the plant was operated by the company. There was counter evidence tending to show acceptance of the trust by the assignees on May 15th. *Held*, no change in title or interest was effected until the deed of assignment was delivered to and *accepted by* the assignee and that on such issue a jury question was presented.

ASSIGNMENT FOR BENEFIT OF CREDITORS: Deed of Assignment—Effect Prior to Acceptance by Assignee—Insurance. A

duly executed and recorded assignment for the benefit of creditors, while having legal force and effect prior to delivery to and acceptance by the assignee, has no such legal force and effect prior to such delivery and acceptance as to constitute a completed sale and transfer, and thereby avoid a policy of insurance which provides for forfeiture in the event of "change of title or interest" in the insured property.

PRINCIPLE APPLIED: See No. 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS: Deed of Assign-
 3 **ment—Acceptance by Assignee—Necessity.** Concede, *arguendo*, that, when it clearly appears that a debtor intends to make a general assignment for the benefit of creditors, the court will, in event the assignee refuses to accept, appoint a new assignee and thereby save the trust, yet, until such court action, the debtor's title and right of possession are indisputable.

PRINCIPLE APPLIED: See No. 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS: Deed of Assign-
 4 **ment—Consent of Creditors—Effect.** The fact that creditors are, under the statute (Section 3071, Code, 1897), conclusively presumed to consent to an assignment for the benefit of creditors, in no wise obviates the necessity of a delivery of the deed of assignment to the assignee and an acceptance thereof by him, before there can be any change in the title of the assignor.

PRINCIPLE APPLIED: See No. 1.

TRIAL: Verdict—Directed Verdict—Conflict of Evidence—Assign-
 5 **ments.** When the evidence on a disputed question of fact is such as would support either one of opposite contentions, a jury question necessarily results. In a case wherein the validity of fire insurance policies depended on the question whether an assignment for the benefit of creditors was accepted prior or subsequent to a fire, held, under the evidence, to present a question for the jury.

PRINCIPLE APPLIED: See No. 1.

DEEDS: Execution—Scope of Term. Principle recognized that
 6 the term "execution," when applied to a deed of conveyance, properly embraces the due (a) making, (b) signing, (c) acknowledgment, and (d) delivery. So recognized in actions on policies of insurance, the validity of which insurance depended on whether the execution, delivery and acceptance of convey-

ances were such as to effect a change in title to the insured property, and thereby avoid the policy.

PRINCIPLE APPLIED: See No. 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS: Deed of Assignment—Recording—Effect on Question of Delivery. The mere recording of an assignment for the benefit of creditors does not, in and of itself, conclusively establish a delivery of the deed to the assignee.

PRINCIPLE APPLIED: See No. 1.

Appeal from Muscatine District Court.—F. D. LETTS, Judge.

WEDNESDAY, NOVEMBER 22, 1916.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

THE above-entitled actions were brought at law to recover upon several policies of insurance against loss or damage by fire. The answer in each case sets up the same defense, and, by stipulation of the parties, the record of testimony in the case first entitled was made applicable to the others. There was a jury trial, and at the close of the testimony, the court directed a verdict for the defendants, and the plaintiffs appeal. Like judgments were entered in each of the remaining cases, and in each, the plaintiffs have appealed. The several appeals have been submitted together, and will be disposed of in a single opinion.—*Reversed and remanded.*

Jayne & Hoffman, for appellants.

Parker, Parrish & Miller, J. F. Devitt, and Pascal & Pascal, for appellees.

WEAVER, J.—Plaintiffs allege the issu-

1. **INSURANCE:** ance of the policies sued upon to the South
 forfeiture Muscatine Lumber Company, and the loss
 change of title: of the insured property by fire on May 17,
 assignment for 1914, within the period covered by said in-
 benefit of cred- surance. As showing their right to recover
 itors: non ac-
 ceptance by as-
 signee.

thereon, they allege that, on the day following the fire, they accepted an assignment made to them by the lumber company of all its property for the benefit of its creditors, and that, as trustees so constituted, they became vested with said right of action. They allege the loss to be total, and demand recovery accordingly. The defendants admit the issuance of the policy, the loss of the property by fire, the making of proofs of loss, and that payment of the indemnity has been refused. They further admit that the lumber company made an assignment to the plaintiffs for the benefit of its creditors, but deny that such assignment was accepted by plaintiffs on May 18, 1914, after the burning of the property, and allege that the assignment was made and accepted on May 15, 1914, and before the loss occurred. Defendants further plead that the policies sued upon provide, in substance, that if, at any time during the period covered by said insurance, any change, whether by legal proceedings, judgment, voluntary act of the insured, or otherwise, takes place in the title, possession or use of the subject of the insurance, or if the policy be assigned before loss, unless otherwise provided by agreement of the insurer, the contract shall become void and of no effect. They further plead that, in violation of said terms of the policies, and without the consent or agreement of the insurers, the lumber company, on May 15, 1914, and before the loss by fire, made a general assignment of all its property and effects to the plaintiffs, who then and there accepted the same, thereby making void the insurance and relieving the defendants of all further liability on the policies.

The deed of general assignment bears date of May 15, 1914, and was acknowledged on the same date; and it is alleged in the answer that the lumber company, having made the deed of assignment, filed the same in the recorder's office on May 15, 1914, and that, on or about the same date, said assignees orally accepted the trust. On the trial,

the plaintiff Bartemeier testified that he accepted the trust on May 18, 1914, and that such acceptance was made in writing. This instrument, which bears date of May 18, 1914, was put in evidence. On cross-examination, he says he first learned of the assignment on Friday evening, May 15, 1914. Did not know that such a thing was contemplated until he was told it had taken place, though he knew the company was financially embarrassed. Being then asked if he would be willing to accept, he replied, "I will have to think the matter over." He did not know that the deed had been filed for record. He further says:

"Arthur Hoffman asked if I was willing to accept as one of the assignees. I told him I would think it over, and I did not tell him or anyone that I would accept prior to the time I made the written acceptance on Monday, and I did not take possession of any of the property until after I had signed the acceptance."

Concerning his co-plaintiff, the witness testified that Schenck was the bookkeeper and secretary of the company, and had the keys to the office. He came into Hoffman's office after the witness did. As they were leaving, Hoffman called them back and propounded the inquiry whether they would accept the trust. One of them asked Hoffman what there was to it, and he replied, "There is quite a bit to it;" and, after some further words of conversation, witness said, "I don't know whether I can accept it or not, but I will see." On the next day, he went over the plant, looking into its condition, to aid him, he says, in coming to a conclusion upon the question of his acceptance, because he had no experience of that kind, and wanted to know pretty near what he was expected to do. Mr. Schenck, as a witness, says that he signed the acceptance on Monday, and that they did not take possession or assume control until after the writing was signed. He did not signify his acceptance before that time, except to say that he would ac-

cept if Bartemeier did. There is evidence to show that the business was continued by the company in its usual manner all of Saturday, May 16th, the day prior to the fire. Schenck owned one share of the capital stock of the company, was its secretary and treasurer, and prepared the list or schedule of creditors which was attached to the assignment. He was also present at a meeting of the stockholders held on the afternoon of May 15th, and voted with the rest to authorize or ratify the assignment.

The motion for a directed verdict, filed at the close of the evidence, was on the following grounds:

1. The evidence shows without dispute that the policies had become void before the fire.

2. The policy was avoided on May 15, 1914, by the change made by the assignment of the company's title to the property.

3. The assignment, or change in the title to the property, was made without the insurer's consent.

4. There is no sufficient evidence to sustain a verdict for plaintiffs, if one should be returned.

This motion having been sustained, and a directed verdict for defendants returned, plaintiffs thereafter, and in due time, moved for a new trial, because of the trial court's alleged error in holding as a matter of law that the conditions of the policy had been violated by plaintiff before the fire, and because the question whether the assignment had been accepted before the loss was one of fact for the jury alone to determine. This motion was denied, and judgment entered against the plaintiffs for costs.

The propositions which the several appeals bring up for consideration are as follows:

1. Was a delivery of the deed or an acceptance of the trust by the plaintiffs necessary to effect a change of title to the property, within the meaning of the contract between the parties; and

2. If such acceptance was necessary, then was the date or time of such acceptance so conclusively shown as to justify the trial court in holding as a matter of law that it took place before the fire?

I. The first question, whether an acceptance of the trust was necessary to work a change of title, within the meaning of the policy, is not, as some of counsel seem to think, equivalent to an inquiry whether the assignment was valid for any purpose or to any extent before such acceptance. We have held that an executory contract, or agreement to sell and convey property, though in all respects valid and enforceable, does not of itself work such a change of title, and that the grantor remains vested with an insurable interest until the conveyance or transfer is complete. *Erb v. German-American Ins. Co.*, 98 Iowa 606; *Moore v. St. Paul F. & M. Ins. Co.*, 176 Iowa 549; *Kempton v. State Ins. Co.*, 62 Iowa 83. See also *Zeitler v. Concordia Fire Ins. Co.*, (Mich.) 135 N. W. 332; *Pomeroy v. Aetna Ins. Co.*, (Kan.) 120 Pac. 344; *Garner v. Milwaukee Mech. Ins. Co.*, 73 Kan. 127; *Browning v. Home Ins. Co.*, 6 Daly (N. Y.) 522; *National Fire Ins. Co. v. Three States Lbr. Co.*, 217 Ill. 115. In the *Moore* case, *supra*, the conveyance was made and placed in escrow with a third person, to be held until the date arrived for a change in the possession of the property. The person holding the deed caused it to be recorded at once. Before the date arrived for the delivery of possession, the house on the land burned. The grantor held a policy of insurance on the building, which contained a condition against change in title substantially like the one relied upon by the defendants in this case, but we held that there had been no such change in the title or interest of the insured as would defeat his action on the policy. Quite similar in fact and principle is the *Pomeroy* case, *supra*, decided by the Kansas

2. ASSIGNMENT
FOR BENEFIT OF
CREDITORS.
deed of assign-
ment: effect
prior to accept-
ance by as-
signee: insur-
ance.

court. The general doctrine that delivery and acceptance of a deed of conveyance are essential to a transfer of title is too elementary to require citation of authorities. In nearly all cases of sale and transfer of title to land, there is some interval of time between the date when the sale is agreed or determined upon and the date when the deed is delivered by the one party and possession is delivered or relinquished by the other. Until this is done, the legal title is in the grantor, who remains clothed with all the essential attributes of ownership.

Generally speaking, a policy of insurance upon the property to be conveyed, providing for forfeiture of indemnity upon change of title or interest in the thing insured, does not become void until the sale and transfer is complete. Acceptance of the deed by the grantee is, as a rule, sufficiently shown by his act in receiving and retaining it, and under some circumstances, it will be presumed from the beneficial character of the conveyance. If, however, the deed is not of a beneficial character to the grantee, but imposes a duty to be performed by him, and there is no other evidence of delivery, the presumption of acceptance does not arise. A transfer of title to real estate to a trustee for the benefit of creditors is effected by deed expressing, in apt words, its character and purpose. It is primarily intended to vest the legal title in the named trustee for the use of the beneficiaries, the grantor's creditors. Until such conveyance is effective to pass the title and possession, there is no apparent reason why it should operate to avoid a policy of insurance upon the property, any more than any other sale or transfer which is not yet complete. To hold it not complete, it is not necessary to say that the contract for the conveyance, in the one case, or the initiatory steps already taken, in the other case, for a general assignment for the benefit of creditors, are void or of no effect, but rather that, if the transaction in either case has not pro-

gressed to a point where there is a complete change of title, then the forfeiture provided for in the policy has not become operative. The fact that a court of equity may, in the first case, entertain an action to enforce performance of the contract, or, in the other case, may assume to administer the trust or appoint a new trustee to administer it, has little or no bearing upon the question which a loss by fire with the title in that condition raises between the grantor and the insurance company issuing the policy indemnifying him against loss of that nature. Between these parties, the question is not whether the property owner has entered into a contract to sell and convey to a third person, or whether such owner had executed a conveyance in trust to another for the benefit of creditors. The thing to be determined between them, in either case, is whether the intended transfer had been fully accomplished. In the case of *Kempton v. State Ins. Co.*, 62 Iowa 83, where the loss occurred after the making of a contract of sale, and before deed was delivered, this court held that the policy of insurance issued to the grantor was not avoided. In so holding, we quoted approvingly the language of the Maryland court, saying that the condition in the policy was one which should be construed with studious care to avoid a forfeiture, and that:

"Nothing less than the absolute sale or conveyance of the property, with all the usual legal ingredients to constitute the transaction as such, * * * can be considered as sufficient to avoid the policy on that account. * * * To constitute a sale within the meaning and terms of the proviso, the right to the property sold and to the possession thereof must pass from the vendor to the vendee."

In *Moore v. St. Paul F. & M. Ins. Co.*, 176 Iowa 549, we approved the same rule, where the forfeiture clause was identical with the one in this case. The transfer in that case, as we have already noted, was complete except the de-

livery of the deed, which was to be withheld for a short period, during which the grantor was to remain in possession of the land. Loss occurred before his right of possession expired, and it was held that he did not forfeit his right to recover upon the policy. There is some confusion in the precedents upon this point, but we have heretofore adhered to the rule above stated, and in so doing, we are quite in harmony with the prevailing view.

The attitude of the appellees, as indicated by the language of the petition and by the course pursued upon the trial, makes it fairly evident that, at the outset, they were disposed to concede appellants' proposition that an acceptance of the trust by the assignees was essential to accomplish a change of title and bring the provision for forfeiture of the insurance into operation. The fact of such acceptance and the date thereof was affirmatively alleged in the answer, as having been made prior to the loss, and evidence was offered in support of such allegation. In this court, counsel for appellee largely rely upon the proposition that an acceptance by the assignees was unnecessary, and that, in the absence thereof, the title of the lumber company was divested by operation of law. But counsel will doubtless concede that a mere intent to make such an assignment would not be effective to change the title to the property. To have the effect, the intent must have been followed or accompanied by appropriate and efficient action. The entire ownership and right of possession must have been conveyed by the assignor and acquired by the assignee before the insurable interest of the former could be eliminated by the forfeiture clause in the policy. The right of an owner to make an assignment for the benefit of his creditors had long been recognized before the enactment of our statute. Such right is an incident of or an element in the right of absolute ownership by which every man holds dominion over his own property. *Brashear v. West*, 32 U. S.

607. To create such a trusteeship, it was universally held that the assignor must, by deed, after the manner of conveyances in general, make an absolute transfer of the title, possession and control of the property to his assignee. There must be a surrender of all right and control, and a complete appropriation by the assignor of his property to a trust fund for the payment of his debts, and until then, there is no complete or effective change of title. An assignment for the benefit of creditors, without an assignor to pass the title and an assignee to receive it, is an irreconcilable contradiction of terms.

It may, for the purposes of this case, be admitted that, when the intent and purpose to make an assignment are clear, and the assignee named fails or refuses to accept or qualify, the court will not permit the trust to fail for want of a trustee, but will appoint one; but it is no less true that, until the court does act in the premises, the assignment remains incomplete, and the assignor's title and right of possession are indisputable. Our statute does no more than to regulate the right of assignment for the benefit of creditors, forbid the making of preferences therein, and direct the manner of administering the trust. It specifically provides that every such assignment shall be in writing, setting forth the name of both the assignor and the assignee, and requires that it shall be acknowledged and recorded in the office of the county recorder of deeds and subsequently filed with the clerk of the court which has supervision of the trust. The effect of such transfer and record is to vest the debtor's property in the assignee. It does not in terms declare what shall be a sufficient delivery or acceptance of such trust. No more do the provisions of our statutes respecting ordinary conveyances and forms of deeds and the execution and acknowledgment thereof undertake to declare

3 ASSIGNMENT
FOR BENEFIT OF
CREDITORS:
deed of assign-
ment: accept-
ance by as-
signee: neces-
sity.

what shall be a sufficient delivery and acceptance of such instruments. In both statutes, the legislature has taken for granted the existence of the long-established rules and principles of law upon the subject, and left these questions to be governed thereby.

The provision of the statute that the
4. ASSIGNMENT FOR BENEFIT OF CREDITORS:
 deed of assignment: consent of creditors: effect.
 consent of the creditors to such assignment will be presumed, does not require any other conclusion. Under the ancient practice prevailing before our statute was enacted,

it was competent for the assignor to classify his creditors and make preferences between them. It was also quite generally held that an assignment required the consent of the creditors, and only such as did consent were entitled to the benefits of the trust. Our statute, as we have seen, denies the right of the assignor to make preferences between his creditors, and, by declaring the creditors' consent to be presumed, eliminates the necessity of other proof thereof as a condition precedent to a valid assignment. But such presumed consent in no wise affects the question here raised as to the point of time when, if it all, the title to the insured property vests in the assignee. As we have already suggested, the time when an assignment has acquired such a status that the court will take cognizance thereof and provide for its completion and administration is not necessarily coincident with the time when the change of title from the assignor to the assignee is complete. That there is or may be an interval of time between the making of the assignment papers and the taking effect thereof as a completed transfer of the title to the assignee, in which interval intervening rights may accrue as between the assignee and third persons, has often been held. Among the authorities to this effect are *Woolson v. Pipher*, 100 Ind. 306; *Crosby v. Hillyer*, 24 Wend. (N. Y.) *280; *Pierson v. Manning*, 2 Mich. 445, 462; *Lawrence v. Davis*, 3 McLean

(U. S.) 177, 178; *Nicoll v. Spowers*, 105 N. Y. 1; *McIlhargy v. Chambers*, 117 N. Y. 532; *Day v. Sines*, 15 Wash. 525; *Hill v. Rolfe*, 61 N. H. 351. See also *Fuller v. New York Fire Ins. Co.*, (N. Y.) 67 N. E. 879; *Marston v. Coburn*, 17 Mass. 453. In the *Crosby* case, above cited, a deed of general assignment had been made and placed in the hands of the assignee, who said he was not prepared to accept, because not satisfied with the naming of another person as his co-trustee, and he would take a little time to consider it. A few hours later, and after an execution had been levied on the property, he announced his acceptance, and claimed the property as against the execution creditor. The court held that the lien of the execution was good, because, at the time of the levy, there had been no completed delivery and acceptance of the deed of assignment. In the *Marston* case, *supra*, the deed of assignment was made and signed by the assignor and also by the assignee. The assignor then took the deed and went to find his creditors, to obtain their consent thereto. While he was gone, a creditor levied upon the property. The court held that there had been no sufficient delivery of the assignment, and that the attachment was a prior lien. In the *Pierson* case, the Michigan court says:

"That there must be an acceptance of the trust by the trustee before the assignment can take effect, is unquestionable."

In the *Fuller* case, the owner of insured property was adjudged a bankrupt upon his own petition, and a receiver of his estate was appointed thereafter, but, before a trustee was appointed, a loss by fire occurred. Action on the policies being brought by the trustee, the insurers, as in the case at bar, pleaded a breach of condition against a change of title. The court ruled against the defense, saying that the title to the property had not changed within the meaning of the contract; that, as a result of the loss, the as-

signor acquired a valid right of action, which passed in turn to the trustee in bankruptcy when appointed. In *Wadleigh v. Merkle*, 57 Wis. 517, the court says:

"Under the common law a deed is not executed so as to be of any efficacy until the same is delivered and accepted by the grantee or assignee named therein. This rule is not disputed by * * * counsel, but it is said that the rule should not be applied to an assignment under the statute. We think there is not only the same reason for applying the rule to such an assignment, but a much stronger reason, because the assignment cannot be executed so as to affect any of the creditors of the assignor without the active assent of the assignor mentioned in the assignment."

In the *McIlhargy* case, from New York, where the statute requires a written acceptance from the assignee, the deed was written and the acceptance signed by the assignee before its execution by the assignor. The paper was left with the scrivener. Later in the same day, the debtor went to the place where the paper had been left, and signed and acknowledged it and left it with his attorney. Some days later, he made a formal delivery of the deed to the assignee. In an action between the assignee and a judgment creditor, it was held that, although the deed was made and was assented to by the assignee in writing as the statute required, it did not become effective until it was delivered to the assignee. The court says:

"Delivery is as essential since the statute of assignments as before its passage, * * * and, until that event, the assignment could not become operative. * * * The mere taking of an instrument into his hands by the grantee, even if he retained it, would amount to nothing if the circumstances showed that he did not receive or hold it as an effective conveyance. * * * We have no doubt that, under the provisions of that act, as before, it is essential to the operation of such an instrument that the

assignor should part with it by actual delivery either to the assignee or to his agent. Delivery is a constituent part of the act of execution. It is its consummation, and the estate of the assignor cannot be affected until the act has been performed."

The question of delivery and acceptance

5. TRIAL: verdict: is determined by the intention of the par-
directed ver-
dict: conflict of ties to the transaction, and, if there is any
evidence: as-
signments. dispute as to what was done, or as to the

intent with which the acts alleged to constitute delivery or acceptance were done or performed, or if the circumstances attending and characterizing such acts are such that reasonable minds may draw different inferences or conclusions therefrom, then the issue of fact so raised is for the jury.

Turning more particularly to our own precedents, we find that, from the beginning of the judicial history of the state, in every case where the subject has been mentioned, the law has been interpreted and applied as requiring a delivery of the deed and an acceptance of the trust, to effect a completed assignment or change of title. In *Cowles v. Ricketts*, 1 Iowa 582, it is said that the statute on this subject clearly "implies a trust and contemplates the intervention of a trustee." We might add that this is not merely implied, but is expressed by the statute in the specific requirement that the assignment must be in writing, and must name an assignee or trustee. Code Section 3072. The case of *Burrows v. Lehdorff*, 8 Iowa 96, sometimes mistakenly cited as overruling or modifying the *Cowles* case, is not at all inconsistent therewith. The decision there made goes no further than to hold that, where a debtor, in an evident attempt to avoid the statute, disposes of all his property by a series of mortgages having the effect of a general assignment preferring some creditors over others, the mortgagees will be held to account as trustees or assignees.

In *Meeker v. Sanders*, 6 Iowa 61, 66, it was held that, where a delivery of actual possession of the property has been made to the assignee, failure to properly acknowledge and record the deed was not fatal to the assignment. In *Drain v. Mickel*, 8 Iowa 438, the court, interpreting the general effect of the statute, held that:

"Assignments for the benefit of creditors are voluntary on the part of the debtor * * * and when made they partake of the nature of a private contract. The assignee derives his authority entirely from the grantor, and the appointment carries with it an actual and not an imaginary or theoretical trust and confidence."

Applying this principle, it was held that the trial court erred in assuming to appoint a new assignee because of an alleged irregularity in filing an inventory of the assignor's property, and that there must be "a total failure to accept or fulfill the trust * * * before the will of the assignor should be suspended by the appointment of a new trustee."

In *Lampson v. Arnold*, 19 Iowa 479, is a somewhat elaborate discussion of the statute with respect to the pre-existing common law, pointing out that the one material change effected was to render invalid general assignments with preferences between creditors. In speaking of the particular assignment then being considered, the court notes that the assignee was notified in advance of the purpose to make the conveyance to him, and it was accordingly "executed, delivered and accepted." Where an assignment was made by a partner for his firm, the other partner being in another state, and the assignee took possession of the property, an attachment levied thereon after the delivery of the deed, but before it was ratified by the absent partner a few days later, was given priority over the assignment. *Mills v. Miller*, 109 Iowa 688. In a contest between an assignee claiming under deed of general assign-

ment, and a creditor claiming under a mortgage made on the same day, it being shown that the delivery of the assignment was made before the delivery of the mortgage, the former was given priority. *Gage v. Parry*, 69 Iowa 605. A debtor made an assignment for the benefit of his creditors to a named trustee, and the deed was recorded; but, before the instrument was delivered, he changed his mind, and nothing further was done to complete or perfect or administer the trust. It was held that, there being no acceptance or delivery, the assignment never became effective, and had never been "acted upon by any person interested therein." *Darnall v. Bennett*, 98 Iowa 410.

In a contest between an attaching creditor and an assignee for the benefit of creditors, the question arose as to the time when the assigned property could be said to be *in custodia legis*. The court, after pointing out that, in the case then under discussion, the assignor had surrendered her property to the assignee, who was in actual possession thereof before the levy of the attachment, held that no lien was acquired by the levy. After discussing the authorities bearing thereon, the opinion states its conclusion, that:

"Where an assignment is *regularly made and the assignee is in possession of the property for the settlement of the estate*, such property is in the custody of the law." *Hamilton-Brown v. Mercer*, 84 Iowa 537, 541. See also *Price v. Parker*, 11 Iowa 144.

In *Singer v. Armstrong*, 77 Iowa 397, an action involving the question of priority between an assignee and an attaching creditor, the issue was made to turn on the question whether the assignment had been accepted by the assignee when the attachment was levied, and it was held that the promise of the assignee in advance to accept, followed by the making of the deed and its delivery to another acting for the assignee, was sufficient. A similar holding is found in *American Co. v. Frank*, 62 Iowa 202. A similar contest

arose in *Rock Island Plow Co. v. Breese*, 83 Iowa 553. There, the deed of assignment and levy of attachment were made on the same day. The assignee had consented to act, but the court found that, when the attachment was levied, the deed had not yet been signed by one of the partners, and, in holding that this gave the attachment lien priority, the court says:

"It may be true that it was a valid instrument without the signature of both members of the partnership, but the signatures of both were thought to be necessary, and the parties acted in that belief, and there was no delivery of the assignment to the assignee as a completed instrument until sometime after the attachment was served, and the property in the possession of the sheriff."

Other cases to the same general effect can be found, but those cited sufficiently indicate that the necessity of delivery and acceptance, or an actual assumption by the assignee of the possession of the assigned property, has been uniformly recognized in this jurisdiction as essential to a completed assignment. Many of the legal propositions laid down in argument for appellees are not at all inconsistent with this view. For example, it may be admitted, for the purposes of this case, that the "assent of the creditors" to an otherwise effective assignment for their benefit will be "conclusively presumed;" also that "the execution, delivery and recording of the deed transfers the property of the debtor into the custody of the law;" also that "an assignment for the benefit of creditors takes effect upon its execution and delivery;" and that "equity will not permit a trust to fail for want of a trustee." The very statement of these principles supports the proposition we have above announced, that, to an effective or completed assignment, a delivery or acceptance or change of possession is essential. It should be kept in mind that, as we have already pointed out, to entitle plaintiffs to go to the jury in this case, it is

not essential that the assignment at the time of the loss of the insured property should be found to have been void or of no effect. The issue turns rather upon the question whether the assignment had then been fully consummated, and the title to the property had then been effectually transferred to the assignee. The appellees' own argument and the authorities cited by their counsel are to the effect that this question depends upon whether this conveyance had been "executed and delivered."

"Execution" of a deed of conveyance is not limited in meaning to the mere making or signing thereof, or to its acknowledgment, although it is sometimes loosely used in that sense. Properly, it includes the idea not only of the due making, signing and acknowledgment, but also of its delivery to the grantee or to some other person for him. *Creamer v. Bivert*, 214 Mo. 473; *Brown v. Westerfield*, 47 Neb. 399; *Nicholson v. Combs*, 90 Ind. 515, 516; *Fire Association v. Ruby*, 60 Neb. 216; *Tiernan v. Fenimore*, 17 Ohio 552; *Wells v. Lamb*, 19 Neb. 355; *Black's Law Dictionary*; *Anderson's Law Dictionary*. We find no precedent in any decision upon the common law of assignments, nor any decision, where the statutory regulations of such assignments are at all comparable with our own, which fairly supports the proposition that an assignment of this nature works a change of title to the assigned property without delivery to or acceptance by the assignee, and without a change in the possession or control. It follows that the first inquiry suggested at the outset of this discussion must be answered in the affirmative.

II. The next and last inquiry is whether, adopting the conclusion above announced, it should still be held that the evidence introduced on the trial shows, as a matter of law, the delivery and acceptance of a conveyance or completed assignment vesting the legal title in the assignee before

6. DEEDS: execution: scope of term.

the loss by fire occurred. This question we are constrained to answer in the negative. It is suggested

7. ASSIGNMENT
FOR BENEFIT OF
CREDITORS:
deed of assign-
ment: record-
ing: effect on
question of de-
livery.

that the recording of the deed effected a delivery, but such is not the law. It may be, and probably is, evidence tending to show delivery, but it is assuredly not conclusive of that fact. Indeed, some courts seem dis-

posed to hold that the mere record of a deed is of but slight weight as evidence of delivery, unless the possession of the recorded paper is traced to the grantee or to the party claiming under him. *Egan v. Horrigan*, 96 Me. 46; *Barr v. Schroeder*, 32 Cal. 609. At most, it gives rise to a rebuttable presumption of delivery. *Neel v. Neel*, 65 Kan. 858; *Beckett v. Heston*, 49 N. J. Eq. 510; *Jackson v. Perkins*, 2 Wend. (N. Y.) 308, 317; *Hill v. McNichol*, 80 Me. 209, 220.

Again, it is said to be shown without dispute that the deed was delivered to counsel for the assignees, and that his act in having it recorded was their act. But the record does not so show. There is nothing in the record to prove conclusively that Arthur Hoffman, who took the deed and placed it of record, was at that time in any manner representing the assignees, or acting under authority or instruction from them. It sufficiently appears that he or his firm represented the insolvent corporation and drew or prepared the deed of assignment and took it to the recorder's office. So far as appears, plaintiffs knew nothing of the recording until after it was done, and, if they tell the truth (and their credibility was for the jury), neither of them ever consented to act as a trustee for the administration of the insolvent's estate until two days later.

It is argued by counsel that there is a conclusive inference of consent on the part of the plaintiff Schenck, because he, as one of the directors of the corporation, attended a meeting of the board on Friday afternoon, and united in the action authorizing or ratifying the act of the officers in

making the assignment. The record does not sustain us in so holding. It is entirely possible that he believed that the embarrassments under which the corporation was laboring made an assignment advisable, and yet was not willing to accept the burdens or responsibilities of a trustee for the settlement of its affairs. It is not shown that he had seen or knew the contents of the deed, or knew or had been informed that he had been or was likely to be named as an assignee; and, in view of his explicit denial that he had consented thereto, it was not within the province of the court to take that question from the jury. Moreover, even if he had consented in advance to accept the trust, the title to the property would not vest in him under the trust until the deed for that purpose was made and delivered. The case of *Commercial Nat. Bank v. Mosser*, 57 Mich. 386, cited by the appellees, differs widely from the one before us. There, the assignees, following the practice allowable in some states, united with the assignors in making the written assignment, after which they themselves filed it for record. This, the opinion expressly says, was done by the assignees "after the execution was complete." In other words, the deed was complete in form, and the assignees' consent was shown by their act in joining in the deed, which was delivered before it was made of record. See, in this connection, *McIlhargy v. Chambers*, 117 N. Y. 532, above cited.

As further bearing upon the question, we may say that there was evidence tending to show that, up to the close of business on Saturday evening before the Sunday on which the fire occurred, there was no visible or actual change in the management, control or possession of such business, or of the company's shops or other property, and, if true, the fact so shown tended directly to corroborate the plaintiff's claim that they did not act or consent to act in the premises until Monday morning, thus emphasizing our conclu-

sion that the question whether the change of title had taken place when the fire occurred was one for the jury. It is true, of course, that circumstances were shown or admitted from which the jury could have inferred that the assignees did consent to their appointment in advance, but, there being also other evidence justifying the contrary finding, it was not a case for peremptory direction of a verdict.

The necessary result of this discussion is the reversal of the judgment of the district court in each of the cases mentioned in the caption, and they will each and all be remanded for a new trial.—*Reversed and remanded.*

DEEMER, EVANS and PRESTON, JJ., concur.

EMPIRE CREAM SEPARATOR Co., Appellant, v. BAIR, FERRELL
& Co., et al., Appellees.

EVIDENCE: Parol as Affecting Writing—Past Transactions. A
1 written contract dealing with future transactions is no obstacle to the reception of oral evidence of a compromise entered into on the same day solely with reference to *past transactions* between the parties.

PRINCIPAL AND AGENT: Authority—Prima-Facie Showing.
2 The sufficiency of the evidence to show, in a prima-facie way, the authority of an agent to act for the principal, depends on the situation and relations of the parties. Evidence reviewed, and held to establish such prima-facie authority.

Appeal from Hamilton District Court.—E. M. McCALL,
Judge.

FRIDAY, NOVEMBER 17, 1916.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

ACTION on account for goods sold. The answer set up an affirmative defense of compromise and settlement. Ver-

dict and judgment for the defendants, and plaintiff appeals.
—*Affirmed.*

Wesley Martin, for appellant.

O. J. Henderson, for appellees.

EVANS, J.—The plaintiff had sold and delivered to the defendant five cream separators at agreed prices amounting to the sum of \$210. This fact was admitted by the defendants. The defendant company pleaded, however, that it had a claim against the plaintiff for about \$400 of commissions in prior transactions, and that the plaintiff was disputing the validity of such claim; that a compromise settlement was reached between the parties, whereby the defendant company relinquished its claim for the commissions, and, in consideration therefor, the plaintiff discharged its account against the defendants now sued on. It appears that the plaintiff is a manufacturer, and the defendants were dealers handling their goods. The five separators were received by the defendants in pursuance of a certain written contract of agency under which the parties operated for a time, and which was later canceled. At the time of the alleged compromise, the parties were contemplating entering into a new written contract of agency. They did enter into such new written contract on October 18, 1913. This is the date claimed by the defendants as that of the compromise. The evidence on behalf of the defendants in support of the alleged compromise is undisputed.

Ten specific points are presented for our consideration on this appeal. They are all based, however, upon two general propositions, as follows:

(1) That the alleged contract of compromise was oral, and that it preceded the making of the written contract of October 18, 1913; that it was, therefore, merged therein,

1 EVIDENCE:
parol as affect-
ing writing:
past transac-
tions.

and that parol evidence, therefore, should not have been received.

(2) That there was a fatal failure of proof of such compromise, in that there was no evidence that the alleged agent of the plaintiff who purported to make the compromise had any authority to make it.

1. The contract of October 18, 1913, was a contract of agency, whereby the defendants placed an order for 70 separators for the purpose of resale, upon certain terms therein specified. The subject-matter thereof was entirely distinct from the past transactions between the parties. The past accounts or existing controversies were not involved therein either by reference or implication.

There was no contradiction or inconsistency between such contract and the alleged oral compromise for settlement of past differences. The written contract, therefore, did not and could not have the effect to render inadmissible the parol evidence of the alleged compromise. There was an incidental relation between the two transactions. The fact that there was an acute dispute between the parties over the transactions of the previous agency would tend materially to deter them from entering into another contract of agency. The fact, therefore, that they did enter into one tends in some degree to corroborate the claim of the defendants that the past dispute was adjusted. We are not greatly impressed with the merits of the defendants' original claim for commissions. But there was a fair subject of compromise involved. The oral evidence introduced by the defendants being undoubtedly admissible, and the same being undisputed by plaintiff, the question raised by the appellant at this point is not well taken.

2. PRINCIPAL AND
AGENT: author-
ity: prima-
facie showing.

2. Was there any authority in the purported agent of the plaintiff to make the alleged compromise? Or rather, was there any evidence of such authority sufficient to sustain the finding? The defendants' place

of business was Webster City. The plaintiff was represented in the alleged compromise agreement by two purported agents, Geyer and Stowell. Geyer was a manager, with headquarters at Mason City. If we understand the record, the defendants were within his territory. Stowell was a manager from the home office. The written contract that was entered into the same day with the defendants was signed for the plaintiff by Geyer. It had a provision, however, that it would not become effective until approved by the home office. It was later approved at the home office. The particular person, however, who approved it in the home office for the plaintiff was Stowell, who was present in person when it was made. A corporation is necessarily represented by some individual in all its transactions. The facts here stated were quite sufficient to make at least a prima-facie case of authority in the purported agents of the corporation. The proof in that direction is further strengthened by another significant circumstance. Considerable correspondence followed between the defendants and the plaintiff through the home office. The defendants asserted the alleged compromise. The plaintiff denied that any compromise agreement had been made. At no time in such correspondence did the plaintiff deny the authority of the purported agents to make the compromise. This was a circumstance entitled to some weight. We think, therefore, that the authority of the purported agents was sufficiently proved.

The judgment of the trial court must, therefore, be—
Affirmed.

DEEMER, WEAVER and PRESTON, JJ., concur.

WINIFRED ERICKSON, Appellant, v. TOWN OF MANSON et al.,
Appellees.

NEGLIGENCE: Contributory Negligence—Knowledge of Danger—

- 1 **Distracted Attention.** The court cannot pass the sentence of guilt of contributory negligence upon the action of one with attention distracted in running against a guy wire in a public street, of the existence of which wire he had no knowledge.

PLEADING: Form and Allegation—Nuisance and Negligence.

- 2 Nuisance may exist although there be no negligence; there may be actionable negligence which does not constitute a nuisance; and negligence and nuisance may combine in the same act. Pleading reviewed, and held to predicate liability on both negligence and nuisance.

MUNICIPAL CORPORATIONS: Streets, etc.—Obstructions—Au-

- 3 **thorisation by City—Effect.** The erection of obstructions in a public street, *under license or permission of the municipality*, does not necessarily render the erector immune from an action for damages for maintaining a nuisance. So held as to telephone guy wires, so constructed as to discommode the public. Sec. 2159, Code, 1897.

TELEGRAPHS AND TELEPHONES: Construction—Discommod-

- 4 **ing Public—Authorization by City—Nuisance.** Telephone guy wires so constructed as to discommode the public, in violation of Sec. 2159, Code, 1897, are actionable nuisances, even though erected under the license or permission of the municipality.

Appeal from Calhoun District Court.—E. G. ALBERT, Judge.

SATURDAY, DECEMBER 16, 1916.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

ACTION, at law to recover damages for personal injuries alleged to have been caused by the negligent maintenance of a telephone guy wire in and along a public street in the town of Manson. The defendants denied all negligence, pleaded that the guy wire was a necessary and proper part of the telephone system, erected and maintained by the telephone company upon the streets of the town under the authority and direction of the officials of the town. Upon these issues, the case was tried to a jury, and, at the conclusion of plaintiff's testimony, the trial court, on mo-

tion of the defendants, directed a verdict in their favor.—*Reversed and remanded.*

Faville & Whitney and *Robert Healy*, for appellant.

V. P. McManus, J. W. Jacobs, E. C. Stevenson, and *Kelleher & Price*, for appellees.

DEEMER, J.—I. Something like 15 years ago, the defendant telephone company, acting under a license or permission from the defendant town, constructed its telephone system over and along the streets of the town, and erected its poles and wires along the south side of Third Street therein. As a part of this system, it constructed the guy wire in question, which was attached to poles, one standing at or near the northeast corner of Third and Calhoun Streets in said town, and the other in the parking nearly in front of the property in which plaintiff lived at the time of the accident, the said property being a corner lot, or lots, bounded on one side by Third Street and on the other by Calhoun. Third Street runs east and west, and Calhoun Street, north and south. There were no sidewalks around plaintiff's property at the time the accident happened, but there was a pathway running east and west along the north side of the property. This was kept free from snow during the winter preceding plaintiff's accident, but neither the plaintiff nor any of the members of the family used this pathway, for the reason that the north door of the house was closed and boarded up as a protection from the cold winds of the winter. This door was opened, however, about a week prior to the accident. Before the opening of this door, the south door of the house was the only one which was used. One desiring to leave the house used this south door, thence proceeded in a westerly direction toward the corner of the lot, and thence westerly again on the street.

Plaintiff and her husband moved into the property December 18, 1913, and were occupying the same on April 26,

1914, when the accident occurred. During the last week of the month of December, plaintiff's husband discovered the guy wire in question, and within a few days thereafter, he notified the manager of the telephone company of the situation, and expressed his desire to have the wire removed. The manager replied that he was acquainted with the situation and would remove the wire. The city officials also had knowledge of the situation, and sometime in March, 1914, plaintiff's husband spoke to the mayor about it, had him go out and look at it, and then told the mayor that it was dangerous and he wanted it removed. As we have already said, this guy wire ran from near the top of one telephone pole down to another pole, the latter being almost directly opposite plaintiff's house, and within two feet of the lot line. The wire was attached to this latter pole about 3 or 4 feet from the ground. The first named pole was about 140 feet from the one to which the guy wire was attached near the ground, the wire being attached to this first named one from 25 to 30 feet from the ground. Proceeding on a direct line from the north door of plaintiff's house, the wire was not more than 5 feet from the ground. Between the two poles there was a tree, the main body of which was perhaps 10 inches in diameter, and this tree was so situated that one coming directly out of plaintiff's north door and passing into the traveled portion of the street would find this tree trunk and the telephone pole about equidistant from his path, the wire at that point being not to exceed 5 feet from the ground. The guy wire was a small single strand No. 9 or 10 wire, not easily seen. It was not of the size or material generally used for that purpose, and was called a "made-guy," and, according to some of the testimony, was not properly put up, and was unnecessary and not of the usual, ordinary and proper form of guy.

On April 26, 1914, plaintiff's husband drove his auto to his home, stopping it on the side of the street nearest

his house and almost directly north of the north door thereof, and at a point midway between the telephone pole to which the lower end of the guy wire was attached and the tree which we have hitherto mentioned. He called his wife and three children to join him for a ride in the machine. Pursuant thereto, they immediately got their wraps and started for the auto, the children preceding their mother. The mother came hurriedly out of the house, buttoning her coat, and passed quickly on a direct line from this north door toward the auto. As she attempted to pass between the telephone pole and the tree near at hand, the wire caught her diagonally across the face, throwing her backward upon the ground, and causing serious and permanent injuries. She testified that she did not know the guy wire was there, had never seen it before, and did not see it at the time of the accident. There was also testimony that the grass was green and that the trees were just beginning to leaf out; that there was a row of trees on the other side of the east and west street, north of the property; and that all of these trees cast such shadows as to obscure the wire. Plaintiff also testified, in substance:

That she could not say whether she looked to see whether there were any obstructions or not; that she did look to see if there were any limbs of the trees in her way; that she was not expecting any obstructions and was not certain as to whether she had looked to see whether there were any overhead obstructions or not; that she was watching the children as she left her house for the automobile, and did not look particularly for any obstructions; that she was attracted by the passing of an automobile, which passed on the north side of her husband's car; and that, for the most part, her attention was directed to her children, as they were entering the car, and to obstructions which might lie along the surface of the ground, but not to obstructions such as the guy wire in question.

This is the substance of the testimony, save that we do not set out that regarding the character of plaintiff's injuries, as that matter does not seem to be involved on this appeal, and in any event, this was a jury question.

To sustain the ruling of the trial court, it is argued that, under the testimony, plaintiff was guilty of contributory negligence as a matter of law in not looking out for and discovering the wire as she proceeded toward the auto. It is also contended that plaintiff's action is bottomed, not upon negligence, but upon the theory that the guy wire was a nuisance, and that there was no nuisance, because the town officials having charge of the matter legalized the nuisance and expressly authorized the erection and maintenance of the guy wire. Counsel also suggest that, even if the action be for negligence, that claim is out of the case because of the license or permission granted by the town officials to the telephone company to construct its poles, wires, etc., in the street.

II. With reference to the claim of contributory negligence, we need do no more than call attention to the testimony given by plaintiff regarding her conduct after her husband called her to the machine. She did not, according to the testimony, know, before the accident, that there was a guy wire at the point in question, and no reason appears why she should have known of it. She never had occasion, prior to the accident, to pass that way, or to observe what was in the street to the north of the house. Her attention was somewhat distracted, and the wire was not one which was easily seen. In such circumstances, the question of contributory negligence was for a jury. *Bonjour v. Iowa Telephone Co.*, 176 Iowa 63; *Middleton v. City of Cedar Falls*, 173 Iowa 619; *Mathews v. City of Cedar Rapids*, 80 Iowa 459. Nothing further need be added on this proposition.

1. NEGLIGENCE:
contributory
negligence:
knowledge of
danger: dis-
tracted atten-
tion.

III. Whether the action is for nuisance or negligence depends upon the allegations of the petition, although it should be said that a nuisance may exist although there be no negligence, and there may be actionable negligence which does not constitute a nuisance. Again, there may be both; that is to say, negligence may be of that type which will constitute a nuisance. Turning to the petition, we find the following, among other, allegations:

2. PLEADING:
form and allegation: nuisance and negligence.

"That the defendant telephone company, more than a year prior to the institution of this suit, created a nuisance and maintained said nuisance for more than a year last past, said nuisance consisting of stringing and maintaining a line of wire on the north side of said lot facing on Third Street, or on the south side of the street and adjacent to said lot, said wire extending a distance of about 150 feet, one end of which was fastened to a pole, said fastening being at a distance of about 4 feet from the ground, and the other end of said wire being fastened to another pole at a distance of about 20 feet from the ground. * * * The plaintiff avers that the defendants, separately, jointly and concurrently, acted in a willful, negligent and improper manner, in erecting, stretching, tying and maintaining said wire in the manner above described, and keeping the same in said condition for said period and length of time."

Along with these are allegations of plaintiff's freedom from contributory negligence. These allegations, it seems to us, charge not only nuisance, but negligence, and it is to be noted that defendants are a little inconsistent in their arguments. If the action is bottomed on nuisance pure and simple, the question of contributory negligence is out of the case; for, as a rule, if the action is not bottomed on negligence, there can, strictly speaking, be no contributory

negligence. We do not, of course, overlook the rule that a defendant may interpose inconsistent defenses, and counsel in argument here, in support of the rulings of the trial court, are not bound to be consistent in their claims. We mention the fact, however, because of the strong insistence by counsel that plaintiff was guilty of contributory negligence. Assuming, then, that the petition charges negligence, we think there was sufficient testimony to take the case to a jury on that proposition, and that it would not do, under the facts shown by this record, to declare as a matter of law that either party defendant was free from negligence. That, as we have said, under the testimony offered by plaintiff, was a jury question.

IV. Assuming, however, that the petition is bottomed on the claim of nuisance, a jury may well have found, under the testimony adduced, that the license or permission given by the city officials for the construction complained of, did not render either defendant immune from an action for damages. Some erections or constructions upon a street may be so legalized that they do not constitute a nuisance; as, for example, telephone or telegraph poles of proper construction and properly placed. But our statute expressly provides that poles and wires must be so constructed as not to discommode the public. See Sec. 2159, Code, 1897; *State v. Iowa Telephone Co.*, 175 Iowa 607. There-

fore, in the placing of poles and wires, care must be taken to see that they are not so placed as to constitute a nuisance. *Wheeler v. City*, 131 Iowa 566; *Kent v. City of Harlan*, 170 Iowa 90. The jury may have found that this small guy wire was a mere temporary affair or expedient which both the telephone company and the city expected to remove or have removed, in a short time, and might also have found that, as constructed, it amounted to an actual

3. MUNICIPAL COR-
PORATIONS:
streets, etc.:
obstructions:
authorization
by city: effect.

4. TELEGRAPHS
AND TELE-
PHONES: CON-
struction: dis-
commoding pub-
lic authoriza-
tion by city:
nuisance.

nuisance in front of plaintiff's property.

Now, while certain things which might otherwise be a nuisance may be legalized, still there are limitations upon this doctrine. In *Pacific Tel. & Tel. Co. v. Hoffman*, (C. C. A.) 208 Fed. 221, the court said:

"The primary and general use of a highway is for travel, and any obstruction that renders it dangerous or unsafe for that purpose is unlawful; and, although a telephone company may have the right to occupy a highway with its poles, yet if it secures them in the highway by guy wires so as to endanger the public travel, or the safety of individuals in the reasonable and ordinary use of the highway, such method of securing and maintaining its poles is an obstruction, and the law declares that such an obstruction is a nuisance, and the act of maintaining such a nuisance, negligence."

In *Kent v. City of Harlan*, supra, we said:

"We have held that hitching posts upon a street, authorized by the proper authorities, are not a nuisance *per se* (citing cases). It does not follow, however, that they may not be a nuisance in fact, under the facts of a given case. *If a nuisance in fact, no authority is conferred upon the city to maintain them as such.*"

See, also, *Mosheurel v. District of Columbia*, 48 L. Ed. (U. S.) 170.

Something is said in argument to the effect that there is no testimony that the nuisance or negligence was the proximate cause of the injury. We do not go into that question, for it was manifestly one for the jury. As to the liability of the defendant city, there was enough to take that question to the jury, under the doctrine announced in *Wheeler v. City*, supra.

The case should, we think, have been submitted to the

jury. The judgment must therefore be reversed, and the cause remanded for a retrial.—*Reversed and remanded.*

WEAVER, EVANS and PRESTON, JJ., concur.

EDMUND FREIDLI, Administrator, Appellee, v. DAVENPORT & MUSCATINE RAILWAY Co., Appellant.

RAILROADS: Accidents at Crossings—Negligence—Evidence. A

1 finding of negligence is justified from evidence that an interurban car was, during the nighttime, run at such a rate of speed over a publicly used and obscured crossing that the car was not under reasonable control, and that said crossing was one customarily used for the taking on and discharge of passengers.

TRIAL: Instructions—Objections—Waiver. Failure to object to

2 instructions when given, especially when counsel's attention was, by opposing counsel, specially drawn to the instruction in question, is a complete waiver of objection thereto. Section 3705-a, Code Supplement, 1912.

Appeal from Muscatine District Court.—M. F. DONEGAN, Judge.

THURSDAY, MARCH 15, 1917.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

ACTION at law to recover damages for the death of plaintiff's intestate. There were verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

E. M. Warner, for appellant.

A. R. Whitmer, and *Dutcher, Davis & Hambrecht*, for appellee.

WEAVER, J.—The defendant company
 1. RAILROADS: ac- operates an interurban electric railway be-
 cidents at crossings: neg- tween the cities of Davenport and Musca-
 ligence: evi- tine. Near the latter city, it crosses a pub-
 dence. lic highway at a point known as Richman, or Richman

Crossing, where cars are accustomed to stop to receive and discharge passengers. The plaintiff's intestate, a farmer, driving to his home at night along said highway, and attempting to make the crossing, was struck and killed by one of the defendant's cars. To recover damages thus occasioned, this action is brought.

Roughly speaking, the car in question was moving from the west eastward, while deceased was driving from the south northward. In the angle between these two lines of approach, there was a bank or elevation of earth, on which there was more or less brush or small trees. The extent to which this intervening screen obscured the view of the track to travelers on the highway, and the view of the highway to motormen operating defendant's cars, form a question on which the witnesses do not altogether agree. The car was moving at about 35 miles per hour, and no stop at the crossing appears to have been contemplated. Deceased, according to the motorman, was driving at a slow or "jog" trot. His approach to the crossing was down an incline. The night was clear and bright. The only eyewitness of the collision was the motorman, and his statements are not altogether clear or free from confusion. This is due, no doubt, to the sudden and unlooked-for character of the accident and to the nervous shock resulting therefrom, rather than to any conscious purpose to distort the facts. The jury could properly find from his testimony that he discovered the horse driven by deceased at the first point or place where it could become visible to him in its approach to the crossing. This point he estimates at from 30 to 40 feet, and it is the theory of the defense in argument that the intervening obstruction was such that it was impossible for the motorman to discover the approach of a highway traveler from the south, or for such traveler to discover the approach of a car from the west, until within a few feet of the crossing. The motorman says he recognized the

crossing as a bad one, and for that reason omitted the sounding of the crossing whistle at the signal post standing ten trolley poles west of the crossing, but sounded it at the seventh pole. There is evidence, however, to justify the finding that the point where the horse and buggy first became visible to the motorman was considerably farther from the crossing than he places it, and the location of the car at that moment somewhere from 200 to 300 feet west of the point of collision.

As bearing upon the question of contributory negligence, the motorman says that, in the flash of his headlight upon the buggy, he saw deceased leaning back in the corner of the buggy top, which was dropped behind the seat, his hands and reins lying limp in his lap. There was also some evidence tending to show that deceased had been drinking while in town, and was carrying a bottle of whisky; but the record as a whole was such that the jury could properly find he was not intoxicated, and was reasonably capable of caring for himself. He was a resident of the neighborhood and familiar with the road and crossing. It should, perhaps, be added that, at the instant of collision, the horse had crossed the track, and escaped injury, but the buggy received the full force of the blow delivered by the car, and was carried or dragged along some distance toward the point where the car was finally stopped, a distance of about 150 feet.

At the close of the testimony on part of the plaintiff, and again at the close of all the testimony, defendant moved for a directed verdict in its favor, on the grounds: (1) That no negligence on part of the defendant is shown by the evidence; (2) that it is shown as a matter of law that the deceased was guilty of contributory negligence; and (3) that there is nothing in the evidence to justify the submission of the case to the jury under the rule or doctrine of "the last clear chance;" and that it appears affirmatively

that the motorman was guilty of no negligence resulting in injury to the deceased after said motorman saw, or in the exercise of reasonable care might have seen, the peril of the intestate. The court refused to direct a verdict, but held that deceased appeared to be negligent as a matter of law, and submitted the case to the jury upon the single proposition whether plaintiff was entitled to a recovery under the rule of the last clear chance. On this issue, the jury found for the plaintiff.

In its brief, appellant submits its case upon two propositions only: First, that there is no evidence tending to show negligence on part of the defendant; and, second, that the court committed error to the prejudice of the defense in Paragraphs 7 and 8 of its charge to the jury.

I. Negligence is charged in the petition in both general and specific terms. The specific allegation is that the car was being operated at a high and dangerous rate of speed, and that there was failure to give a signal or warning of the approach of the car to the crossing. We are quite clear that, even if we assume the peculiar character of this crossing and its surroundings to be just as appellant's counsel describe them, it presents a situation imposing upon the company the duty of reasonable care proportioned to the hazard so created, to avoid injury to persons lawfully using the highway. It is, of course, to be admitted that, generally speaking, no rate of speed by a railway car or train in the open country is negligent *per se*. But it is an equally well settled proposition of law that, where a railway is operated over a crossing or other place open to lawful public use, and especially where such place is obscured and rendered more than ordinarily hazardous by the nature of its surroundings, the company is bound to take notice of the hazard, and, by reasonable regulation of the operation or speed of its cars and use of its tracks, prevent, so far as is reasonably practicable, injury to those who are in the

rightful use of such public place or way. *Kinyon v. Chicago & N. W. R. Co.*, 118 Iowa 349; *Gray v. Chicago, R. I. & P. R. Co.*, 143 Iowa 268, 279 (160 Iowa 1); *Johnston v. Delano*, 175 Iowa 498; *Lundien v. Ft. Dodge, D. M. & S. R. Co.*, 166 Iowa 85.

This proposition is equally applicable to the case before us whether we consider the case as one of original duty resting upon the defendant by virtue of the peculiarly dangerous character of the crossing, or as one of resultant duty to avoid injuring the deceased after he had brought himself into the place of peril. So far as appears from the evidence, the motorman, though conscious of the dangerous character of the crossing, contented himself with a sounding of the whistle, and, without reducing speed or bringing his car under control, drove into the place of danger at a speed which he could not check in any effective way in time to avoid collision with any person seeking to make use of the public way at that point.

There was no error in the refusal of the trial court to hold as a matter of law that there was no evidence of negligence by the defendant.

2. TRIAL: instructions: objections: waiver. II. In Paragraph 7 of its charge to the jury, the court used the following language:

"By 'last clear chance' is meant it is the duty of a person to use reasonable care to discover and know the peril in which another person has placed himself through his own negligence, and to do what he reasonably can to avoid injury to such other person, as soon as it is reasonably apparent, or, by the exercise of reasonable care, would be reasonably apparent, that such other person is in or is going into a place of danger. A person failing to perform such duty and use reasonable care under such circumstances would be guilty of negligence, and, if another person were injured thereby, such injured person could recover, not-

withstanding the fact that he himself were negligent in going in or in going into such place of danger. In such a case, however, the acts or omissions constituting such negligence would be confined, as to the time of their occurrence, to the time after the person charged with negligence saw or knew, or by the exercise of reasonable care would have seen or known, that the injured person was in, or was going into, a place of danger. In this case, therefore, the negligence, if any, must consist in some act or omission on the part of the motorman, McCauley, which happened after he first saw, or by the exercise of ordinary care should have seen, the horse driven by Mr. Campbell, and you should not consider any of the evidence as to what happened prior to that time as constituting negligence upon which the plaintiff can recover in this case."

Appellant's argument is quite largely devoted to the alleged erroneous statement of law in the language above quoted. Were that question open to discussion in this case, it would call for a general review of the precedents and authorities from which has come the comparatively modern doctrine of the last clear chance, or, as sometimes expressed, the last fair chance, and might, perhaps, develop some difference of judicial opinion as to the soundness and propriety of the doctrine as stated by the court below. But upon the record before us, we think the appellant is not in position to raise the question, and we therefore do not attempt its decision.

It is shown by the abstracts that the trial court, having prepared its charge, including the matter now complained of, gave it to counsel for examination and for such exceptions as they might wish to preserve. After such opportunity for examination had been given, the trial judge, with the official reporter and counsel on both sides, took up the matter (not in the presence of the jury), and counsel on either side were called upon to state their exceptions,

if any, to the charge. Appellant's counsel presented no specific objection or exception to the charge as prepared. Appellee's counsel, however, called special attention to Paragraph 7, the last clause or part of which is above quoted, saying:

"I call special attention to the last paragraph of Instruction 7, and ask counsel whether he has criticism as to that, and if so, I am willing to have it modified."

He also repeated the suggestion in another form, saying:

"I call special attention to Instruction 7 with reference to the language there used defining 'last clear chance,' and ask counsel if he has any exception to that instruction. If so, I will consent to have it modified."

The only response made by appellant to this proposition was, at first, "That is the one I had any question about;" but later he added, "As I said before, I stand on the charge as it is." After the case had been submitted and verdict returned, appellant, in a motion for new trial, sought to except to the paragraph in question. with others, the only reason assigned for the failure to except at the proper time being that counsel was then very weary from his labors in the case, and that he failed to discover the errors. If any effect whatever is to be given the statute which requires parties and counsel to take their exceptions, if any, to the court's charge when the same has been prepared and submitted to them for that purpose, this case would seem to be a clear one for its application. It is not denied that opportunity was thus given. Counsel frankly admits it in argument. Nor is it denied that this very proposition in Instruction 7 was particularly called to his attention and the attention of the court by plaintiff's counsel, who voluntarily consented to have it modified, if objection was made thereto. When, therefore, appellant's counsel announced his desire to "stand on the charge as it is," there is neither

hardship nor unfairness in holding him bound by his election. If there was any error in this instruction, counsel clearly invited it when, in moving for a directed verdict, he assigned as a ground thereof that the motorman was not shown to have been guilty of any negligence "after said motorman saw, or in the exercise of reasonable care might have seen, the peril of the intestate."

Treating the instructions, therefore, as the law of the case, we have only further to say that the verdict of the jury is justified by the evidence. It follows that the judgment appealed from must be, and it is,—*Affirmed*.

GAYNOR, C. J., LADD and PRESTON, JJ., concur.

EVANS, J. I concur. I would omit from the opinion the quoted instruction, inasmuch as we refuse to review it.

WILLIAM J. GRAHAM et al., Appellees, v. O. B. COURTRIGHT, Appellant.

WILLS: Undue Influence—Attorney Drawing Will, as Beneficiary.

- 1 An attorney at law, in the drawing of a will, acts in a confidential relation to testator, he being specially called because he was such attorney, and because of testator's long friendship for him.

WILLS: Undue Influence—Evidence—Declarations of Testator.

- 2 Declarations of testator subsequent to the execution of a will may be admissible as showing his condition of mind, but not as substantive evidence that undue influence had actually been exercised over testator in the execution of the will.

WILLS: Undue Influence—Legatee-draughtsman—Presumption

- 3 and Burden of Proof. A legatee-draughtsman, even though holding confidential relations with testator at the time of the drawing and execution of the will, does not have the burden of proof to show that he did not secure his legacy by the exercise of undue influence. Legatee-draughtsman'ship does not, *ipso facto*, create a presumption of law that the legacy was ob-

tained by undue influence. By drawing the will and by becoming a legatee therein, he supplies an item of evidence against himself—an inference that he may have secured his legacy by undue influence or fraud. The probative force of this inference, or suspicion, under varying circumstances, to establish undue influence, (a) may be negligible, (b) may constitute a *prima-facie* showing of undue influence, or (c) may be so overwhelming as to require the direction of a verdict against the legatee. *But so long as the inferences to be drawn from a given state of facts are in equipoise, the question of undue influence is for the jury.*

PRINCIPLE APPLIED: See No. 4.

EVIDENCE: Presumptions — Fiduciary Relations — Legatee-

- 1 Draughtsman. The doctrine that undue influence is to be presumed as between parties *inter vivos*, dealing with each other when fiduciary relations exist between them, has no application to testamentary gifts.

PRINCIPLE APPLIED: Deceased, a careful, cautious business woman, was 74 years of age, had never been married, had one half brother, with whom she was living, and another brother, but whether full or half brother does not appear. Outside of blood relation, she was under no obligation to her relatives. She had been in good health until shortly prior to her death. She and defendant (an attorney) had known each other during all their mature years. Defendant, 25 years prior to the drawing of the will in question, had been attorney for her while she was acting as administratrix of her father's estate. Defendant and his family and deceased frequently exchanged friendly calls. During her last sickness, in accordance with a prior-expressed intention, she caused the defendant to be called to the house for the purpose of drawing her will. Apparently it was already understood that this half brother was to get the bulk of her property. The wife of this half brother and defendant were cousins, and defendant advised said brother not to be present during the preparation of the will, the reason being that the brother expected to be the principal legatee, and it would be better for him not to be present; and he was not present. Defendant was alone with deceased, she being bedridden. After some short time, defendant came out of the room, and informed the half brother that the deceased wished to make him a personal present. Defendant claimed that he told the half brother that he had, on account of this legacy to himself, re-

fused to draw the will, and that deceased had told him that, if he would not draw the will, she would not have any drawn. In this talk, nothing was said about the amount of the defendant's legacy. Defendant returned to the sick room and drew the will; witnesses were called; the will was fully executed, and defendant took it away with him. At the time of the witnessing, the will was not read over, but something was said by the deceased to the effect that she had given defendant a little present, and defendant remarked that he considered it more than a little. The will disposed of an estate of \$25,000 by giving to the one brother \$5,000, to the defendant \$5,000, and the residue to the said half brother. Deceased died 12 days later. *Held*, there was no presumption that defendant had secured his legacy by undue influence; that, consequently, the burden of proof was not thrown on defendant to show that he did not obtain his legacy by such means, but, in view of defendant's being a stranger to the blood, and in view of the amount of the legacy, the record presented a jury question on the issue of undue influence.

Appeal from Black Hawk District Court.—FRANKLIN C. PLATT, Judge.

WEDNESDAY, MARCH 14, 1917.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

ACTION to set aside the third paragraph of the will of Bessie Graham, as having been inserted through the alleged undue influence of the beneficiary therein, resulted in the verdict and judgment as prayed. The defendant appeals.—*Reversed*.

J. W. Arbuckle, for appellant.

Mears & Lovejoy, for appellees.

LADD, J.—Bessie Graham executed her will March 5th, and died March 17, 1913. She had never married, and was 74 years of age. She had been in good health until shortly before death, though she had become so fleshy that it was difficult for her to get about. The will was admitted to probate April 25, 1913, and this action to set aside the

third clause thereof was begun shortly afterwards. The will (1) directed the payment of debts, and (2) made a bequest of \$5,000 to William J. Graham, to be paid in 15 months. The third clause read:

"To the long-time and faithful friend of my beloved father and my friend, the Hon. O. B. Courtright, I hereby in gratitude give and bequeath the sum of \$5,000 to be paid to him by the executor hereof within 15 months from and after the probate hereof."

The residue of the estate, real and personal, was left to Theodore M. Graham, who was named as executor, without bond. The bequests were declared liens on the real estate. Theodore was a half brother, 10 or 12 years younger than decedent. Whether William was brother or half brother does not appear. Courtright drew the will, and the clause quoted is assailed only as having been inserted in consequence of undue influence exercised by him over testatrix. The jury, in so finding, accompanied their verdict with a statement denominating him "innocent of any charge of attempted fraud, but admit that he is the victim of a most unfortunate legal hypothesis which deprives him of an otherwise legitimate legacy."

Errors in ruling on the admissibility of evidence, in overruling motion to direct a verdict, and in instructions given, are assigned, and, as these are based on the evidence, the record may as well be stated at the outset. The acquaintance of Courtright and testatrix began when living with their parents on farms not far apart, in Grundy County. She continued there until about 1885. He began the practice of law in Parkersburg in 1878. Upon the death of her father, in 1888, she became administratrix of his estate, and employed Courtright as attorney to aid in its settlement. Thereafter, she lived at Cedar Falls until the death of her mother, when she returned for a short time to Parkersburg. Thereafter, she made her home for a time

with the family of William at Cedar Falls, and later lived at the home of Gallagher in that place about 15 months. From October, 1912, until her death, she lived at the residence of Theodore Graham, at Waterloo. She had paid \$1,500 toward its purchase, by Theodore, in order to have a home with him, and had paid him \$300 besides, and, in addition thereto, \$20 per month for board. She owned a farm of 160 acres, worth \$24,000, and had \$600 in money at the time of her death. Courtright had become a member of the firm of Courtright & Arbuckle at Waterloo in 1894, and had been in the active practice of his profession until 1911, when he retired, but occasionally attended to legal business thereafter. During all the years, they had met occasionally, she had visited at his home up to the time of his first wife's death, and after she came to Waterloo, he had called on her frequently with his wife, as well as on Graham and wife, the latter being his cousin. Their relations had always been cordial. They were friends. At the trial, Theodore testified that "she was a woman that had been accustomed to carry on her own business matters all her life, and was a very cautious, careful woman. She was in the habit of reading over or having read over documents before she signed them;" that, aside from being sick, he "did not know whether her mind was as good as it ever had been or not;" that she had said that, when she got sick, she wished the defendant to draw her will.

Shortly before noon on the day in question, Mrs. Graham telephoned Courtright that "Bessie is sick, and would like to see you." She had previously told him that testatrix would like to do something about her will. He called after lunch. Theodore testified that Bessie was sick in bed when he arrived; that he went to the sick room with him.

"I told him that it had been my sister's request that, whenever the time came when she wanted to dispose of her

property, I was to assist her. He said he thought it better for me not to, as I expected to be a beneficiary, so that, if the will was ever questioned, I could go on the stand and deny I knew what was in the will. As I went out, he put his hands on my shoulder and walked to the door with me and closed the door tight. He and she were left in the room; nobody else. After probably 10 or 15 minutes, he called me in, and says: 'Bessie wishes to make me a little present;' and I asked what was the nature of the present, —'as a retainer to act for the estate?' He says, 'No, just a little present.' There was no reply from her, and I replied, 'Why,' I says, 'It is hers, she can do as she pleases,' and I walked out. In a few minutes, he came out with his notes and wrote out the will, and after he got it wrote out, he told my wife to call in some witnesses, and they were called in. He went into the bedroom and I don't know what took place. The witnesses came. I did not read the will and was not in the bedroom while the witnesses were there. He came out with the will, stuck it in his pocket and walked out. When she came to make her home with me, she could not get out doors. She never went out of the room until the day she died. It was very difficult for her to walk about."

His wife, Effie Graham, corroborated her husband somewhat, by testifying:

"I heard him say, 'Theodore, you better be out, because if you were called on you can get up and say that you knew nothing that is in the will.' My husband came out and went into the kitchen. The door was shut up tight. Mr. Courtright was in the room alone with Bessie about 15 minutes, while he made the notes of the will. He then came out, and says, 'Theodore, Bessie wants to make me a little remembrance.' Mr. Graham says, 'What is this, in the nature of a retainer?' He says, 'No, just a little present.' I never heard the will read and did not read it."

On the same subject, the defendant testified as follows:

"I went to the home of Theodore Graham in response to this call. I met Theodore Graham and his wife and the decedent, Bessie Graham. I found the decedent in a bedroom on the first floor of the house. Theodore went into the room with me. I had some conversation with Theodore there in the room. I don't remember just how it started, but do remember of telling him that he had better not be present during the time that I was ascertaining what the provisions of the will were to be, and he replied that she had said when she came to make her will she wanted him present, and I said to him, 'Well, that is all right so far as she is concerned, but for your own interests I think it would be better for you not to be present. If any difficulty should arise hereafter, which is liable to, you would be in a better position if you could go onto the stand and testify that you knew absolutely nothing about what was in the will,' and upon that he went out of the room. Whether I put my hand on his shoulder or not, I don't remember. The bed lay lengthwise of the room. The door came in pretty near opposite the foot of the bed, and there was a stove and a chair between the door and the head of the bed, and I sat in the chair or stood there by the chair probably not over a foot or two from the bed, and not more than a foot or two from the door. After he went out of the door, I am quite sure I closed it."

The witness then explained the reason for the suggestion that Theodore be not present, relating a conversation concerning difficulty between testatrix and W. J. Graham, which conversation Theodore and his wife denied having had, and proceeded:

"That is substantially the conversation we had at that time, and I knew that fact when he came into the room, and thought that, if he was to be given the bulk of the property, it would be better for him—and I was interested in

him, his wife being a relative—that it would be better for him not to know the contents of the will, and said so to him, and said if there was any trouble it would be better for him to be able to go on the stand and swear that he didn't know anything about what was in the will. After being in the room some 5 or 10 minutes, I stepped to the door and called Theodore and told him to come. I think the door was closed, but I am not positive about that. He came into the room, and I said to him, 'We are up against it.' He says, 'What is the matter?' I says, 'Bessie wants to leave me a legacy or bequest, and I have refused to draw her will, and she says that she won't draw a will unless I draw it.' Theodore hesitated a moment, and then says, 'Well, I suppose what she gives you she gives by way of retainer to look after my interests, if there is any trouble.' I says, 'No, sir, what she proposes to do is to give me an out and out bequest.' There was nothing said about the amount of it in any shape. He says, 'Well, go ahead,' and turned around and went out, and I closed the door and did go ahead."

The subscribing witness, Thomas Dunlavey, testified that the will was not read over in his presence, and that, to the inquiry "if this was her last and only will," decedent responded "Yes;" and then she said that she left a little present or little remembrance to Mr. Courtright, and he said, in substance, that it was a "good remembrance." Mrs. Dunlavey, also a subscribing witness, testified that:

"Bessie said she left Mr. Courtright a little remembrance. I think he said, 'Well, Bessie, it is more than a little.' That is as near as I can tell the exact words."

This witness was asked, on cross-examination, whether decedent replied:

"Yes, it is what I wanted to do anyway. A. Well, she meant something like that, but I couldn't say just exactly what it was. Q. Well, was it substantially that?

A. Yes, it was something like that. She seemed to think that she wanted to give him something. Q. It was—she seemed to want to indicate that it was what she wanted to do, anyhow? A. Yes, sir. Q. Whether it was big or little? A. Yes, sir. Q. Was that your idea? A. Yes, sir.”

I. Appellant contends that the trial court should have held that he acted merely as a scrivener, and erred in submitting the issue as to whether the relation of attorney and client existed between him and decedent when he prepared the will. There was no error of which he may complain. He was an attorney at law, and she knew him as such. Though wills are often drawn by others, their preparation is usually entrusted to attorneys, and, when an attorney is called for that purpose, the inference is that his services as such are desired. As said in *Loder v. Whelpley*, (N. Y.) 18 N. E. 874:

1. WILLS: undue influence: attorney drawing will, as beneficiary.

“A lawyer, in receiving the directions or instructions of one intending to make a will, is confided in by reason of his professional character as a counselor, and he acts in that capacity, although asking no questions, and without advising; he does nothing more than to reduce those directions to writing. The relation, therefore, between the testatrix and the witness was that of client and attorney.”

This was said in holding that such attorney might not testify to communications between him and client under a statute of New York. Under the decisions of this and many other states, similar statutes do not apply in contests over the probate of the client's will. *Winters v. Winters*, 102 Iowa 53. The cases on which appellant relies so hold, and that, where an attorney acts as such, the statute has no application. *In re Downing's Will*, (Wis.) 95 N. W. 876; *In re Estate of Young*, 33 Utah 382 (17 L. R. A. [N. S.] 108), and cases collected in note; *Borum v. Fouts*, 15 Ind.

50. These decisions furnish no aid in the determination of whether an attorney acted as such in the preparation of a will, for in any event he may testify to what occurred, unless precluded from so doing on some ground other than professional confidence. Where an attorney is called upon to perform services in the line of professional employment, and he does so, the natural inference is that the relation of an attorney and client is thereby created. Such an inference was not obviated, but strongly confirmed, by the record before us; for appellant advised the residuary legatee with reference to his attitude as bearing on any possible contest thereafter, and also disclosed to him the testatrix's design of making him a beneficiary, thereby protecting decedent in the matter of her estate's reaching those she intended to benefit. This conclusion is not obviated by the circumstance that he had retired from the active practice of his profession, for he still attended to legal business entrusted to him, and his capability as a lawyer was unimpaired. The court might well have assumed that the relation of attorney and client existed, and therefore appellant was in no manner prejudiced by the submission to the jury of whether that relation existed.

2. WILLS: undue influence: evidence: declarations of testator.

II. Effie Graham testified that, after the defendant had completed the will and had been gone about a half hour, she had a conversation with the testatrix, in which she inquired of her: "Bessie, what did you leave Orlando?" She said, "I left him \$500." On cross-examination, she was asked:

"Who was present? A. Mr. Graham and I. * * *

Q. Isn't it a fact that her first reply was that she did not wish to tell, or words to that effect? A. Well, no; she didn't say right out that she didn't wish to. She just spoke about the same as anybody, I guess. I says, 'Bessie, tell me,' and she did. She says, 'Mr. Courtright is a friend

of yours.' I says, 'Well, Bessie, tell me how much you left him.' She says, 'I left him \$500.' I asked her a second time. I said to her, 'Bessie, tell me how much you left Orlando.' She said, 'Orlando is a friend of yours.' I said, 'Well, Bessie, tell me.' She says, 'I left him \$500.' "

Her husband, Theodore, testified that he heard the conversation, and that:

"My wife asked her, 'How much did you leave Orlando?' That was the name that Mr. Courtright was always known by in the family. She said, 'I left him \$500.' "

This evidence was received over objections, and it is contended: (1) That it was inadmissible for any purpose; and (2) that the instructions 6, 7 and 8, with reference thereto, were erroneous.

Evidence indicating the condition and attitude of decedent's mind was admissible as bearing on the issue as to whether decedent's mind had in fact been influenced. *Johnson v. Johnson*, 134 Iowa 33; *Cash v. Dennis*, 159 Iowa 18; *Hughes v. Silvers*, 169 Iowa 366; *Zinkula v. Zinkula*, 171 Iowa 287, 301.

The ruling of the trial court is approved on this ground. It is argued, however, that this class of evidence is not admissible until substantive testimony of the exertion of undue influence has been adduced. The satisfactory answer to this is that the order of the introduction of evidence is controlled by the discretion of the district court, and, in any event, the record was such that the exercise of undue influence might have been found by the jury. The decisions of this court cited above are conclusive that the above evidence is to be regarded as mere hearsay on the issue as to whether undue influence was actually exercised or exerted on the decedent, and may not be considered as bearing thereon. But the court, in the sixth instruction, enumerated many items of evidence, including "the evidence in

regard to the amount of the legacy to the defendant," and told the jury that:

"All this evidence may be considered by you not only in determining whether there was undue influence exercised by the defendant, but also in determining whether the defendant has overcome the presumption, if any, that he did exercise such undue influence over the said Bessie Graham."

This instruction manifestly was erroneous, and, in view of the fact that contestant relied largely on the inference of undue influence to be drawn from the fiduciary relation existing between testatrix and appellant, was extremely prejudicial.

III. The trial court also instructed the jury, in substance, that, if the relation of attorney and client existed, the clause of the will was presumed to have been the result of undue influence exerted by him over testatrix, and:

3. WILLS: undue influence: legatee-draughtsman: presumption and burden of proof.

"That the law then casts upon the defendant the burden of showing by a fair preponderance of the credible evidence that no undue influence was exercised by him over the said Bessie Graham that induced her to make the legacy to him."

Appellant contends that, even though he did act as attorney, the rule as to presumption and burden of proof was not correctly stated. The doctrine that undue influence is to be presumed as between parties *inter vivos*, dealing with each other when fiduciary relations exist between them, has no application to testamentary gifts. The theory as to contracts and gifts *inter vivos* is that a person having need of property, or at least a desire to retain it during life, is not likely to part with it without a measurably adequate equivalent. When it appears to have been

4. EVIDENCE: presumptions: fiduciary relations: legatee-draughtsman.

given away or parted with for an inadequate consideration to one in a dominating position in relation to the donor or grantor, the presumption arises that the latter has not freely parted therewith and its enjoyment, but that his act was induced by the undue exercise of the influence which the beneficiary may have had over him; and this presumption must be met by the grantee or donee and rebutted, else, in equity, it becomes as a fact proven—a vitiating factor in the transaction. But the primary presumption on which this whole doctrine rests is entirely lacking in testamentary dispositions. The natural inference that the owner is adverse to parting with his property in the case of gifts and contracts *inter vivos* is reversed in the disposition of property by will. The design of the testator, as manifested therein, is to give away a part of or all that he has or may thereafter acquire. He does not undertake to part with its use or enjoyment, for the will speaks only from the time of his death, and therefore its use and enjoyment by him are not interrupted. There cannot be an assumption that testator would not part with his property, for in the nature of things that is the object of his testament, and the property necessarily must pass to others upon his death. Another reason for this distinction, recognized by the authorities, is that the donee or grantee *inter vivos* is a party to the transaction and possessed of knowledge in relation thereto, and therefore is in a situation to present the facts to court or jury, whereas a beneficiary is not necessarily a party to the execution of the will, and may have no knowledge thereof until years after it has been made. As said by Lord Penzance, in *Parfitt v. Lawless*, L. R. 2 Pro. & D. 462:

“To cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the

testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge."

For these reasons, a presumption of undue influence is not to be based on the mere existence of a fiduciary relation between the beneficiary under the will and the testator. *Tyson v. Tyson*, 37 Md. 567, 583; *Bancroft v. Otis*, 91 Ala. 279 (24 Am. St. 904). The relations which excite suspicion in transactions *inter vivos*—friendship, confidence and trust, affection, personal obligations—may, and usually do, justify and properly give direction to testamentary dispositions. All that can be said is that the existence of a confidential relation, such as that of guardian and ward, attorney and client, religious adviser and layman, and the like, affords peculiar opportunities for unduly exercising influence over the mind; and, where the dominant party in such relation initiates the preparation of the will, or gives directions as to its contents to the scrivener, or writes it himself,—in other words, is active either in its preparation or execution, and is made a beneficiary thereunder,—a suspicion arises that the benefaction may have resulted from the exertion of undue influence over the testator, rather than from his free volition. The strength of this suspicion necessarily depends on the circumstances of each particular case.

Under the civil law, a will in favor of the person writing it was void. The common law is less strict, and, where the legatee benefited does not sustain a fiduciary relation toward the testator, but prepares or participates in the preparation of the will, this alone will not warrant the denial of probate or an order setting aside its admission to probate. *In re Last Will of Hollingsworth*, 58 Iowa 526; *Denning v. Butcher*, 91 Iowa 425; *Reeves v. Howard*, 118 Iowa 121; *Hanrahan v. O'Toole*, 139 Iowa 229. That the draughtsman who prepared the will inserted a legacy in his

own favor is, at most, a suspicious circumstance, entitled to more or less weight, according to the facts of the case. It is said in some cases, in substance, to constitute a just ground of suspicion, and to exact vigilance on the part of the court; in others, that it excites stricter scrutinizing and requires stricter proof of volition and capacity; in still others, to call for satisfactory explanation.

Of course, the matter is not to be so stated to the jury, but their attention directed to the situation as it is, as to whether the legatee-draughtsman is related by blood, his previous association with testator, the amount of the legacy as compared with the entire estate, and the like. *Coffin v. Coffin*, 23 N. Y. 9 (80 Am. Dec. 235); *Stirling v. Stirling*, 64 Md. 138 (21 Atl. 273); *Yardley v. Cuthbertson*, 108 Pa. 395 (56 Am. R. 218); *Sellards v. Kirby*, 82 Kans. 291 (28 L. R. A. [N. S.] 270, 272).

Even where the legatee-draughtsman is shown to stand in a fiduciary relation toward the testator, the inference of undue influence is not always to be drawn therefrom. It was so held in *Trubey v. Richardson*, 224 Ill. 136 (79 N. E. 592), where articles of little value were bequeathed to the attorney who prepared the will, and it was said that this was not sufficient to raise a presumption of undue influence. In *In re Wells*, (Me.) 51 Atl. 868, the gift of a relatively small sum of \$100 to the attorney drawing the will was said to be entitled to little weight. In *Bennett v. Bennett*, (N. J.) 26 Atl. 523, the court said:

"By the civil law a will written by a person in favor of himself was void, but this was never the rule of the common law. By the common law the mere presence of this fact was never sufficient of itself to invalidate the will. The utmost effect it was ever entitled to in any case was to create a suspicion against the validity of the will of more or less weight, according to the circumstances of each particular case; in some of no weight at all, as where the gift

to the draughtsman is small in amount or of trifling value; while in others, especially when coupled with other evidence of fraud or imposition, of very great weight, as, for example, where the will is drawn by the principal legatee, when the testator is very infirm, and his capacity is doubtful, and it is executed by the procurement of the principal legatee, when the testator is dying. 'But,' as was said by Baron Parke, speaking for the judicial committee of the privy council, in *Barry v. Butlin*, 6 Eng. Ecc. R. 417, 419, 1 Curt. Ecc. 637, 'in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument expresses the real intentions of the decedent.' The doctrine just stated is the established law of this state."

In *Snodgrass v. Smith*, 42 Colo. 60 (15 Ann. Cas. 548), the court, speaking through Campbell, J., after referring to cases affirming that a presumption of undue influence arises, said:

"The better considered cases do not go so far. The better rule is that this circumstance at most raises a suspicion, strong or weak, or, in some cases, of no force at all, depending on all the attending circumstances, which should, in a proper case, cause the court to require of proponent, in addition to proof of formal execution, other clear and satisfactory evidence, not necessarily that the will was read to or by the testator, but that he knew its contents, and was free from undue influence. Perhaps the rule has never been more clearly expressed than by the learned Baron Parke in the leading case of *Barry v. Butlin*, 1 Curt. Ecc. 637. In referring to a case like the one before us, and with respect to a contention similar to that made here, the learned judge said: 'If it is intended to be stated as a rule of law that in every case in which the party pre-

paring the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is, therefore, required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect. * * * And it cannot be that the simple fact of the party who prepared the will being himself a legatee, is in every case and under all circumstances to create a contrary presumption, and to call upon the court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. * * * All that can be truly said is that, if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case.’”

The rule is well stated in 1 Underhill on Wills, Section 137, in speaking of the situation where the draughtsman is a beneficiary and takes under the will:

“The safer and more correct statement of the rule is that such a condition of affairs creates no presumption, but merely raises a suspicion which ought to appeal to the vigilance of the court. Such wills are certainly not looked upon with favor. The court will cautiously and carefully examine into the circumstances which were attendant upon their execution, and will scan with a scrutinizing eye the evidence offered to procure their probate. No presumption of undue influence invariably arises from the fact that a will is drawn by a beneficiary under it, which is sufficient to cast the burden of showing the absence of influence upon the proponent. It is a fact to be considered with other facts. It is undoubtedly a suspicious fact, but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected.”

See, also, *Riddell v. Johnson's Exr.*, 26 Gratt. (Va.) 152; *Griffith v. Diffenderffer*, 50 Md. 466; *Appeal of O'Brien*,

(Me.) 60 Atl. 880; *In re Miller's Estate*, 31 Utah 415 (88 Pac. 338); *Post v. Mason*, 91 N. Y. 539 (43 Am. Rep. 689); *Dudley v. Gates*, 124 Mich. 440, 446 (86 N. W. 959); *Paine v. Hall*, 18 Ves. Jr. 475; *Downey v. Murphey*, 18 N. C. 82.

No one could well claim that an inconsiderable legacy, as compared with a large estate, to a legal adviser for many years, who prepared the will, is unnatural or indicative of the exertion of undue influence. Something more or different would seem necessary in order to raise such an inference. This much merely excites suspicion, and possibly enough to put the court on inquiry; but to justify an inference of the perpetration of fraud, something unlikely to have been brought about by fair means, or contrary to what was likely to happen in the ordinary course of events, must appear. In other words, some indicia of undue influence must be proven, as a substantial benefit, out of proportion as compared with the entire estate, weak mental or physical condition of testator, opportunity for imposition, whether bestowed on natural objects of affection and to those connected by the ties of blood, affection, or previous association, and other contingencies too numerous to mention. Undoubtedly, the circumstances may be such as that, unexplained, they would compel a verdict against the validity of the will or clause thereof assailed. This appears from numerous decisions bearing on the subject, collected in notes to *Kirby v. Sellards*, (Kans.) 28 L. R. A. (N. S.) 270, and *Snodgrass v. Smith*, (Colo.) 15 A. & E. Ann. Cas. 548. Such an inference is denominated in many cases a presumption of undue influence, and is treated as one of fact. This means, in the connection in which the expression is employed, no more than that a prima-facie case of undue influence of more or less strength has been made out, and must be met by other evidence in order to obviate a verdict so finding. What is to be inferred depends so much upon the facts of each particular case that we are inclined to

treat the showing as of mere items of evidence of varying weight, persuasive of or compelling certain inferences, rather than denominating the inferences necessarily to be drawn therefrom as presumptions. But the matter of nomenclature is not very important. Whether the necessary conclusion to be drawn from a particular state of facts be denominated a presumption of fact, or said to make out a prima-facie case, a verdict is inevitable unless the conclusion is met by evidence such as at least to put the issue in equipoise. Though appellant had acted as counsel for decedent at one time, it does not appear that he had been such during the 25 years preceding the making of the will. They had been friends for nearly a half century. She appears always to have transacted her own business, and was shown to have been in the possession of all her faculties, though physically weak. The fair inference to be drawn from the record is that she was under no obligation to the other beneficiaries named in her will, save through the ties of blood, and her promise to make contestant her residuary legatee. No secrecy was observed with reference to the proposed gift to appellant, and, had it been small as compared with her estate, we should have had no hesitancy in saying that the issue of undue influence should not have been left to the jury. But her fortune did not exceed in value \$25,000, and the bequest to appellant was one fifth of this amount, and, as he was a stranger in blood and prepared the will, proof of these facts was sufficient to carry the case to the jury. The strength of the inference to be drawn from such a situation depends on the facts of each particular case. Thus, if the testator is weak of mind and in the care of the person supervising or preparing the will, the inference of undue influence is much stronger than where the faculties of the testator are unimpaired and the fiduciary relation merely that of present employment to prepare the instrument. The inference from the facts

shown by contestant may be such as to exact a verdict; but, if other evidence is adduced, such as may be found to put such inference in equipoise or overcome it, the issue is for the jury.

Whatever the proof, however, the burden does not shift, and it can never rightly be said that the burden is upon the proponent to negative the allegation of undue influence. Strictly speaking, the burden of proof never changes during the trial. *Barber v. Maden*, 126 Iowa 402; *Gibbs v. Farmers & Merch. St. Bank*, 123 Iowa 736. As said in the last mentioned case:

"When a prima-facie case is made out by presumption or otherwise, in order to destroy its effect and shift the burden of producing further evidence, the party denying it must produce evidence tending to negative the claim asserted to a point where, if no more testimony is given, his adversary cannot win by a preponderance of the evidence."

That a state of facts justifying or compelling a particular conclusion of fact, whether this be denominated a presumption or not, be proven, is only an incident of the trial, exacting evidence to meet it in order to avoid an adverse finding, and this sometimes occurs, though not often, several times in the course of a trial. But whether a fact be inferred from others proven or be presumed, it is not necessarily of any more probative force than were it established by direct evidence. Any of these standing alone may sustain a verdict. The burden of proof is not thereby changed, even though the situation be such that such conclusion or presumption or evidence must be met by other proof in order to avoid an adverse finding, and the jury may be so instructed, and further informed that the showing must be enough, at least, to put the evidence bearing on the issue in equipoise, but that, having done so, the burden of proof is on the party having the affirmative of the issue.

The Supreme Court of Maine, in *Appeal of O'Brien*, 60

Atl. 880, has dealt with the subject in accordance with the views here expressed:

"According to our rules of evidence and of practice, the burden of proof, in its technically proper sense, does not ordinarily shift from one party to the other so long as the parties remain at issue upon a proposition affirmed upon the one side and denied upon the other. The condition of things stated by the counsel in the statement of his proposition of law is undoubtedly a most important one, and would naturally and properly be entitled to much force and bearing upon the issue involved. It is undoubtedly sufficient, as a matter of fact, to arouse suspicion, and to require the closest scrutiny and most careful examination of all of the surrounding circumstances; but it still remains a condition or situation of facts, the force and weight of which is to be considered in connection with all of the other facts and circumstances surrounding the case. Evidence showing the condition of facts referred to may or may not be sufficient to sustain the burden of proof resting upon the contestant, according to the other circumstances of the case, and the determination of the tribunal which is passing upon the issue. Such a condition might, as a matter of fact, cast upon the proponent the burden of explanation, and the absence of satisfactory explanation would be an additional fact of more or less weight. But we do not regard it as accurately correct to say that upon the proof of this situation the burden of proof shifts from the one party to the other. This burden, upon the whole evidence, taking into consideration the situation referred to and all of the other circumstances, is still upon the contestant, who is bound to sustain the proposition asserted by him by a preponderance of all the evidence. Nor do we regard it as entirely proper to say that the existence of this state of facts as a matter of law raises a presumption of fact that undue influence has been exercised by the person occupying this

close confidential relation. The issue is one of fact, to be determined by the tribunal to which it is submitted, and we do not approve of a statement to the effect that any particular evidence is sufficient to change the issue from one of fact to one of law."

See *Barry v. Butlin*, 2 Moore P. C. C. 480; *Weston v. Tenfel*, 213 Ill. 291 (72 N. E. 908). Other decisions express the same view. Baron Parke, speaking for the Privy Council, in *Barry v. Butlin*, supra, after holding that the burden of proof does not shift in such a case, said:

"The strict meaning of the term *onus probandi* is this: that, if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. A single instance, of not infrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business, worth 100,000 pounds, leaves the bulk of his property to his family, and a legacy of 50 pounds to his confidential attorney who prepared the will; would this fact throw the burden of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that if such proof were not supplied the will would be pronounced against? The answer is obvious; it would not. All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, accord-

ing to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the quantum of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case."

It follows that the court erred in instructing the jury that the burden of proof was cast upon the appellant to establish by a preponderance of the evidence that testatrix was not dominated by Courtright in writing the will. All exacted, at the most, was that he meet the prima-facie case made against him by putting the evidence pro and con in equipoise. The burden of proof was on contestant at all times, and the jury should have been so advised. Though every case submitted to the jury is upon assumption that the evidence is such that a finding either way is warrantable, yet it is advisable, in a case of this kind, that facts from which a finding of undue influence may be inferred shall be pointed out in charging the jury; but, if this is done, attention should also be directed to those which tend to obviate such an inference and as definitely, such as long acquaintance, obligations, if any, to the beneficiary, and obligations, if any, to others; whether any secrecy was observed in inserting the clause or with reference thereto, conversations with the residuary legatee or others in the presence of testator when the will was being prepared; whether appellant then advised said legatee that he could not draw the will because of being made a beneficiary, and that testatrix had refused to have anyone else do so; whether said legatee directed him to go on and prepare it, and the like. What we have said disposes of the contention of appellant that a case was not made out for the jury.

For the errors pointed out, the judgment is—*Reversed*.

GAYNOR, C. J., WEAVER, EVANS, PRESTON and SALINGER, JJ., concur.

HARRY W. HILL, Guardian, Appellee, v. IGNATZ VICTORA et al., Appellants.

CARL VICTORA et al., Appellants, v. IGNATZ VICTORA et al., Appellees.

DIVORCE: Abatement of Action—Death—Reopening Proceedings.

- 1 Principle recognized that, while a divorce proceeding is abated by the death of the defendant, yet it may be, upon proper showing, reopened, in so far as it affects property interests.

COMPROMISE AND SETTLEMENT: Validity—Fraud—Inability

- 2 to Understand Language. Evidence reviewed, and held insufficient to set aside and annul, for fraud and misrepresentation, a compromise and settlement of property interests, and decrees entered in accordance therewith, between a wife, husband and stepchildren, even though the wife was unable to read the English language, was not of strong mind, and was easily influenced and imposed upon.

FRAUD: Acts Constituting Fraud—Duty to Enlighten Ignorant

- 3 Person. Principle recognized that one dealing with a person unable to understand or read the language in which an instrument is written, owes the duty to such person to fully apprise such person of the contents and meaning of such paper.

Appeal from Madison District Court.—W. H. FAHEY, Judge.

MONDAY, JANUARY 22, 1917.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

THESE proceedings are somewhat complicated, and the issues are involved. The first is an action by the guardian of Barbara Victora to set aside a decree in the case of Barbara Victora v. Ignatz Victora et al., and also a de-

cree in the case of Fred Victora and Carl Victora v. Ignatz Victora and Barbara Victora, and also to set aside the contracts on which said actions were based, because of fraud practiced in obtaining the same, and for other reasons. The first decree sought to be set aside was in an action for a divorce, in which Barbara Victora was plaintiff, and also asked for the protection of her dower interests in certain lands formerly owned by her husband, Ignatz Victora, and that a contract and deed made between the husband and his sons, Carl and Fred Victora, be set aside. The second was an action brought by the sons, Carl and Fred, against Ignatz and his wife, Barbara, to re-establish a deed of the lands in controversy made to the said sons, the original deeds, or one of them, having been destroyed at the instance of a brother of Barbara Victora's. All these actions were consolidated and tried together, resulting in a decree setting aside the decrees entered in the original cases, establishing and confirming Barbara Victora's dower interest and distributive share in the real estate, and setting aside the deeds executed by Ignatz and Barbara Victora to John, Carl and Fred Victora. The appeal is from this latter decree.—*Reversed and remanded.*

F. T. Van Liew and W. S. Cooper, for appellants.

C. W. Lyon, Wilkinson & Wilkinson, and J. W. Rhodes, for appellees.

DEEMER, J.—I. Barbara Victora commenced an action for divorce against her husband, Ignatz, December 5, 1910, based upon cruel and inhuman treatment. Thereafter, and about September 11, 1911, she filed a supplemental petition, making Fred, Carl and John Victora, sons of Ignatz, and her stepchildren, parties defendant in which she claimed that these sons, with their father, en

tered into a fraudulent conspiracy to defraud the wife out of her inheritable interest in her husband's property, and that, pursuant thereto, John Victora commenced an action against his father to quiet title to certain lands, the title to which then stood in the father's name; that the father appeared to said action, filed an answer admitting that title should be quieted in the plaintiff therein; that Carl and Fred Victora commenced another action against plaintiff and their father to quiet title to certain real estate in Madison County, to which the father appeared and practically admitted the allegations of the petition, and thereafter, John Victora commenced an action against both Ignatz and Barbara Victora, claiming that they owed him the sum of \$7,000, for which he asked judgment, to which action Ignatz appeared and filed an answer, admitting the indebtedness. Barbara appeared and filed answer.

After these actions were commenced, with fraudulent motive and purposes, it is claimed, it is averred that Ignatz and his three sons got together, induced Barbara to go to Des Moines with them, and, in the absence of her attorney, fraudulently and corruptly induced Barbara to sign a pretended agreement of settlement, which, in effect, deprived her of all rights in and to her husband's property. It is claimed that Barbara could not understand the English language, did not know what was in the agreement of settlement, but believed that it protected her rights, because the parties represented to her that it would; and that they further stated that, unless she signed the agreement, the lawyers would get all the property and leave them all without anything. A subsequent stipulation was entered in January of the year 1912. This stipulation was carried into a decree, and it provided for the confirmation of a deed made by Ignatz and his wife to John Victora for certain lands in Adair County, and for the con-

firmation of another deed theretofore made by Ignatz Victora and his wife to Carl and Fred Victora for certain lands in Madison County, and for the conveyance by Ignatz to his wife, Barbara, of a house and lot in Earlham, the grantee therein to immediately reconvey the same to Ignatz's six children, reserving, however, to the grantor, Barbara, a life estate in said house and lot. The decree entered on the stipulation also provided that, if Barbara survived her husband, John, Carl and Fred Victora should pay to Barbara the sum of \$1,000. It was provided in the deeds which were confirmed that John, the grantee in the first one, should pay to Ignatz and Barbara, during the lives of either of them, the sum of \$180 annually, and that Carl and Fred should pay to Ignatz and Barbara, or the survivor, \$310.50 annually thereafter. These payments were to commence on December 1, 1911. Provision was also made for the payment of Barbara's attorney's fees. It was also provided, in effect, that the divorce proceedings against Ignatz should be dismissed; that they should live together thereafter; and that Barbara should have no interest in the real estate conveyed, save the life estate in the Earlham property, and perhaps a lien upon the lands for the annuities provided in the deeds. This decree was entered February 6, 1912, and the divorce action was subsequently dismissed. Barbara Victora seems to have been represented by counsel at the time this consent decree was entered, and their fees were provided for in this decree. The decree was entered in a case entitled Barbara Victora, Plaintiff, v. Ignatz Victora, Defendant; John Victora, Carl Victora and Fred Victora, Defendants and Interveners.

Before the commencement of the divorce suit, and on November 14, 1910, Carl and Fred Victora commenced an action against Ignatz and Barbara Victora, in the Madison County District Court, to re-establish a deed made

by Ignatz and his wife, Barbara Victora, to them on or about September 9, 1910, covering certain lands in Madison County, which deed, it is claimed, after delivery in escrow, was wrongfully obtained by Ignatz and his wife from the depository some two weeks after its delivery, and destroyed by them. It is also averred that, by false and fraudulent representations, they induced Carl Victora to believe that the deed had no force and effect. Carl and Fred asked that this deed be re-established, alleging that it was based upon a sufficient consideration, and was wrongfully and fraudulently destroyed. Defendant Ignatz appeared in that action by attorney, and filed an answer practically admitting the allegations of the petition, and it is this answer which is referred to in the action commenced by Barbara. Barbara appeared, September 8, 1911, and filed an answer and cross-petition, in which she pleaded that the original deed was obtained through fraud and misrepresentation regarding the nature and object of the same, and she denied all other allegations of the petition. She also filed a cross-petition, in which she pleaded her marriage to Ignatz in the year 1890, possessed of lands in Madison and Adair Counties, worth about \$35,000; and that thereafter, the plaintiffs in the action, by fraud and misrepresentation, secured the execution of the deed to them, and she asked that the deed be set aside. In a reply to this cross-petition, it was alleged that, since the filing of Barbara's answer and cross-petition, Ignatz Victora had died, and Barbara had been adjudged of unsound mind. They also denied the allegations of the cross-petition, and further pleaded the decree entered pursuant to the stipulation in the original divorce proceeding, confirming the deed, as hereinbefore recited.

Under these issues, a decree was entered in the action commenced by Carl and Fred, confirming their title to the Madison County land, subject to the liens, etc., referred

to in the decree in the original divorce case. Thereafter, and on April 20, 1914, Harry Hill, as guardian for Barbara Victora, who had been adjudged of unsound mind, filed a petition in the case brought originally by Carl and Fred Victora against Ignatz and his wife, to set aside the decree therein, and also the decree in the case brought by Barbara v. Ignatz Victora and John, Fred and Carl Victora, and the deeds referred to therein, because each and all were obtained by fraud. Thereafter, he filed an amended and substituted petition to vacate and set aside the judgment and decree in the action brought by the sons against their parents, and the deeds therein referred to, for fraud, etc., and on the same day, he filed a like petition in the action brought by Barbara Victora against her husband and his sons, this, too, being based on fraud and misrepresentation. A motion was also filed to set aside the order of dismissal of the original divorce action. Issue was taken upon these petitions and the motion, and a trial had to the court, all of the actions being consolidated and tried together; and a decree was finally entered, granting the petition to set aside and vacate the judgments, and the deeds referred to therein to John and to Fred and Carl Victora were set aside, and Barbara's dower interest or distributive share in all of the real estate was established and confirmed, and she was given a one-third interest in all the property, including the house and lot in Earlham. John, Carl and Fred Victora appeal.

II. It has seemed necessary to set out these voluminous pleadings and proceedings, in order that the matters at issue may be better understood.

As has been observed, Ignatz Victora is now dead, and, if he died seized of any property, his widow is entitled to her distributive share therein. The widow is now under guardianship, having been adjudged insane

1. DIVORCE: abatement of action: death: reopening proceedings.

in February, 1914, and she is represented by Harry W. Hill as guardian. It is manifest that the original divorce proceeding has abated by the death of Ignatz, but it may be reopened, in so far as it affects property rights, upon a proper showing. It also appears without dispute that, on the 9th day of September, 1910, what purports to be a warranty deed was made by Ignatz and Barbara Victora to Carl and Fred Victora to certain lands in Dallas County, Iowa, the deed reciting a consideration of \$1 and other valuable consideration. This deed does not seem to have been filed for record, and, as will subsequently appear, it was destroyed. Again, it appears that the same grantors, on the same day, to wit, September 9, 1910, made a deed to John Victora for land in Adair County, in consideration of \$1 and other valuable considerations. This deed was filed for record September 20, 1910. In the deed first mentioned, the grantees agreed to pay the grantors or the survivor of them \$310.50 annually, commencing December 1, 1911. The grantees were also to pay a sister, upon the death of their father, the sum of \$1,000, and the grantors were to have the use of the dwelling house upon the land during their lives or the life of either. In the second deed mentioned, the grantees agreed to pay the grantors or the survivor the sum of \$180 per annum. Each deed provided that it was accepted by the grantees as their share in the estate of the grantors, or either of them. It will also be observed that, in the consent decrees entered in the two original actions, these deeds were confirmed, and the decree, in addition to the annuities provided in the deeds, provided that, within six months after the death of Ignatz Victora, John, Fred and Carl Victora should pay to Barbara the sum of \$1,000; she was also allowed what was, in effect, a life estate in the house and lot in Earlham, the remainder going to all of Ignatz Victora's children, six in number. The record further shows a quitclaim deed made by Ignatz

and Barbara Victora to John Victora of the land in Adair County, which was recorded May 25, 1911, and another deed of the same character, made by Barbara Victora to the six children of Ignatz, for the house and lot in Earlham, reserving a life estate to the grantor. This deed, having been made January 22d and recorded February 6, 1912, was also confirmed.

The record also shows a written memorandum of agreement made and entered into between Barbara Victora and Ignatz Victora, of date January 19, 1912, which reads as follows:

“MEMORANDA OF AGREEMENT.

“It is hereby stipulated by and between Barbara Victora and Ignatz Victora, plaintiff and defendant respectively, in the case entitled Barbara Victora vs. Ignatz Victora, now pending in the district court of Madison County, Iowa, as follows, to wit: That whereas, the parties hereto are desirous of settling all differences and all litigation now pending between the parties hereto or the children of Ignatz Victora, and whereas, the parties hereto desire to re-establish themselves as husband and wife, and live together as such, witnesseth:

“Par. 1. That, in consideration of the defendant, Ignatz Victora, deeding to the plaintiff, Barbara Victora, all his right, title, and interest to certain premises owned by him in the town of Earlham, Madison County, Iowa, during her lifetime, said property upon the death of Barbara Victora to revert to the surviving heirs of Ignatz Victora, it being understood and agreed that the said Barbara Victora is to have the rents and profits accruing upon said property during her lifetime, she retaining only a life interest in and to said premises.

“Par. 2. In further consideration that, in the decree entered in the above entitled cause or causes, the plaintiff,

Barbara Victora, be awarded, as her one-third interest in and to the farm situated in Madison County, Iowa, now occupied by the defendant, Ignatz Victora, and Carl and Fred Victora, and the farm situated in Adair County, Iowa, and now occupied by John Victora, said \$1,000 to be paid by the owners of said farms to said Barbara Victora within 6 months after the death of said Ignatz Victora; provided, however, that, in the event that said Barbara Victora does not survive Ignatz Victora, then and in that event the lien herein referred to shall be discharged and released.

"Par. 3. It is hereby further stipulated and agreed that the defendant Ignatz Victora shall pay all court costs in the litigation herein referred to, and pay plaintiff's attorneys the sum of \$500; and to pay Mrs. Janda of Des Moines, Iowa, \$32 for board and room of Mrs. Victora during her stay with Mrs. Janda; and to Mr. Frank Meleneck, \$5 for services as interpreter on January 19, 1912. said sums to be paid out of the moneys now in the possession of the clerk of the district court of Madison County, Iowa, the balance of said moneys in the possession of the clerk of the district court of Madison County, Iowa, to be turned over to Ignatz Victora; also Ignatz Victora is to be given the moneys now deposited to Barbara Victora's credit in the Citizen's State Bank at Earlham, Iowa.

"It is further understood and agreed that nothing herein contained shall in any manner affect the provisions in the deeds heretofore given to John Victora, Fred Victora, and Carl Victora by Ignatz Victora and Barbara Victora.

"In consideration of the above and foregoing, the plaintiff, Barbara Victora, hereby agrees to dismiss any pending litigation which she may have against this defendant."

This is the stipulation which was carried into effect in the decree which it is sought to set aside.

It is manifest that, to sustain the decree from which this appeal was taken, it must be found that, from the be-

ginning, John, Fred and Carl Victora have acted fraudulently, and thereby and by false and fraudulent misrepresentations induced Barbara Victora to sign the contracts, agreements and deed hereinbefore referred to, or that she (Barbara) was of unsound mind at the time these transactions took place, or of such weakness of mind as to be easily imposed upon, and that, taking advantage thereof, John, Fred and Carl Victora, together with her husband, unduly influenced her into making these different instruments and into agreeing to the consent decree against her will. These things must be established by at least a fair preponderance of the testimony. Indeed, the rule is somewhat stronger than this, where fraud is the gravamen of the charge.

It should also be stated that the original deed to Fred and Carl Victora was destroyed in the manner hereinafter indicated, and that the final settlement of the case was had with the consent of counsel for Barbara Victora, and the final decree entered upon that settlement was prepared and presented to the court by her counsel.

III. Coming now to the facts bearing upon the crucial issues of the case, we find

2. COMPROMISE AND SETTLEMENT: validity: fraud: inability to understand language. that Ignatz and Barbara Victora were married in July, 1890. They were each born in Bohemia, and Barbara was unable to speak the English language, and could not read or write any language. Ignatz had been married before, and by that marriage had six children, the eldest being 17 and the youngest less than 3 years of age, at the time of the second marriage. These children were Joseph, John, Carl, Fred, Emma and Rose, the two latter being now married. Barbara performed her duties as wife and stepmother to these children down until the time the difficulties arose, of which we shall presently speak. She was industrious, a good housekeeper, and neat and cleanly in her habits. She lived

with her husband until December of the year 1910, when she commenced the divorce action heretofore mentioned, when a separation took place which lasted until January 12, 1912, when the parties resumed their marital relations and continued to live together as husband and wife until the death of the husband, in December of the year 1913. For the last 10 years, Barbara has been in poor health, and her mind has been somewhat affected. She was extremely nervous, and it is claimed that the trouble she had with her husband and the family unsettled her mind, and that she became what one of the doctors described as a "mental degenerate." Her counsel now say that, by reason of a dangerous injury received some years ago, and a severe attack of typhoid fever, her mind, never strong, became clouded, and that for several years she has been of unsound mind. Counsel do not claim that, at the time the various decrees were entered and transactions had, Barbara was so insane that for this reason alone the deeds, decrees, etc., should be set aside, but they do insist that she was incapable of attending to business matters, save of the simplest character; that she was dependent upon others, sympathetic, easily influenced and imposed upon; and that both her husband and his children, recognizing this fact, took advantage thereof, and fraudulently conspired to rid her of any interest in her husband's property save such as they saw fit to give her.

During the husband's lifetime, and before September, 1910, he acquired 210 acres of land in Dallas County and 120 acres in Adair County, at least 160 acres of which were secured after his second marriage. He also owned a house and lot in Earlham, had considerable stock and money, was not in debt, and, it is claimed, was worth in all at least \$50,000 in September, 1910; and it is claimed that about that time the conspiracy was formed to deprive Barbara of any interest she might have in her husband's

property. The testimony tends to show that the wife was easily influenced, and that the deeds hereinbefore referred to, from her husband and herself to the boys, Carl and Fred, and to John, of the Dallas and Adair County lands, were secured from her on the theory and upon the representations of the parties that they were mere leases, and that the boys were to pay rental for the use of the lands. It is claimed that, when she discovered that they were in fact deeds, she employed an attorney, and that, with this attorney and another, or others, she went to the bank where the deed to Carl and Fred had been deposited, secured the possession thereof and had the same destroyed, and that it was then agreed that the deed to John of the Adair County land, which was then in John's possession, should be recalled and destroyed, but that this was never done. Shortly thereafter, and on November 14, 1910, Carl and Fred brought their action to have the destroyed deed reinstated, and to quiet their title to the Dallas County land, and John also commenced a similar action to have his title quieted in the Adair County lands. John, also at the same time, commenced an action to recover from Ignatz and Barbara Victora the sum of \$7,000 for work and labor performed by him for the defendants therein named. Notice of these actions was served upon Barbara.

Following these suits, Barbara commenced her action for divorce against Ignatz, which suit was commenced on December 5, 1910. She filed a supplemental petition in that case, as hitherto stated. In their answer to this supplemental petition, John and Fred claimed that Ignatz and Barbara Victora owed them \$15,000 for work and labor done. Ignatz appeared and filed answer in the actions brought by his sons Carl and Fred, and by John, in which he admitted practically all the allegations of the petitions; and, after issue joined by Barbara in all of the cases, they were continued.

In March of the year 1911, Joseph Victora, one of the sons, called upon Barbara at a place where she was then visiting, and prevailed upon her to go with him to his home in Adams County, and tried to induce her to return to her own home and to resume her marital relations, and, it is claimed, worked upon her sympathies, and, by various statements as to what would be done to protect her property interests, persuaded her to have the husband come to Joseph's house, and after he arrived there, it is claimed that the father and son induced her to accompany them to Des Moines, there to go to the house of one John Vicker, a nephew of Ignatz', in order to settle their various controversies. It is further claimed that, after reaching Des Moines, they induced Barbara, by various misrepresentations, to forego the services of her attorney, and saw to it that she did not go to the house of her brother, who also lived in Des Moines, although she asked to go to this brother's house, and also asked that her attorney, who lived in Madison County, be called in. She also wanted her brother to act as interpreter, in order that she might understand the settlement which the father and sons were proposing to make, but they induced her to accept an interpreter of their own selection.

It seems that a contract of settlement had been prepared by someone, and this the husband and his son, with the aid of the interpreter, induced Barbara to sign. They also secured her signature to a dismissal of her suit for divorce, etc. After this was done, Barbara and Joseph visited the woman's attorney at Winterset, but, as they were unable to satisfactorily explain the matter to him, he refused to permit the case to be dismissed at the May, 1911, term of court, and called the attention of the judge to what he thought was an unjust settlement. It seems that Barbara was then or thereafter in court, and the presiding judge, after talking with her through an interpreter,

concluded not to accept the settlement, and he refused to enter an order of dismissal pursuant to the settlement. Later, in January, 1912, the parties in interest, or some of them, induced Barbara to go with them to the office of C. W. Lyon, Esq., an attorney at Des Moines, and there the attorney was told, through an interpreter, what the agreement of settlement was, and he (the attorney) claims that it was stated to him that it was to the effect that Barbara should be secured in her rights by a mortgage of \$1,000 on the Madison County farm, and that Barbara should return and live with her husband. With this understanding, it is claimed that her Des Moines attorney, believing it to be his duty not to "step in" between husband and wife, finally consented to any settlement which the parties might make, although he had doubts of the validity thereof, and he drew another contract, which was there signed. Barbara then went home with her husband and continued to live with him.

On February 6, 1912, decrees were entered in the several cases upon the last agreement of settlement. Although, as already remarked, the issues are complicated, the whole case turns upon the question of fraud and misrepresentation. It is not seriously contended that Barbara was wholly *non compos mentis*, but it is claimed that she was of a confiding and trusting nature, very easily imposed upon by her friends, easily misled and of feeble mentality; and that the defendants, taking advantage of these frailties, imposed upon the woman and her counsel, by various promises, misrepresentations and machinations, induced the woman to part with her valuable interest in her husband's property, she at no time understanding the full import thereof.

As Barbara could not speak or understand the English language, and could not read or write any language, it was the duty of the husband and his sons and their attorneys, or representatives, to state the facts regarding the contents, nature and effect of the instruments which they induced her to sign, and, if they failed to do so, this in itself would constitute a fraud. Or if they knew or had good reason to believe that she did not, because of her infirmities, know the effect of the instruments, and, knowing or having good reason to believe that she did not understand the contents, nature or effect of these instruments, led her into signing the stipulations and agreements, on an erroneous supposition as to their nature or effect, this, too, would constitute fraud.

The record is voluminous upon this question, and we shall not set out the testimony bearing thereon. Suffice it to say that, if the case stood alone upon the original deeds and the first settlement of the cases, the latter having been made in March of the year 1911, we would have little difficulty in finding them fraudulent, and that they and all proceedings based thereon should be set aside and the decree below affirmed. But the last settlement, executed in January of the year 1912, stands on an altogether different basis. This was the second time that the parties attempted to adjust their difficulties, and every effort seems to have been made to secure a complete and final adjustment thereof.

Barbara was represented by counsel, and two disinterested persons were present to act as interpreters. Her counsel attempted to procure as favorable terms as possible, although he would not interfere in any way with the reconciliation between husband and wife. The entire transaction was fully explained to Barbara, and she declared that she understood it. Counsel seems to have been

2. FRAUD: acts
constituting
fraud: duty to
enlighten ignor-
ant person.

extremely careful, in view of the preceding attempts at settlement, to have his client fully understand the matter, and, although not entirely satisfied with what was being secured for this woman, he concluded that, as she fully understood the terms and was satisfied therewith, and wanted to return to live with her husband and have all prior difficulties settled, he would yield to her wishes. One of Barbara's counsel lived at Winterset and the other at Des Moines, and, as the one at Winterset was not present, but had discouraged, if not disapproved, the prior settlement, counsel at Des Moines, before the matter of final settlement was closed, called up his colleague at Winterset by 'phone, and the two discussed the matter and concluded that the settlement should go through. There was no fraud whatever in this transaction. Every effort was made to acquaint Barbara with the terms of the agreement, and it was her fault if she did not understand it. She received the money agreed to be paid her under the settlement, and she and her husband also saw to it that the attorneys' fees were all paid. Barbara returned with her husband to their home, and they resided there until the death of the husband. They received their annuities until the death of the husband, and since that, these annuities have been paid, or offered, to the widow. None of the money paid under this last settlement has ever been returned by Barbara, nor has there been any offer of return. The most that can be said under the testimony is that Barbara got a mistaken notion in some way that she was to be paid \$9,000. No one claims that any such statement was made to her, unless it was made by her own interpreter. If such statement was made, it was not induced by anything said by the other parties in interest during this settlement.

There is no claim that any party in interest made any false and fraudulent statements at this time, and none of

them knew that any were being made to Barbara. Her counsel was present, and he was more watchful than he might ordinarily have been, because of a prior settlement made when his client did not have the aid of counsel; and both her attorneys thought that there was no reason why their client should not enter into the stipulation. This stipulation and the final decree itself were draughted by Barbara's counsel in his own office after the matter had been fully talked over and discussed, and counsel had secured all the concessions which his client had demanded, and perhaps a little more, and, after the stipulation was prepared, it was again carefully translated by an interpreter to Barbara and explained to her. If such settlement can be overturned for fraud, then no settlement made with one unfamiliar with the English language can stand; for it is always possible for such an one to say that he did not understand what the interpreter said. Moreover, the settlement was not so grossly inequitable as to indicate fraud or overreaching. The boys to whom the conveyances were made, after, as well as before, reaching majority, remained at home and worked for their parents without other consideration than their board and spending money. Barbara brought nothing to her husband when she married him, and there is every reason to believe that she did not enter into the marriage to secure her husband's property. She felt kindly disposed toward his children, and they bore her no ill will. The annuities were fixed on the basis of \$1.50 per acre rental value of the land, and it is shown that it was the intention of the father, when some of the land was procured, that it should go to his sons. The amount paid to Barbara, and what she will receive until her death, will give her a good living until that time; and she has never had any children of her own. She is, and was, of that type of mind easily satisfied, provided she was assured of a comfortable living until her death.

We are convinced, after a careful study of the record, that Barbara is concluded by this settlement and the decrees entered thereon, and that they should stand.

It follows that the decree below must be, and it is, reversed, and the cause is remanded for an order dismissing the petitions, and affirming and confirming the judgments and decrees sought to be set aside.—*Reversed and remanded.*

WEAVER, EVANS and PRESTON, JJ., concur.

EMMA L. HUNT, Appellant, v. IOWA STATE TRAVELING
MEN'S ASSOCIATION, Appellee.

INSURANCE: Mutual Benefit—Amendments to By-Laws—Notice

1 to Member. A member of a mutual benefit society may not complain, in the absence of allegation and proof of fraud, that his attention was not called to amendments to the constitution and by-laws adopted shortly before he became a member. So held where a prior adopted amendment shortened the period in which the assured should die after an accident in order to render the association liable.

INSURANCE: Mutual Benefit—Amendments to By-Laws and Con-

2 stitution. The force and effect of a reasonable amendment to the by-laws and constitution of a mutual benefit insurance association, duly adopted prior to a member's becoming such, are not obliterated by the fact that, at the time of delivering a certificate to such member, the association also delivered to him a copy of its by-laws and constitution which did not show said amendment, no fraud or estoppel being pleaded.

Appeal from Polk District Court.—WM. H. McHENRY,
Judge.

SATURDAY, DECEMBER 16, 1916.

REHEARING DENIED JUNE 22, 1917.

ACTION at law to recover \$5,000 as a death benefit under a certificate of accident insurance in the defendant

company. There was a directed verdict for the defendant in the court below, and the plaintiff has appealed.—*Affirmed.*

Fred E. Smith and Nourse & Nourse, for appellant.

Sullivan & Sullivan, for appellee.

EVANS, J.—The defendant is a mutual assessment company, and insures its membership against accident only. The plaintiff is the beneficiary of a certificate of accident insurance, issued by the defendant association to her husband, Fred R. Hunt. At the time of his application, Hunt was a resident of Eugene, Oregon, and so continued until the time of his death. He became a member of the association in the early part of 1910, and died on July 17, 1914. It is claimed by the plaintiff that his death was accidental, in that it was the direct result of an accidental fall sustained by him on February 2, 1914.

Prior to January 15, 1910, the by-laws of the defendant association provided for the payment of a death benefit for accidental death, provided such death resulted within 26 weeks after the injury causing the same. On January 15, 1910, the by-laws were amended by limiting the death benefit to those cases where death resulted within 90 days after the injury causing the same. The petition of the plaintiff alleged that Hunt became a member of the association while the "26 weeks" provision was in force, and the action is predicated upon that allegation. This allegation is denied in the answer. The facts pertaining to the original membership of Hunt, as they appear in the evidence, are that Hunt's application for membership was dated on January 14, 1910, at Eugene, Oregon. Such application was received at the office of the association in Des Moines on January 20th. The application was approved and a certificate issued and mailed to the insured on February 7, 1910. By the terms of his application, and

by the certificate later accepted, Hunt agreed to be bound by the "articles of incorporation and by-laws as from time to time they may be changed or amended." The articles and by-laws of the defendant association provided for their amendment at any annual meeting, which annual meeting was to be held each year on the third Saturday in January. It was also provided that any proposed amendment to a by-law should be filed with the secretary 30 days before the next annual meeting, and that notices thereof should forthwith be mailed to the membership. This procedure was followed as to the amendment adopted on January 15, 1910, whereby the "90 days" limitation was adopted. The plaintiff denies the legality of the adoption of such amendment. This denial is predicated upon the alleged fact that no notice of such proposed amendment or its adoption was ever received by Hunt; and further, that, when the certificate of membership was mailed to Hunt, there was mailed therewith a copy of the 1909 by-laws.

While the articles and by-laws of the defendant required notice of a proposed amendment to be mailed to the members *before* action thereon at the annual meeting, there is no provision requiring notice of the actual adoption of an amendment to be thus mailed thereafter. Nevertheless, it is made to appear by the defendant that, on March 1, 1910, notice of the adoption was actually mailed to all the membership of the association, including Hunt. The nature of the proof is that, immediately upon the issuance of Hunt's certificate, his name was placed in the addressograph, an instrument intended to include the name of every member of the association, and which printed the name of each automatically in its turn, and that this instrument was used invariably for the purpose of addressing all communications to the membership. All the notices of assessment were mailed by the use of such instru-

ment, and those addressed to Hunt were all received by him.

It is claimed for the plaintiff that Hunt never received the notice and copy mailed on March 1, 1910. The method of proof is the testimony of the plaintiff, who was the wife of the insured, to the effect that she aided the insured in his work and kept his books and opened and read his mail, and that she had no recollection or knowledge of ever having seen the notice referred to. It further appeared for the defendant that, at the annual meeting of 1912, there was a further amendment of the by-laws, and that this amendment included a recital of the previous amendment pertaining to the "90 days" provision; that notice of this proposed amendment was mailed to all the membership of the association in advance of the annual meeting; and that notice of its adoption was later mailed to all the membership. It is claimed for the plaintiff that these notices were not received by Hunt, the method of proof being the same as already stated. It is further made to appear without dispute that, on two occasions, first in 1912, and later in the early part of 1914, Hunt allowed his insurance to lapse by failure to pay his assessment. In each case, he made application for reinstatement, and in such application agreed to be bound by the provisions of the articles and by-laws then in force.

Evidence was introduced on behalf of plaintiff tending to show that the death of the insured on July 17, 1914, was the result of an accidental fall on the sidewalk sustained by him on February 2d. On behalf of the defendant, the evidence tended to show that the death of the insured resulted from natural causes only. The trial court directed a verdict for the defendant mainly upon the ground that the death of the insured did not occur within 90 days after the alleged accidental cause thereof.

It will be seen from the foregoing that the question before us at this point is not whether the amendment of January 15, 1910, was a reasonable one, but whether such amendment was in fact adopted on such date, and before Hunt became a member of this association. We see no ground in the record to claim anything to the contrary. The fact that Hunt received no notice of the proposed amendment in advance of the annual meeting proves nothing. He was not at that time a member, and was not entitled to such notice. His application was not even received until January 20th. Even the fact, if it be a fact, that he did not receive the subsequent notice of March 1, 1910, with a copy of the amendment, could not have the effect to defeat the legality of the adoption of the amendment. Such subsequent notice was not required at all by the by-laws; much less was it a condition to the legality of the adoption already done. The adoption of such amendment being conclusively established, it was necessarily binding upon subsequent members, in the absence of fraud or estoppel. The petition in this case is not predicated upon either fraud or estoppel. It distinctly alleges that the previous by-laws, containing the "26 weeks" provision, were in force and thereby became a part of the contract of insurance. The proof wholly fails to sustain such allegation.

By way of reply, however, the plaintiff denied the legality of the adoption of the alleged amendment, and pleaded that a copy of the 1909 by-laws was sent to him with his certificate of insurance. No fraud is charged; no estoppel is pleaded in terms. The fact that a copy of the 1909 by-laws was sent with the certificate is pleaded in the reply in support of the plaintiff's denial that such original by-law had been superseded by an amendment.

1. INSURANCE:
mutual benefit:
amendments to
by-laws: notice
to member.

2. INSURANCE:
mutual benefit:
amendments
to by-laws and
constitution.

The only function of the reply was to avoid affirmative matter pleaded in the answer. Plaintiff's case must still rest upon the allegations of her petition.

We see no escape from the conclusion upon this record that the "26 weeks" provision was not in force and the "90 days" provision was in force when the insured became a member; and in this respect, the plaintiff failed to sustain the allegations of her petition. For this reason, the judgment of the lower court must be affirmed.—*Affirmed*.

DEEMER, WEAVER and PRESTON, JJ., concur.

C. H. JOHNSON, Appellee, v. JOHN BUCKLEY, Appellant.

TRIAL: Instructions—Form, Requisites and Sufficiency—Admitted

1 Counterclaim. A charge which, throughout, treats a counterclaim as admitted, is not insufficient because the court did not tell the jury that it was admitted in the pleading.

BROKERS: Compensation—Action—Evidence—Sufficiency. Con-

2 flicting evidence reviewed, and held to present a jury question on the issue whether a broker was entitled to a commission

Appeal from Cherokee District Court.—W. D. BOIES, Judge.

FRIDAY, JUNE 22, 1917.

ACTION by plaintiff to recover commission for a sale of real estate. Verdict and judgment for part of amount claimed. Defendant appeals.—*Affirmed*.

J. A. Miller, for appellant.

Molyneux & Maher, for appellee.

SALINGER, J.—I. Plaintiff alleges that he entered into oral contract with the defendant that plaintiff was to attempt to procure a purchaser for the defendant's farm of 200 acres at \$80 an acre, and, if he procured such purchaser, he should receive \$1 an acre; that there was further agreement as to certain town property owned by defendant, being that plaintiff was to attempt to procure a buyer for said property, at a price and terms agreeable to defendant,

and, if successful in this, was to receive \$50 for this service. It is alleged further that plaintiff procured one Mahoney as a purchaser, who, at the instance and request of plaintiff, inspected the farm of defendant; that plaintiff accompanied Mahoney to the farm; that Mahoney bought the farm for \$85 an acre, and also entered into contract of purchase of said town property, at a price and on terms agreeable to defendant. Judgment for \$250, with interest from September 20, 1910, is prayed. The answer is a general denial. There was a counterclaim, to which reference will be made later. Plaintiff had verdict and judgment for \$50, and defendant appeals.

II. To the claim of plaintiff, defendant

1. TRIAL: instructions: form, requisites and sufficiency: admitted counterclaim.

interposed a counterclaim, based upon a promissory note given by plaintiff to defendant. Plaintiff made no defense to the counterclaim. Defendant complains that the court failed to instruct the jury that the counterclaim was admitted in the pleadings. The entire charge treats the note as admitted, and tells the jury to use all of it as an offset to anything it may find plaintiff is entitled to on the claim sued upon by plaintiff. We think the complaint is not well made.

2. BROKERS: compensation: action: evidence: sufficiency.

III. The parties as witnesses state as a conclusion, respectively, that there was a contract between them, and that there was not. Others testify that they heard that from which a jury might decide that there was such a contract as plaintiff claims. Defendant denies that he said this in the hearing of these others. He also gives his version of what he did say at that time, and at others. There is testimony upon which a jury might well have found that some circumstances militated against plaintiff's claim, and that an agreement was made between him and defendant in regard to his claim concerning what he did

for defendant. For instance, it appeared that plaintiff made claim for commission quite a long time after the transaction in which he claimed a commission had been closed; that he had no charge on his books against the defendant; that he borrowed money of him at a time when, in one view, he had more coming in commission than he was borrowing of defendant and giving defendant his note for. On the other hand, plaintiff explains this by saying that, as he construed matters, his commission was not due when he gave said note.

Appellant claims there was not sufficient testimony that plaintiff was ever authorized to act for defendant. We do not so view the record. We think this question was fairly for the jury and properly submitted to it, and that its finding thereon for the plaintiff concludes us.

VI. Much the same situation exists on the question as what plaintiff did for defendant, and, consequently, how much there is due from defendant to plaintiff. Here, again, the parties testify by stating conclusions, the owner claiming in testimony that the agent had nothing to do with the sale, and was in no wise effective in procuring it, while the plaintiff gives his conclusion that he had very much to do with it, and that without his intervention it would never have been made. The same situation is exhibited concerning the sale of the town property. It is not disputed that the buyer first learned from the alleged agent that the property which he afterwards bought was for sale; that the plaintiff negotiated with him, took him to his house preparatory to going to see the owner; and that the two went over the land; and that afterwards all three did. The buyer testifies, in effect, that he would never have bought the Buckley farm had it not been for the initiative of the plaintiff; that he certainly would not have made this particular purchase without that intervention and initiative. It seems to be without dispute that, at one time

at least, the defendant desired plaintiff to see one Harshbarger with reference to buying, having heard that a sale might be made to Harshbarger. As is quite usual, there is testimony that, after the alleged agent brought the buyer to whom a sale was made, the owner modified terms that he had theretofore been insisting upon. On the other hand, there is the equally usual line of testimony that the one now claiming to have been an agent didn't tell the buyer, in so many words, that he was an agent, until after the sale was made; and testimony by the defendant that he didn't think plaintiff was an agent when he came to him with a purchaser, and that the agent did no talking while the buyer and owner were together in his presence. It may be said in this connection that the owner did know, when the buyer and plaintiff came to him, that these two had all the night before been together at the house of the plaintiff. It appears fairly that the sale of the town property was in fact contemporaneous with the sale of the farm, and at least agreed upon at the same interview, and while the buyer and agent were present.

We think that *Kelly v. Stone*, 94 Iowa 316, *Rounds v. Allee*, 116 Iowa 345, *Hanna v. Collins*, 69 Iowa 51, and *Clements v. Stapleton*, 136 Iowa 137, fairly sustain us in holding that plaintiff had a sufficient case to go to the jury. We are of opinion that *Gilbert v. Baxter*, 71 Iowa 327, does not militate against this, and that *Storm Lake Bank v. Missouri Valley Life Ins. Co.*, 66 Iowa 617, *Walton v. Dore*, 113 Iowa 1, *Whitman v. Dubuque & S. C. R. Co.*, 96 Iowa 737, *Armistead v. Chicago, B. & Q. R. Co.*, 70 Iowa 130, *John Gund Brewing Co. v. Peterson*, 130 Iowa 301, and *Miligan v. Davis*, 49 Iowa 126, cited by appellant, have no relevancy to any matter in review here.

It follows that we must overrule the contention that the record does not contain sufficient evidence to sustain

the claim of plaintiff. Wherefore, the judgment of the trial court must be, and is,—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

MAY LOMAX, Appellant, v. LEON W. LOMAX, Appellee.

DIVORCE: Cruelty—Evidence—Sufficiency. Evidence, revealing a quite large degree of mutual blame, reviewed, and held insufficient to justify a decree of divorce on the grounds of cruel and inhuman treatment.

Appeal from Polk District Court.—LAWRENCE DEGRAFF Judge.

WEDNESDAY, NOVEMBER 22, 1916.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

ACTION for divorce, for custody of children and alimony. After a trial on the merits, the plaintiff's petition was dismissed, and she appeals.—*Affirmed*.

J. G. Myerly, for appellant.

C. C. Bigger and Miller & Wallingford, for appellee.

PRESTON, J.—The petition alleges that
DIVORCE: cruelty: evidence: sufficiency. defendant had been guilty of such cruel and inhuman treatment as to affect plaintiff's health and endanger her life. The treatment, as appellant states it, is abusive language and threats of personal violence sufficient to put plaintiff in great bodily fear and restraint, so that she was compelled to leave defendant's home. Plaintiff asks the custody of the two girls, 8 and 3 years old, but does not ask the custody of the boy, aged 6. Alimony in the sum of \$5,000 is asked. Plaintiff also avers that plaintiff owns in her own name one half of 90 acres of land, which defendant had before deeded to her, and asks that her title to the same be quieted in her.

No unusual or disputed questions of law are presented. The only question is whether, under the evidence adduced, plaintiff was entitled to a decree, and whether the court erred in dismissing plaintiff's petition. Ordinarily, we do not attempt to set out all the testimony, where the only question is one of fact. It serves no useful purpose to do so, and we shall refer to the circumstances only in a general way. The trial court, after seeing and hearing the witnesses, concluded that plaintiff had not established her claim, and, after an examination of the record, we have come to the same conclusion.

The plaintiff is 27 years of age, and defendant, 44. They were married in 1906, when plaintiff was about 17. Their married life was unhappy. Both were to blame. It is claimed by appellant that, under the evidence, defendant was of an extremely mercenary disposition, and that this trait was one of the primary causes which brought on this litigation. In fact, plaintiff in her testimony shows that defendant is really penurious in regard to expenditures for other than household and family expenses. This is substantially admitted by counsel for defendant in argument. Defendant claims that he provided well the substantial necessities for the comfort of his wife and children, yet he admits that he should have afforded them more of the luxuries and pleasures of life. Appellee contends that this is not a ground for divorce. Defendant contends that plaintiff was also looking after the dollars.

They separated in October or November, 1913, in Missouri, where they were living, and plaintiff came to Des Moines. At this time, a contract was entered into, by which plaintiff was to go back home with defendant, and, by the agreement, defendant was to convey to her 45 acres of the 90-acre farm, being the part containing the buildings, and was to pay her \$600 in money. Her notion seems to have been that, if she had this land in her name, it would

make a difference in the way that she would be treated by defendant. \$500 was paid at the time of the signing of the contract, but the other \$100 has never been paid. There was a clause in the contract, as originally drawn, by which the parties should resume living together as man and wife. This was objected to by plaintiff, and that clause was erased. Plaintiff went back to Missouri with her husband, but they did not cohabit, and, as plaintiff claims, defendant began demanding back the deed and the money he had paid her.

Many of the circumstances testified to by plaintiff are denied by the defendant; others are explained, and some admitted, with some qualifications. Plaintiff claims that defendant would swear at her, and that he boasted of his intimacy with other women before his marriage with plaintiff. She claims that defendant struck her at one time, before they had been married a year. She claims that he had been using intoxicating liquor, and defendant admits that he did use liquor to some extent, but that, for two years or such a matter, he has not used it at all. She claims that defendant accused her of being intimate with other men without cause; that this occurred before their first separation, and after she returned to live with him. The night before she left the last time, she claims that the trouble was over some oysters she had bought for supper, and that defendant complained about the expense of it, and that a quarrel ensued, and she left. Plaintiff claims that, at one time, defendant threatened to shoot her with a .22 calibre rifle. Defendant's version of this is that, at the time, plaintiff had become greatly enraged at him, and, fearing that she would assault him again, as he claims she had before, he picked up a small target rifle and, as he says, shook it at her. He testifies that it was unloaded, and that he had no intention of shooting her. Some of the circumstances are testified to by the small children of the

parties. Ordinarily, the testimony of children under such circumstances in divorce cases is not given great weight, and some courts even think they ought not to be permitted to testify at all. Defendant seems to have been industrious and a very hard worker; in fact, plaintiff admits that she sometimes thought he worked too hard. Some other circumstances are testified to by plaintiff and her witnesses, but we shall not refer to them in further detail.

It should have been stated that defendant had been reared on a farm, and plaintiff had spent her life in a city. Soon after the parties were married, they took up their residence on the farm, and it may be that plaintiff was not pleased with her life on the farm. Defendant contends that, under the evidence, there were no serious differences between the parties until the year 1913, although he concedes that, at times, plaintiff, who possessed a high temper, became greatly enraged at defendant, and that defendant also became angry at plaintiff, but that these outbursts were mutual, and would pass away. As plaintiff attaches importance to defendant's disposition and treatment of her in this respect, it may not be out of place to set out some of her testimony as to her disposition and conduct. She admits that she got angry with him and said sharp words to him, and that she got angry with him about as often as he did with her, but says that she asked him to help her control her temper, and that she tried to help him; that once in a while she got angry with him when he was not angry with her. It seems that the parties had considerable difficulty and quarreling over one Wilkins. The defendant objected to plaintiff's receiving attentions from this man, and claims that this was the real cause of the separation. Their discussion of this party and their differences in regard to him resulted at one time in a serious quarrel. In her testimony on cross-examination, we find this:

"Q. Did you go after him with a stick of stove wood on one occasion? A. I did. Q. You assaulted him, hit him several licks? A. I did my best. Q. Is that the time he took hold of you and tried to choke you? A. No. Q. That time, he did not resist you—you got out of the way? A. He had a dipper of water in his hand when it started. He threw the water on me and picked up the bucket and threw it on me. I was armed with a stick of stove wood and he with a dipper of water and a bucket of water."

And she says that is the way he finally stopped her. Defendant's contention is, as before stated, that much of the trouble between the parties was because of the attentions the man Wilkins paid to plaintiff. Wilkins was the husband of defendant's sister. They lived in the neighborhood, and the two families visited back and forth frequently. Defendant contends that Wilkins began paying attention to plaintiff and was frequently in her company, and would accompany her to neighboring towns; that Wilkins was a man of dissolute and disreputable character; that, when defendant learned of the situation, he objected to plaintiff's being in the company of Wilkins and going to places with him, and, as stated, this resulted in heated discussions between them, plaintiff insisting that she was all right and could take care of herself, and defendant admitting that she was all right and expressing confidence in her, yet insisting that, owing to the character of Wilkins, their being together might cause talk among the neighbors. We find this in her cross-examination on this subject:

"Q. Isn't it a fact you told him you knew you were all right, and didn't he say, 'Yes, I know you are, but it will cause talk?' A. He may have said that; I don't remember. Q. Didn't you tell him you could take care of yourself, and you didn't care what the neighbors said? A.

Yes, I didn't care what—— Q. Didn't he insist you should not go with Wilkins; it would cause talk, as he had a bad reputation, and it would give you a bad name?

A. Yes, sir."

We think plaintiff's conduct in this respect was not entirely as it should have been, and may have provoked the defendant to some of the acts and conduct about which she complains.

Without further discussing the testimony, it is our conclusion that, under the entire record, plaintiff has not shown herself entitled to a divorce. The situation is most unfortunate for both plaintiff and defendant, and the three small children. We have said that the plaintiff was at fault in some respects, and we can say from the record that defendant has not treated as he should the woman he vowed to protect. The court is not responsible for the unfortunate situation.

The judgment is—*Affirmed.*

DEKMER, WEAVER and EVANS, JJ., concur.

KATIE F. McCORD, Appellant, v. CITY OF CHEROKEE,
Appellee.

MUNICIPAL CORPORATIONS: Public Improvements—Assessment
1 of Benefits—Appeal—Non-Approval of Bond. Filing appeal bond in proper amount, but without securing the approval thereof, as required by Sec. 839, Code, 1897, is not sufficient to maintain the appeal.

BONDS: Statutory Bonds—Defects—Rectification. Section 357,
2 Code, 1897, providing that defects in bonds shall be non-prejudicial if rectified within reasonable time, has no application to a defect which consists of a failure to secure, as required by statute, the approval of a non-defective bond.

Appeal from Cherokee District Court.—WM. HUTCHINSON,
Judge.

FRIDAY, FEBRUARY 19, 1917.

REHEARING DENIED TUESDAY, JUNE 22, 1917.

APPEAL from an order of the district court sustaining a motion to dismiss. The plaintiff appeals.—*Affirmed.*

Claud M. Smith, for appellant.

Guy J. Tomlinson, for appellee.

LADD, J.—The plaintiff interposed objections to the levy of a special assessment against Lot 1 in Block 31 of Lebourveau's Second Addition to the town of New Cherokee, now included in the city of Cherokee, and these were overruled. Thereupon, the plaintiff tendered a bond in due form to the clerk of the defendant city, in the amount by him previously fixed, and it was duly filed. It was not approved, nor was an approval endorsed thereon by the city clerk or mayor. The motion that the appeal be dismissed, for that no sufficient bond, approved as required by statute, had been filed, was sustained, and rightly so. *Johannsen v. City of Colfax*, 161 Iowa 502; *City of Fairfield v. Jefferson County*, 168 Iowa 623; *Van Meter v. Town of Tipton*, 178 Iowa 1201; *Sutton v. Bower & Perkins*, 124 Iowa 58.

Section 357, Code, 1897, relates to defective bonds, and not to omissions of the approval of those not defective. The statute exacts the filing of the bond, duly approved, within ten days from the date of the levy of the special assessment, and, plaintiff having failed so to do, the motion to dismiss was rightly sustained.—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

Vol. 180 IA.—29

FRED MEHLISCH, Appellant, v. A. J. MABIE, Administrator,
Appellee.

NEW TRIAL: Grounds—Newly Discovered Evidence—Impeaching
1 Evidence. Newly discovered *impeaching* evidence is not
2 grounds for new trial. So held where, in an action on a claim
against an estate, a witness testified that she was working at
the home of deceased at a certain time, and that *at such time*
deceased gave claimant a check, and that the parties then
agreed that the check was to constitute a full settlement be-
tween them, the newly discovered evidence being to the effect
that at said time the witness *was not at the home of deceased*.

WITNESSES: Examination—Rebuttal—Leading Questions. On re-
2 buttal, to disprove the making of statements attributed to the
witness by others, it is proper to put the question in a *direct*
form, to wit: "Did you say to them at that time and in that
conversation that you had settled up?" or, "Did you tell them
you had settled up and had all your money, or anything of that
kind?"

WITNESSES: Examination—Leading Question. It is not a *leading*
3 question to ask a witness: "Did you tell them you had settled
up and had all your money, or anything of that kind?" or,
"State whether or not you told anybody that evening that you
had settled."

WITNESSES: Competency—Transactions and Communications with
4 Deceased. A question which does not itself reveal the fact that
it calls for transactions with a deceased, should not be exclud-
ed unless the objector shows such to be the fact.

WITNESSES: Competency—Transactions with Deceased—Opening
5 Door to Interested Witness. Testimony by a witness *other than*
an administrator, etc., as to a transaction with the deceased,
though introduced *on behalf* of the administrator, does not open
the door to an interested witness, otherwise incompetent, to tes-
tify to the same transaction. See Section 4604, Code, 1897.

PRINCIPLE APPLIED: Trial of claim against an estate.
The administrator filed no pleadings, but claimed that the mat-
ter in controversy had been fully settled between claimant and
deceased. To prove this, the administrator called a witness who
testified that, on a certain occasion, she was present when de-
ceased and claimant figured their accounts, and that, at the

end thereof, deceased gave claimant a check for an amount which she did not learn, and that she heard claimant and deceased agree and say that the check was in full settlement of their affairs. *Held* not to open the door to claimant to testify to the same transaction.

EVANS, J., because of the insufficiency of the evidence to support any verdict for claimant, dissents to the order of reversal.

Appeal from Marshall District Court.—B. F. CUMMINGS, Judge.

SATURDAY, DECEMBER 16, 1916.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

Claimant, Fred Mehlich, filed a claim against the estate for balance due for labor as a farm hand for decedent, and for balance alleged to have been due claimant from deceased while associated with him as a partner in farming and raising stock on the land of deceased. There was a trial to a jury, and a verdict for the estate. The plaintiff appeals.—*Reversed*.

Bradford & Johnson, for appellant.

F. L. Meeker and C. H. Van Law, for appellee.

PRESTON, J.—1. The appellant, or his attorney, seems to have had some trouble in stating the plaintiff's claim and the nature of it. The claim was prepared by an attorney. The claim as first filed, on June 21, 1913, was for \$1,218.71, "on open account and for goods and merchandise sold." It is claimed by appellee that the items making up this account were items or articles sold at public sale. On March 16, 1914, plaintiff filed an additional claim for \$2,020.68, balance of money alleged to be due plaintiff from the estate because of the shipment of stock by plaintiff and deceased as partners, and for the proceeds thereof. The total for the debit side of this account is \$9,815.56, with cred-

its of \$3,200, one half the balance of which plaintiff claims to be due him, a certain amount for balance due on stock and grain bought and sold, etc., also an account for services alleged by plaintiff to have been performed by him for deceased, commencing in the year 1903 and ending in the year 1909; but he does not claim to have worked all the last two years. The charges are by the year, and each year's credits are given for a part alleged to have been cash payments to plaintiff. The balance of this account for wages as claimed is \$1,131.25.

It is thought that the manner of plaintiff's presenting his claim is a circumstance against him, and it may be so; and yet it seems to some of us that there is some excuse, in view of the fact that he kept no books, and whatever books there were, were kept by deceased, and that the shipments of stock, in several instances at least, seem to have been settled soon after the shipment, and when the money had been received and divided. However, this was a matter for the consideration of the jury, if there were any discrepancies in his account. It sometimes happens that attorneys, in preparing such claims, which are sometimes lengthy and consist of many items, are not as careful as they might be. Of course, in so far as there was a conflict in the testimony, it was a question for the determination of the jury.

The substance of appellant's claim is that he established by evidence when he started to work for deceased, how much he was to receive, how long he worked, and how much he was paid on the work, and that appellee did not dispute his work, and showed no payments other than those appellant had given him credit for; and his claim, boiled down, is that the wages earned amounted to \$1,980, and that he had been paid thereon \$848.75, leaving a balance of \$1,131.25, and that he proved shipments of stock by the firm and remittances or credits received, and that deceased

sold stock from the place belonging to the firm, for which he owed appellant one half of \$4,908.28; that appellant bought stock for the place, for which deceased owed him one half the sum of \$1,059.67; that deceased owed appellant a note of \$135, and \$115 on another note; that McMannes owed appellant for farming implements of plaintiff sold at the sale; and that the balance due Mehlich on the entire account, after allowing all credits, including an item of \$413 credit, which will be referred to later, is \$1,747.37. Appellant had, in some of the accounts, given deceased credit for a check of \$600 as of date May 24, 1913, but appellant now claims that that is a mistake, and should have been a check of \$413, and of date November 18, 1912.

It is appellee's contention that there

1. NEW TRIAL:
grounds: newly
discovered evi-
dence: im-
peaching evi-
dence.

was a settlement on the last named date by the payment of a check of \$413, and that this settlement between deceased and plaintiff was a full settlement of all their affairs; and this really seems to have been finally the main controversy in the case. It is true that defendant, as he had a right to do, required plaintiff to make the proof of his claim, and the plaintiff's testimony in establishing this claim is found in 64 pages of the abstract, while all the evidence for the estate is found in about 8 pages of the abstract. As stated, after the evidence was in, there seemed to have been less controversy over the account as plaintiff alleged he had proved it, than over the question of settlement. It should be stated that the administrator filed no pleading, but relied upon the statutory denial. The question was not raised in the district court, nor has it been here, as to whether the settlement and payment relied upon by the defense should have been pleaded under Section 3340, Code, 1897, and claimant did not object to the testimony as to the alleged settlement upon the ground that the evidence was irrelevant, so that we do

not determine that point. But the larger part of the time consumed in the trial was in proving plaintiff's claim. The evidence as to the settlement came at the last, and the one witness, Mrs. Spence, upon whose testimony the appellee relies largely to establish the alleged settlement, came as substantially the last, if not the last, witness for defendant; so that appellant was not advised that such an issue was in the case until near the close. This witness, Mrs. Spence, testified in substance that, on the date named, when the \$413 check was given, she was present at the transaction between deceased and plaintiff at the home of McMannes, where she claims she was then working, and that the substance of the conversation was that this was a settlement of all matters between the parties, although, as stated, the appellant claims there was more than \$2,000 due him at that time. The plaintiff was used as a witness by the defendant to identify the \$413 check, but no cross-examination of plaintiff was permitted as to the transaction for which the \$413 check was given. The plaintiff denied that this check was given in settlement of the account and denied that there was any settlement, but his examination on this point is claimed by claimant to have been unduly restricted, and perhaps it was so. There was the testimony of two or three witnesses as to statements alleged to have been made by claimant that he was going to settle with McMannes, and others that he had settled. This evidence as to verbal declarations is, under the rule, which is well understood, not the strongest evidence, although, of course, a matter may be so frequently stated and so well understood that it may be entitled to great weight. But, outside of these two or three verbal admissions, the question as to the settlement, which, as stated, turned out to be the vital point in the case, rested upon the testimony of the plaintiff, an interested witness, and the witness Mrs. Spence, supposed to have been a disinter-

ested witness. Plaintiff, testifying as a witness, did not claim that Mrs. Spence was not present at the place she claimed, but he did deny that the statements were made, and denied the transaction. In the motion for new trial, however, he claims he did not know that she did not work there at that time. In the motion for new trial, plaintiff, under a proper showing, set out the evidence and affidavits of six witnesses, showing newly discovered evidence, upon which claimant asked a new trial. The testimony of these witnesses tends very strongly to show that Mrs. Spence, at the time stated, was not working at the McMannes home, and was not present there at the time she claims there was a settlement between plaintiff and deceased, but that she was working at another place for a Mrs. Mabie, because of an operation on Mrs. Mabie, who was a relative of the administrator in this case; that she had been working there from sometime about the middle of October until about the first of January afterwards. A physician testified as to the date of the operation, which was October 19th, and that Mrs. Spence was there doing the work; that he made professional calls on Mrs. Mabie on November 18th and substantially every day up until the 6th of December; that he knows that Mrs. Spence was at Mabie's all the time doing the housework; and that he dropped in several times in November not shown by call book, when he was passing, and that Mrs. Spence was there. The nurse who was caring for Mrs. Mabie testifies that Mrs. Spence was at Mabie's from October 19th to after January 1st. Mrs. Keople, a neighbor of McMannes', says that she knows Mrs. Spence was not working for McMannes in November. She testifies who was working there, and that she herself worked a part of the time. Mr. Keople testifies that he is sure that Mrs. Spence was not working for McMannes in November; that witness was working there at that time. Another neighbor testifies that she knows Mrs. Spence was

not working for McMannes in November. Another witness, a tenant of McMannes', says he knows that Mrs. McCormick worked for McMannes. This is the substance of the alleged newly discovered evidence.

Counsel for appellee cite cases holding that a new trial will not be granted where the alleged newly discovered evidence is impeaching testimony, or where it is cumulative. The cases are for the most part collected in the case of *Smith v. Smith*, 160 Iowa 111, at 117. A majority of the court are of opinion that this evidence was impeaching, and that the court properly overruled the motion, in so far as it relates to this ground.

2. WITNESSES' examination; rebuttal; leading questions. 2. The trial court unduly restricted the plaintiff in excluding the evidence offered by him. Some of the questions are close as to whether he was a competent witness as to certain of the transactions, because of Section 4604, Code, 1897. The record contains a great many instances where matters which claimant sought to prove were excluded upon objection. We shall not attempt to set out all of them. Ray Keople, a witness for appellee, was permitted to testify that plaintiff stated, at a certain time and place, that he (claimant) had just settled with McMannes. James Johnson, a witness for appellee, was permitted to testify in substance, that, in November, 1912, he heard claimant say, when they were eating supper, that he had been over to McMannes' and he and McMannes had settled up. In rebuttal, plaintiff was put upon the stand, and we have this record:

"I heard the testimony of Mr. Keople and Mr. Johnson in regard to a conversation they claim took place at the supper table and their testimony in regard to it. Q. Did you tell them you had settled up and had all your money, or anything of that kind? (Administrator objects as leading and suggestive. Sustained, and claimant excepts.) Q.

You may state whether you told anybody there that evening that you had settled up with Mr. McMannes. (Same objection, ruling and exception.) Q. Did you at any time in that conversation say to them that you had settled up? (Objected to as leading. Sustained, and claimant excepts.) Q. What had you been doing over there at Mr. McMannes'? (Administrator objects as incompetent under the provisions of 4604. Sustained, and claimant excepts.) Q. You may state whether when you were at McMannes' that day you did figure up with Mr. McMannes your account between you. (Administrator objects for the same reason. Sustained, and exception.) Q. You may state whether or not the figures of your figuring up were left with Mr. McMannes. (Same objection, ruling and exception.)"

The abstract shows that the testimony was here closed. At this point, the claimant moved to strike from the testimony all the evidence given by the witness James Johnson (just set out), James Barton, Pearl Spence and Carl Damon, offered in behalf of the administrator, because the court refused to permit the claimant to testify as to the transaction.

"Court: The court did not refuse to permit the claimant to testify as to the conversation testified to by those witnesses, but the court did refuse to permit the claimant to testify as to the transaction with a deceased person. The motion is denied. Plaintiff excepts."

We shall not stop to set out the testimony of the others. But we think the court was in error in its conception of the testimony of the witness Johnson at least. But we shall not go into that further now, but consider the record before set out. The principal objection to these questions was that they were leading. It must be remembered that this evidence was offered in rebuttal, where it was sought to show by plaintiff that statements alleged to have been made by him and testified to by other witnesses were not

true; that is, that he claimed they were not true, and desired to contradict their testimony. So that it was, under the rules, permissible to put the questions direct, and often it is permissible to put a leading question for that purpose.

Furthermore, we think these questions

3. WITNESSES: were not leading. We understand the rule
 examination:
 leading ques- to be that a leading question is one that
 tion.
 • suggests the answer. The first question we

have set out to be leading would be framed in this way, as applied to what counsel for claimant would naturally want the witness to answer: "You did not tell them you had settled up and had all your money?" The question as propounded asks him the straight question as to whether he did tell them that he had settled up, or anything of that kind. The next question is: "State whether or not you told anybody there that evening that you had settled, etc." The next, whether at any time in that conversation he said that he had settled. We think none of these are leading, and we think they were perfectly proper in rebuttal.

The next question is: "What had you

4. WITNESSES: been doing over there at Mr. McMannes'?"
 competency:
 transactions The administrator objected to this because
 and communi- incompetent under Section 4604. But the
 cations with witness is not objected to, and the question
 deceased.
 itself does not show that it was a personal transaction, and

therefore incompetent. The objecting party must show, if the question itself does not, that it does call for a personal transaction. The inquiry may have been in regard to a personal transaction, but it does not so appear, from the question or otherwise.

As before stated, the question of a settlement was finally the vital point in the case, and two witnesses at least, and perhaps another, were permitted to testify as to statements alleged to have been made by the plaintiff in regard to a settlement, and he was not permitted to deny it at all.

We think we ought not to take the time or space to go through each instance where appellant claims the examination of the witness was unduly restricted. Appellant as a witness was asked as to the purchase of certain live stock, etc., of others than McMannes, deceased, that was brought on the place, and he was asked if he bought certain implements at a sale of McMannes' goods by others, and as to a sale of property of his own, and as to who bought it other than McMannes, but he was not permitted to answer; and it is argued by appellant that, if he could not prove by his own testimony that he worked this farm during the partnership, he could at least prove that no one else did, and that, if he could not prove by his word that he bought certain property at a sale conducted by someone else, then he certainly could prove that no one else did, and that, if he could not prove by his own testimony that McMannes bought appellant's property at a sale conducted by others, then he could prove that no one else did so, and as authority, appellant cites *Walkley v. Clarke*, 107 Iowa 451, which seems to so hold. See, also, *McElhenney v. Hendricks*, 82 Iowa 657.

3. Mrs. Spence testified in reference to the alleged settlement and the giving of the \$413 check to plaintiff on November 18, 1912, by deceased:

5. WITNESSES:
competency:
transactions
with deceased:
opening door
to interested
witness.

"I was employed by McMannes in the summer of 1912, and went there along in July and stayed along about the first of December. I am slightly acquainted with Mehlich. He came there to McMannes' late in the fall of 1912, where I was keeping house for them. It was after dinner. McMannes and Mehlich were in the dining room, and McMannes' wife and myself were present. His wife has died since that. Mehlich stayed about an hour. They were transacting business and figuring up accounts. When they got through, he gave him a check and asked him

if that would square them in full, and Mehlisch said, 'Yes.' McMannes gave Fred a check and asked if that would settle—called it 'square them'—in full, and Fred said, 'Yes.' I don't know the amount of the check. It wasn't very long after McMannes gave him the check that he left the place. I could not tell you the date, but it was in November before Thanksgiving."

To meet this testimony, plaintiff was called to the stand in rebuttal, and testified to his claim about the mistake in regard to a certain \$600 check and the date of it, and its connection with reference to the \$413 check, and was then asked:

"Q. What took place between you and Mr. McMannes at his house the day Mrs. Spence says you was there? (Administrator objects as not proper rebuttal, witness incompetent under the provisions of Section 4604 of the Code, incompetent, immaterial and irrelevant. Sustained. Claimant excepts.) Q. You may state how the check of \$413 that you received at that time happens to be for that amount. What took place there in the presence of Mrs. Spence, the woman who has testified in regard to that, and if she was there? (Same objection, ruling and exception.) Court: Are you not calling for a personal transaction? Mr. Bradford: I understand the rule is, when the administrator attempts to show a thing of that kind, I have a right to show what took place at that time. I may be wrong. Court: I think you are. (Complainant excepts.)"

The appellee relies upon the two cases of *In re Estate of Brown*, 92 Iowa 379, and *Whisler v. Whisler*, 117 Iowa 712, to sustain the ruling of the court at this point. In the first case cited, it was held that, where a check issued by a decedent is put in evidence in behalf of the estate, it does not constitute testimony of the administrator, within the meaning of Section 4604, Code, 1897, so as to admit the evidence of the claimant who receives such check as

to what the check was given for. And in the *Whisler* case, the holding was that the admission of a receipt or deed or other writing of a deceased person is not sufficient to admit the testimony of a living witness otherwise incompetent under the statute, and that this rule applies to books of account of deceased. But we think the two cases cited do not quite meet the situation here presented. The present case is more like *Canaday v. Johnson*, 40 Iowa 587, where it was claimed that the door was opened for evidence in rebuttal as to personal transactions between deceased and the party to the action, because another party (the widow) had testified as to the same transaction inquired about, and it was there held that the evidence was not admissible. There is, we think, some basis for the argument that the last clause in Section 4604 has reference to evidence introduced on behalf of the administrator, heirs at law, etc., rather than the testimony of such person himself, because, as to the administrator at least, he is usually a disinterested person, without personal knowledge of transactions between deceased and other persons. The same reasoning, perhaps, would apply to a guardian, and some of the other persons named in the exception. And there is reason, too, for the argument that, where one party has opened up one side of a transaction, the other side should be permitted to meet it. But the statute does not so read, and the question seems to have been foreclosed by the *Canaday* case, *supra*. This case, so far as we are able to discover, has not been before questioned since it was decided, some 40 years ago. Our conclusion is that the court ruled correctly at this point.

We have, perhaps, set out too many of the numerous questions where testimony was excluded, and we shall not take the time to refer to others. Enough has been set out to show the general tendency of several others not set out.

For the reasons given, the judgment is reversed and

the cause remanded for new trial.—*Reversed and remanded.*

GAYNOR, C. J., DEEMER and WEAVER, JJ., concur.

EVANS, J. (dissenting). I do not concur in the reversal of this case. Upon all the evidence introduced and offered by the plaintiff, I feel sure that no verdict in his favor could properly have been permitted to stand.

A. L. OBER, Appellee, v. JACOB SEEGMILLER et al., Appellants.

OTTO SOLBERG, Appellee, v. JACOB SEEGMILLER et al., Appellants.

WILLS: Construction—Estate Created—Obligation of Devisee to

- 1 **Pay Another—Garnishment.** A will imposing on a devisee an obligation to pay to his father so much of a stated sum as the father "may demand" or "may be pleased to demand" *each year* during the lifetime of the father, creates no debt, and consequently no opening for a garnishment, until the father makes a demand; and, should no demand be made during any stated year, the right to make demand for such lapsed year is lost.

PRINCIPLE APPLIED: See No. 2.

GARNISHMENT: Persons Subject—Interest of Devisees—Condi-

- 2 **tions Attending Creation of Debt.** If the bringing into existence of a debt depends upon the exercise of a condition *personal to the one to whom the debt would be due*, then no one can create the debt for such person without his consent, and thereby open the door to the garnishment of the debtor.

PRINCIPLE APPLIED: A wife devised to her husband "so much of and such part of \$1,000 each year during * * * his natural lifetime as he may be pleased to demand."

The provision for payment was that certain other named devisees should pay to the husband "so much of the sum of \$1,000 as he (the husband) may demand, each year during the term of his natural life."

The will also provided that the devise to the husband "shall be clear and free from the rights and claim of his personal creditors of every kind and nature."

The husband elected to take under the will. He never demanded any payments of the obligated devisees. Creditors of the husband garnished said other devisees.

Held that, under the devise, the husband was the *only* person who could bring into existence a debt against the other devisees, and he must do that by making demand; and, as no demand had been made, no debt was created, and said other devisees were not liable as garnishees.

APPEAL AND ERROR: Parties—Garnishment Proceedings—When
3 Judgment Defendant not Necessary Party. A judgment defendant is not a necessary party to an appeal by a garnishee if a reversal would not prejudicially affect such judgment defendant. (See Secs. 3951-3953, 4111, Code, 1897; Secs. 3947, 3948, Code Supp., 1913.)

PRINCIPLE APPLIED: See No. 2.

APPEAL AND ERROR: Perfecting Appeal—Notice—Execution
4 Defendant and Garnishees—Co-Parties. A defendant in execution and one garnished as his supposed debtor are not co-parties. Section 4111, Code, 1897.

Appeal from Winneshiek District Court.—W. J. SPRINGER,
 Judge.

THURSDAY, NOVEMBER 23, 1916.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

THESE cases, while not submitted together, involve the same propositions of law and fact, and will be disposed of in one opinion. They are each garnishment proceedings, in which the parties named were garnished as supposed debtors of Jacob Seegmiller, on an execution issued on a judgment held by plaintiff against said Seegmiller. The trial court held the garnishees liable, and they appeal.—*Reversed and remanded.*

Boice & Hook, for appellants.

E. W. Cutting, for appellee.

DEEMER, J.—The garnishees are the sons of Jacob Seegmiller, the judgment defendant. Plaintiffs each held judgments against the father, and they caused the sons to be garnished on executions issued on

I. WILLS: construction: estate created: obligation of devisee to pay another: garnishment.

these judgments. This indebtedness to the father, if there be one, arises out of the will of their mother, from which we extract the following:

"To my beloved husband, Jacob Seegmiller, I give and bequeath so much of and such part of the sum of \$1,000 each year during the period of his natural lifetime as he may be pleased to demand, said sum to be paid to him as is hereinafter provided; also the personal right to use and occupy my dwelling house, and the lots on which said house is located, the same being Lots 5 and 6 of Block 32, in the city of Decorah, Winneshiek County, Iowa, during the period of his natural lifetime; also the personal right to use all of my household furniture during the period of his natural lifetime. And I hereby expressly and specifically provide and declare that the gift in this paragraph made to my said husband shall be clear and free from the rights and claims of his personal creditors of every kind and nature."

This is followed by specific devises to the sons, upon the following conditions:

"This gift is subject to and dependent upon the performance by said William Seegmiller of the following acts and conditions, to wit: (a) The payment, within two years after the death of my said husband, should he survive me, to each of my daughters, Emma Frieker, and Lydia Koenig, the sum of \$266.66; (b) the payment to my said husband, Jacob Seegmiller, each year, during the period of his natural lifetime, so much of the sum of one third of \$1,000 as he may demand; (c) the furnishing, together with my two sons, Reuben and Aaron, to my said husband, at his home in Decorah, Iowa, so much fire wood, prepared for use, as he may wish to use; (d) the payment of one third of any and all debts that I may die owing that are secured by mortgages on any of the lands herein devised to this devisee or to my sons Reuben and Aaron Seegmiller; (e) The pay-

ment of all taxes and insurance charged or levied on the property included in this gift in this paragraph"—and certain others not necessary to be mentioned.

Also:

"This gift is subject to and dependent upon the performance by my said son, Reuben Seegmiller, of the following acts and conditions, to wit: (a) The payment, within two years after the death of my said husband, should he survive me, to each of my daughters, Emma Frieker and Lydia Koenig, the sum of \$266.66; (b) the payment to my said husband, Jacob Seegmiller, so much of the sum of one third of \$1,000 as he may demand, each year during the term of his natural life; (c) the furnishing, together with my two sons, William and Aaron, to my said husband, at his home, in Decorah, Iowa, so much fire wood, prepared for use, as he may wish to use; (d) the payment of one third of any of all debts that I may die owing that are secured by mortgages on any and all lands herein devised to this devisee and to my sons William and Aaron; (e) the payment of all taxes and insurance charged or levied on the property included in this gift in this paragraph
* * * all of which are to be and remain liens on said land, and the said land is not to be sold during the lifetime of my said husband. Said Reuben Seegmiller is to use and occupy without other charge the lands in this paragraph described, so long as he performs the obligations herein laid upon him, and the legal title thereto is to vest in him in fee simple on the death of my said husband."

And also:

"This gift is subject to and dependent upon the performance of my said son, Aaron Seegmiller, of the following acts and conditions, to wit: (a) The payment, within two years after the death of my said husband, should he survive me, to each of my daughters, Emma Frieker and Lydia Koenig, the sum of \$266.66; (b) the payment to my

said husband, Jacob Seegmiller, so much of the sum of one third of \$1,000 as he may demand, each year during the term of his natural life; (c) to furnish, together with my two sons, William and Reuben, to my said husband, at his home in Decorah, Iowa, so much fire wood, prepared for use, as he may wish to use; (d) the payment of one third of any and all debts that I may die owing that are secured by mortgages on any of the lands herein devised to this deviser and to my sons William and Reuben; (e) the payment of all taxes and insurance charged or levied on the property included in this gift in this paragraph"—and certain other conditions.

The will also contained these provisions:

"Par. 10.—I hereby appoint my said husband, Jacob Seegmiller, trustee for the purpose of executing the following trust, and I clothe him with full discretionary powers, otherwise than as limited herein. I also authorize him to act as such trustee without being required to give bonds: (a) To make such division of my said dwelling house and the the lots on which it is located, among my five sons named herein as to him may seem right and proper —such division to take effect during his lifetime or at his death, at his discretion.

"Par. 11. —After the death of my said husband, my household goods then remaining are to be sold at auction and the proceeds equally divided among all of my seven children herein named."

The father elected to take under the will, and each of the sons went into the possession of the lands devised to them, and neither has ever paid anything to the father, because he has not demanded it.

The question arises whether or not, under this record, the garnishees are so indebted to their father as that they should be held liable in garnishment proceedings. If so, it arises out of the provisions of the

2. GARNISHMENT:
persons sub-
ject: interest
of devisees:
conditions at-
tending creation
of debt.

will. It will be noticed that there is not an absolute bequest of \$1,000 or any other fixed sum to Jacob Seegmiller. The provision is to pay so much of and such part of the sum of \$1,000 each year during the period of his natural life as he may be pleased to demand. If he made no demand during the year, then clearly nothing was due him for that year. Whether anything would become due for future years depended (a) upon his survival, and (b) upon his demand. These were conditions precedent to the vesting of the gift. It is not a case of bequest of a certain sum upon demand of the donee, in which case the obligation would be fixed, but a bequest or devise of such a sum as he might demand during any one year, not exceeding \$1,000. Again, the demand was clearly personal, and the demand not only fixed the time of payment, but the amount thereof; and, until there was a demand, there was no debt.

The latter part of the second paragraph of the will makes it clear that the gift or bequest was a conditional one, and that no one else but the beneficiary could make the demand or fix the amount of the bequest. The bequest was not of a fixed sum on demand, as in most of the cases cited in support of the court's ruling. In such cases, the bringing of an action is a sufficient demand, and the obligor in such cases may be garnished. Here, there was no promise to pay a fixed sum, but only such an amount up to a given sum as the donee or beneficiary under the will should be pleased to demand. In this respect, the case is quite like *Allen v. Allen*, 116 Iowa 697, where we said:

"Here the amount of the liability is uncertain. It was to be determined, within the set limit, by the creditor, and could be made certain only by a request or demand. Until the amount due was thus fixed, surely no obligation rested upon the debtor to seek the creditor and proffer payment. We are of opinion that a demand was necessary upon plain-

tiff's part before she could maintain an action or proceed with a claim in probate."

There, as here, if no demand was made, nothing was to be paid; and, as no demand was made by the father at any time, nothing was due which he could collect for the years which had passed, and nothing would be due in the future save as he might fix the amount and make demand for the same. This and other things were conditions precedent to the creation of any obligation on the part of the sons to whom the property was devised.

As a rule, one may be held as a garnishee from whom a recovery might have been had by the principal defendant, but this is not always the case. If the bequest is upon a condition personal to beneficiary, and he and he alone may perform that condition, then no one can create the obligation for him. The testatrix was under no obligation to so dispose of her property that creditors of one of the beneficiaries under the will might take the share of that beneficiary. It was pure gift, the terms of which might properly be controlled by the donor or deviser, and we know of no rule of law which forbids the making of such a bequest. To hold otherwise would make it impossible to sustain spendthrift trusts or other forms of gifts or bequests intended for the personal benefit of the donee or beneficiary. Somewhat akin to this case is *Hunter v. Citizens Savings & Trust Co.*, 157 Iowa 168. In that case, it is said:

"The creditors have neither legal, equitable nor moral rights to any greater interest or estate in the property than their debtors acquired under the will. It was the undoubted right of the mother, in making her will, to burden or limit the estate she was giving her children by such lawful conditions and limitations as to her should seem wise. She was under no obligation to provide for the payment of their debts or to protect their creditors, and, if the conditions or limitations imposed by her made the subject of

the devise less available or more difficult of subjection to the payment of their claims, it was within her right so to do, and affords them no just ground of complaint."

See also *Meek v. Briggs*, 87 Iowa 610, 620, and *State Bank of Woolstock v. Schutt*, 174 Iowa 583.

In *Sebrell v. Couch*, 55 Ind. 122, a mortgage was given to secure the payment of a certain sum, which contained a provision that it was "to be paid by the mortgagor * * * when called on by said mortgagee; and the mortgagor does not agree to pay the above sum to anyone else except said mortgagee." The court said:

"The fair construction of the mortgage, as we think, bound the mortgagor, Benjamin, to pay the money specified when he should be called upon for that purpose by the mortgagee; and, if not called upon by the mortgagee for that purpose, he was not bound to pay it at all. The condition on which he was to pay was that the mortgagee should call on him for payment, and, that condition not having been performed, he was not bound to pay at all. Any other interpretation of the mortgage would do violence to its terms, and frustrate the intention of the parties, as gathered from the language employed by them. There is no analogy between the case here and the case of a note payable on demand, generally, on which suit may be brought without any demand. * * * Here a demand was not only to be made, but was to be made by the mortgagee himself, implying, when taken in connection with what follows in the mortgage, that, if he did not choose to make it, the debt was not to be paid at all. It may well have been that the mortgagee never intended that the debt should be paid at all, unless he himself should have occasion or see proper to demand it, intending, if he should not demand it, that the consideration of the indebtedness should be retained by the mortgagor as a gift or gratuity; and, dying without having demanded the debt, the gift became com-

plete and perfect. This in no way contravenes the doctrine that, to constitute a valid gift, the thing must be delivered to the donee. It may be assumed that the consideration for the mortgage, whatever it may have been, was delivered to the mortgagor; * * * and this consideration is what constitutes the gift, the mortgagee not demanding payment in his lifetime, according to the terms of the mortgage."

See also, as further sustaining our conclusion, Underhill on Wills, Secs. 484, 486 and 509; also Sec. 529, which cites many decisions closely in point; *Robertson v. Schard*, 142 Iowa 500. We do not think the garnishees were indebted to their father in such a sense as that they may be garnished as his debtors.

It is said that the testimony was not properly made of record in the court below, and that the appeal should not be considered. The abstracts show that this testimony was made of record by the shorthand reporter, and that a translation of the notes was filed in due season. Defendant in judgment was notified of the garnishment proceedings below, but he did not file an answer or any other pleading, although an appearance was made for him. He did not except to the judgment rendered against the garnishees and he has not appealed.

The garnishees excepted, and they served notice of appeal upon plaintiff's attorneys, and also upon the clerk of the court below. No notice of appeal was served upon the defendant in execution. A motion has been made to dismiss the appeal because of failure to serve notice upon the original judgment defendant. He was not a coparty with the garnishees, and not a necessary party to the appeal, unless his interest may be affected thereby. He does not object to the judgment against the garnishees, and seems to be content therewith. Our statute, Code Sec. 3953, provides that an appeal in

8. APPEAL AND
ERROR: parties:
garnishment
proceedings:
when judgment
defendant not
necessary
party.

garnishment cases may be taken by the plaintiff, the defendant, the garnishee, or an intervener claiming the money or property. The defendant in execution

4. APPEAL AND
ERROR: per-
fecting appeal-
notice: execu-
tion defendant
and garnishees:
coparties.

and the garnishee are not coparties; so that Code Sec. 4111, which requires service on coparties where one alone appeals, does not apply. And no notice of appeal need be

given any party to an appeal except one who is interested in the result thereof and whose rights may be affected thereby, save as the statute expressly requires such notice. As original judgment defendant's interest cannot be prejudicially affected by this appeal, we do not think it necessary that he be served with notice thereof.

The garnishees are complaining of an order requiring them to pay a sum of money on a debt which they do not owe, and therefore have a right, under the statute, to appeal. If they are successful on the appeal, the original judgment defendant's rights are not adversely affected. And if they lose, he suffers nothing, because he is not complaining of the original judgment. As the rights of these garnishees on appeal may be determined without in any manner prejudicing the rights of the original judgment defendant, it was not necessary to give the court jurisdiction that notice be served on such judgment defendant. *Wright v. Mahaffey*, 76 Iowa 96. The motion to dismiss the appeal must be and it is overruled. The judgments against the garnishees will, however, be reversed and the cause remanded for those in harmony with this opinion.—*Reversed and remanded.*

WEAVER, EVANS and PRESTON, JJ., concur.

RICHARD ROLFS, Appellant, v. T. L. MULLINS, Appellee.

WORDS AND PHRASES: Construction—"Upon." "Upon" does
1 not necessarily signify a state of being *up* and actually *on*, but
may denote *close proximity* only. So held where an ordinance
required of automobile drivers a signal "upon traversing a cross-
ing."

STATUTES: Construction—Connection of Words. Principle recog-
2 nized that, in the construction of words and phrases, very much
depends on the connection in which the same are used.

EVIDENCE: Opinion Evidence—Purpose or Motive of Another.
3 One may not give his opinion as to the unknown and undiscover-
able motive or purpose of another.

Appeal from Dallas District Court.—J. H. APPLGATE,
Judge.

FRIDAY, JUNE 22, 1917.

ACTION for damages in consequence of collision with
automobile resulted in judgment for defendant: The plain-
tiff appeals.—*Affirmed.*

George Wambach, Dingwell & Clarke, for appellant.

White & Clarke and Hunn & Jones, for appellee.

LADD, J.—The facts are stated in *Rolfs, Administrator, v. Mullins*, 179 Iowa 1223. As in that case, no objections were interposed to the instructions prior to submission of the issues to the jury, and what was there said disposes of the contentions that want of contributory negligence on the part of plaintiff, and negligence of defendant, were conclusively established. A ruling on the admissibility of evidence and a refusal of an instruction requested only require consideration.

I. It appears from the opinion men-
1. **WORDS AND PHRASES:** construction: "upon."
tioned that defendant was operating his au-
tomobile on the south side of High Street,
moving easterly toward Twelfth Street, and

slowed down, near to stopping, to allow a street car to swing around the corner from Twelfth Street into High Street, and that, as soon as there was room, the automobile increased its speed. The front wheels were then about 20 feet west of the west line of Twelfth Street, and, as the automobile started up, the horn was sounded. The jury might have found that it was not sounded again prior to the collision. A section of an ordinance of the city of Des Moines, regulating the use of motor vehicles on the streets, was introduced in evidence. It reads:

"Pedestrians are hereby given the right of way over the crossings at street intersections, and, upon approaching a crossing or intersecting ways, and also upon traversing the crossing or intersection, the person in control of an automobile or other motor vehicle, as defined in the statutes of this state, shall sound a signal in such a way as to give warning to other vehicles and to pedestrians of his approach, and shall reduce the speed of such vehicle below that above specified, and shall not move at a greater speed than is reasonably safe and proper, having regard to the rights of pedestrians and to the traffic and use of intersecting ways."

With reference thereto, counsel requested the court to instruct that:

"One of the grounds of negligence charged in this case is that the defendant failed to comply with the provisions of the ordinances of the said city of Des Moines providing for warning to be given to pedestrians of the approach of automobiles. You are instructed that, under the testimony in this case, it is admitted upon the part of the defendant that the only warning given at said Twelfth and High Street upon the night of the injury, was at the approach of the street crossing on the west side of Twelfth Street. You are further instructed that, by the terms of the said ordinance, the defendant was required to sound a warning.

while traversing the street intersection, and that his failure to do so constituted negligence on the part of the defendant; and if you find that such failure to give warning was the proximate cause of the injury complained of, and if you find that, by the giving of such warning, said accident and injury could have been avoided, then and in that case your verdict should be for the plaintiff, unless you find that at such time the said plaintiff was not exercising reasonable care for his own protection and safety."

The court refused to so instruct, and instead, told the jury, in substance, that the warning contemplated by the ordinance was such signal as drivers of automobiles generally sound, where other persons may be in danger from the running of the car, and that:

"From the situation then presented, as shown by the evidence in this case, it is a question of fact for your determination, whether the signal or warning given by defendant, as shown by the evidence, was merely a signal of his approach to the crossing, such as required by the ordinance in question, or was a signal or warning upon his traversing said crossing or intersection, and whether such warning as is shown to have been given by the defendant was a reasonable compliance with the provision of said ordinance, which requires that a signal or warning be given of an automobile traversing a crossing or intersection of streets in the city of Des Moines."

Whether, in event no signal was sounded as required, such omission was the proximate cause of the collision, was then submitted. It will be seen that the controversy settles down to the one inquiry; i. e., whether the ordinance required that warning be given while actually on and traversing the intersection, or when about to enter the same. The meaning of the word "upon" ordinarily is the same as "on" (*State v. Hitchcock*, 241 Mo. 433 [146 S. W. 40,

2. Statutes *
construction:
connection of
words.

31]); but this is not at all definite, for the meaning of "on" varies with the connection in which used. Thus "upon" may mean "as soon as," as where something is to be done upon receipt of money (*Smith v. Nesbitt*, 2 Common Bench 285); or "near to," as in the phrase "upon the Atlantic seaboard" (*American Fisheries Co. v. Lennen*, 118 Fed. 869, 873); or "at the time of," as, "upon the death" of a named person, title to certain property shall devolve on the one named (*In re Melcher*, 24 R. I. 575 [54 Atl. 379]), and where, upon admission to office, immediate qualification is required (*Regina v. Humphery*, 10 Adol. and E. 335); or signifies a condition precedent, as, when used in a contract of subscription, "provided that upon such payment there shall be delivered a certificate of stock, etc.," a tender of stock is a prerequisite to the maintenance of an action on the subscription (*Courtright v. Deeds*, 37 Iowa 503); or "upon condition that" (*Little v. Wilcox*, 119 Pa. 439 [13 Atl. 468]); or "in case of" (*Appeal of Roberts*, 59 Pa. 70 [98 Am. D. 312]); or "after" (*Brown v. Ferren*, 73 N. H. 6 [58 Atl. 870], *Murray v. Davis*, 21 N. D. 64 [128 N. W. 305]); or "at the time of" (*Archer v. Jacobs*, 125 Iowa 467, *Brown v. Clough*, 39 Me. 566).

From these authorities, it is apparent that the meaning to be attached to the word depends largely on the connection in which found. Though sometimes signifying literally up and actually on, it is more often employed as indicating proximity, or "the time of," and we are of the opinion that the giving of warning "upon traversing," as found in this ordinance, means that such warning is required to be sounded at the time of and in close proximity to the intersection; that is, when about to enter thereon. Motor vehicles move at high speed, even in cities. They are made and used for such purpose. To be effective in warning others of the approach of an automobile, signal of approach must be given somewhat in advance. Otherwise,

opportunity to avoid collisions therewith is not afforded. Greater protection ordinarily will be given by sounding the warning when about to enter on the intersection than when actually traversing it. Indeed, any other construction would defeat the purpose had in the enactment of the ordinance, i. e., that of guarding against danger to other travelers on or about to enter the intersection; for warning, in passing over the intersection, would be likely to be given when the automobile had come too near to enable either party to avoid the danger warned against. The design of the ordinance is that warning be given when approaching the intersection, in order to put others on the lookout, and, when at and about to traverse the intersection, another warning be sounded that the automobile is going on what the city council, in enacting the ordinance, evidently regarded as the danger zone. The court's instruction was as favorable to plaintiff as, if not more favorable than, he was entitled to have it. The instruction requested was rightly refused. It should be added that the power of the city to enact such an ordinance was not challenged, and for that reason is not considered. But see Sec. 1571-m18, Code Supplement, 1913.

II. The defendant's daughter, Doris, testified that she heard her father "honk the horn" as the street car passed and the automobile started on. On cross-examination, objections to inquiries as to the purpose of doing so, as for an automobile coming from the north, were sustained, and the ruling was correct. She could not well have known her father's purpose in what he did, and moreover the motive was immaterial, if in fact the warning was sounded.

The judgment is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

3. EVIDENCE
opinion evi-
dence: purpose
or motive of an-
other.

STATE OF IOWA, Appellee, v. JOHN CLARK, Appellant.

CRIMINAL LAW: Trial—Instructions—Unduly Narrowing Issues.

- 1 Specifically and correctly stating, at the beginning of instructions, the ultimate elements which must be established before an accused may be convicted, furnishes no basis for the claim that the issues were unduly narrowed, or that the jury were "coerced and urged" to convict without consideration of other matters militating in defendant's favor.

CRIMINAL LAW: Trial—Instructions—Order of Stating Proposi-

- 2 **tions—Construction as a Whole.** The particular order in which propositions are stated or grouped in instructions is not of controlling importance. The all-important consideration is the accuracy and fullness of the charge when construed as a whole. And a jury need not be specifically told to construe instructions as a whole.

CRIMINAL LAW: Trial—Instructions—Assumption of Fact. An

- 3 inferential assumption of fact in one instruction will not constitute error when, in other instructions, the jury is repeatedly told that it is for it to determine whether such fact actually exists.

CRIMINAL LAW: Trial—Instructions—Expressions by Court of

- 4 **Weight of Testimony.** Instruction reviewed, and held not to contain any expression or opinion by the court of the weight or credibility of the testimony.

CRIMINAL LAW: Trial—Instructions—Assailing Credibility of De-

- 5 **fendant.** An instruction that the testimony of a witness should not be taken as true if the jury believe "he" was mistaken, affords no basis for the objection that the court committed a special assault on the credibility of the defendant—a male person.

CRIMINAL LAW: Trial—Instructions—Withdrawing Fact Issue.

- 6 Instruction reviewed, and held not to withdraw a fact issue from the jury.

WITNESSES: Impeachment—Contradictory Statements. State-

- 7 **ments by a witness which, when construed in the light of the language thereof and the record pertaining thereto, would not justify the jury in finding that the witness had even impliedly denied the truthfulness of her story as a witness, are necessarily inadmissible as impeaching evidence.**

PRINCIPLE APPLIED: Prosecutrix, a child under the age of consent, but past the age of puberty, and defendant were both in jail at the same time, the latter charged with carnally knowing the prosecutrix. Prosecutrix had divulged to the authorities the meretricious relations existing between her and defendant. During the confinement in jail, she wrote the following note to defendant.

"Hello John: Did Mr. Mason go your bonds. I hope he did so you can get out. The reason why I told people what I did was because I thought they would then let us get married, if I must go to the school at Mitchelville I wont be gone long and we can get married. I still love you and hope it will come out all right."

On the final trial, prosecutrix was a witness against defendant. The testimony as to defendant's guilt was very persuasive. While denying guilt, he admitted he had slept with the child since she was four years old. The above note was offered as an item of impeachment of prosecutrix.

Held, the note, in view of the language thereof and of the record in the case, did not constitute even an *implied* denial by prosecutrix of the truthfulness of her story as a witness, and therefore was inadmissible.

SALINGER, J., dissents, holding, *inter alia*, that the construction of the note was for the jury and not for the court.

Appeal from Black Hawk District Court.—CHAS. W. MULLAN, Judge.

FRIDAY, JUNE 22, 1917.

DEFENDANT was convicted of the rape of a female under the age of 15 years, and appeals.—*Affirmed*.

H. M. Harner, Attorney General, H. H. Carter, Assistant Attorney General, and Edward J. Wenner, for appellee.

W. W. Woolley, H. E. Tullar and J. C. Murtagh, for appellant.

SALINGER, J.—I. On complaint against instructions given, references are made to the abstract. These are so narrow that, if we confined ourselves to what they point out, we would begin and end in the middle of lines, and

deal with detached pieces of the instructions, which, detached, are without meaning. We have been compelled to use our own judgment in adding context in order to deal with what is complained of.

Next to stating what the indictment charges, the plea, and that defendant claims he did none of the things charged, the jury is told that, before defendant may be found guilty, the State must establish beyond reasonable doubt: first, that defendant had intercourse with Iva Utley; second, that she was a female child then under the age of 15 years; that, if these two things have been so proven, the guilt of defendant is established, and the jury should so find by its verdict; that, if this has not been done as to either of these two things, defendant should be acquitted. It is presented that these two propositions were "specially indented and spaced at the head of the instructions to attract attention," and that this much of the charge unduly narrowed the issues and led the jury to think nothing else in the case was worthy of attention.

The crime charged consists of intercourse with a female child under 15 years of age. It cannot be an improper narrowing to make conviction depend upon proving the elements which constitute the crime charged. What was done merely sifted the material from the immaterial, and that is the purpose of instructing a jury. Nor can it be error that a correct instruction was emphasized. As for the rest, we cannot dictate the style of composition in a correct instruction, or the juxtaposition of proper elements therein.

This all seems so clear that we feel that it is not seriously disputed. This is no strained theory, because there are other complaints of the same statement in the instruction, of which it might be said that they present a

1. CRIMINAL LAW:
trial: instructions:
unduly narrowing issues.

2. CRIMINAL LAW:
trial: instructions:
order of stating propositions:
construction as a whole.

complaint for which it is possible to claim more reason. That complaint, as we understand it, is that the charge unduly narrowed the issues, because it speaks in terms of exclusion, and thereby makes it possible to convict the defendant, although the testimony of the prosecutrix be not corroborated. This confuses a statement of what must be proven beyond reasonable doubt with a guide stating what constitutes such proof. In this instruction, the court did not undertake to tell the jury what would establish the two elements which would justify conviction, beyond saying that they should be proven beyond reasonable doubt. It left it to another part of the charge to state what would make proof beyond reasonable doubt of these elements. It there directed that proof of penetration was essential, and that the testimony of prosecutrix must be corroborated. True, only the element of penetration was put close to the statement of the two elements essential to conviction, and that the part dealing with corroboration is some 66 lines removed from that first statement. But, as said before, that is mere matter of method, style and diction.

1-b

In like case is the complaint that the jury was not told that the instructions were to be considered as a whole, and might not consider any detached line or lines separately and independently. It is proper to give such an instruction, of course. We know of no requirement that the trial judge must have in the instructions an index to the instructions, advising the jury where different points in the charge may be found therein, and that none so specified is to be considered, detachedly. So long as all that is required is found in the charge as a whole, and there is nothing conflicting or misleading, mere method of presentation will rarely, if ever, constitute reversible error.

1-c

Next, it is said that to follow up the statement that the guilt of defendant is established if said two elements were proven, with the statement that, if these were proven, the jury should so find by its verdict, in effect, "coerced and urged to convict." We think otherwise. A correct statement that, if certain elements were proven, guilt is established, makes it follow that the jury should find defendant guilty by their verdict. It is not coercion, but the statement of an inevitable deduction. How strained all this is becomes apparent when it is remembered that the jury was told that, if either of these elements were not proven, there should be a verdict of acquittal. Upon the reasoning of appellant, this is a coercion to acquit.

We have given no consideration to that part of the brief for appellant which presents our various decisions condemning instructions held erroneous for conflict, undue emphasis, or other reasons. The law these announce is undeniable, but is inapplicable. The instruction under consideration violated nothing condemned in these cases, and said instruction presents no reversible error.

II. Complaint is made of Lines 26 to

3. CRIMINAL LAW: 33, inclusive, page 26 of the abstract. These lines are:
trial: instructions: assumption of fact.

"In determining whether the defendant is guilty of the crime of rape, by reason of having carnally known and abused the said Iva Utley, and in having sexual intercourse with her, you are instructed that the State must establish, beyond a reasonable doubt, that the defendant, in having sexual intercourse with her, did penetrate the body of the said Iva Utley, in the act of sexual intercourse."

It is argued that there should have been added, "if he did so have intercourse with her;" that without this, the

court assumed for the jury "that the defendant did carnally know and abuse the prosecutrix and did have sexual intercourse with her." It is added that this matter was obviously for the jury to determine; that it must have been influenced "by the manner" adopted by the court "of referring in this instruction to the issue of carnal knowledge and intercourse;" and that it was needless for the court to refer to the matter in this way, and so doing was prejudicial. The jury was told time and again that the fact of whether there was intercourse was for them. That being so, we have fully set out the matter complained of and the complaint made of it, because merely doing this will demonstrate that the complaint is not well made.

III. One part of the charge tells the jury that, though it may find from the evidence that no force was used by the defendant except such as might have been included in the act itself, "such act does not relieve the defendant of the charge of rape and is no defense to such charge as made in the indictment." The complaint is that the jury might find from the evidence that no force was used by the defendant, and may have thought that "the court was merely expressing a view as to what the evidence indicated on the issue of force and sexual intercourse, and, if so, this was an invasion of the province of the jury;" that it was improper to use language from which the jury might fairly understand the court was passing on the weight of conflicting evidence.

It is true that this should not be done as to conflicting evidence. We think it was not done, and that there is no merit in any part of this objection.

IV. It is urged that the credibility of the defendant as a witness was unduly assailed in the instructions. Most of the references made to the abstract in support of this point out cautions against the testi-

4. CRIMINAL LAW:
trial: instructions:
expressions by court
of weight of
testimony.

5. CRIMINAL LAW:
trial: instructions:
assailing credibility
of defendant.

mony for the State, and are requirements that the testimony of the prosecutrix be corroborated. True, in the general instruction that the jury is the sole judge of the weight of the evidence and the credibility of the witnesses, it is told to consider the interest of the witnesses in the result. This, standing alone, is proper, of course. But the claim that this dealt unfairly with the testimony of the defendant as a witness is not so much grounded on this part of the instruction, but upon another part of the same general instruction, which is:

"You are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances in evidence that such witness is mistaken in any of the facts testified to by him."

The argument is that using the word "him," because it does not touch the testimony of the female prosecutrix, singles out defendant as witness on his own behalf. This objection is utterly strained and hypercritical. The jury could not in reason so have understood it, and the statute provides:

"Words importing the masculine gender only may be extended to females." Par. 3, Section 48, Code, 1897.

It was said in one instruction:

"Evidence as to the defendant having
had intercourse with the prosecuting witness more than 18 months before the time charged in the indictment has been admitted upon trial of this case."

8. CRIMINAL LAW:
trial: instructions:
withdrawing fact
issue.

One objection to this is the following:

"Our argument that this was prejudicial is superfluous, in view of the same error having been committed in other parts of the charge, and having been already argued."

The argument is not very clear to us. The additional complaint is that, since defendant denied he ever had inter-

course with prosecutrix, and there was evidence of intercourse both within and before that 18 months, the court failed to leave the issue of intercourse before the 18 months to the jury, because it did not say, instead of, "evidence has been admitted of intercourse more than 18 months before the time charged in the indictment," "evidence had been admitted *tending* to prove such intercourse." It must suffice that we say the objection is not well taken.

If there be other objections to the instructions, what has been said covers them, or their type.

V. For the purpose of this review, it is established that, while both prosecutrix and defendant were in jail, the girl wrote defendant the following note:

7. WITNESSES :
impeachment ;
contradictory
statements.

"Hello John: Did Mr. Mason go your bonds. I hope he did so you can get out. The reason why I told people what I did was because I thought they would then let us get married, if I must go to the school at Mitchelville I wont be gone long and we can get married. I still love you and hope it will come out all right."

The defendant made due offer of this paper in evidence, and it was excluded on the objection that its contents were irrelevant and immaterial, and not an issue in the case. The majority is of opinion that this exclusion does not justify a reversal. Its views are thus stated by Ladd, J.:

"I am not persuaded that an inference may be drawn from the note sent to defendant by prosecutrix, while both were in jail, that the accusation was not made because true, but solely to bring about a marriage. The only language which could possibly warrant such an inference is the following: 'The reason why I told people what I did was because I thought they would then let us get married.' In the first place, this does not carry the implica-

tion that what she 'told people' was untrue. What she had told would not naturally have been divulged but for some compelling circumstance, and this she plainly states, i. e., to clear the way for their marriage. The plain implication is that, but for this, she would not have told their secret. Every word written was entirely consistent with the truthfulness of her story, and the jury might not, had the note been before them, properly have inferred an implied denial of the truth of her accusation. Other portions of the note tend to confirm her story, for it is scarcely possible that this child of his deceased wife, scarcely 15 years of age, would have written him of her love and desire to marry but for meretricious relations previously existing between them. Her mother had departed this life in November, 1914, and she attained 15 years of age on April 20, 1915. Though the defendant denied having sustained improper relations with her, he testified that 'sometimes Iva slept on springs and sometimes she slept with me. Mr. Wright, when building the fires, could see the front room where Iva and I slept, and where the view was not obstructed. There was perhaps a dozen times when Wright was there that Iva became frightened and insisted on lying on my bed. Iva said at these times that she was afraid to sleep alone.' He then swore that it had been her custom to sleep with him since 4 or 4½ years old. Wright testified that he had boarded there 5 or 6 weeks, during which defendant and this girl occupied the same bed; and, coupling all this with what appears in this note and in her story, it becomes very clear that there is no implication that she intended in the note to deny having told the truth. Both say they had repeatedly occupied the same bed, and the circumstance that she, as a child, had slept in his bed, scarcely justified their occupancy of the same bed after the only legitimate tie between them had been severed by his wife's death, and she was past the age of puberty. In

view of this record, it seems utterly impossible that the jury could have construed the note into a denial of what prosecutrix had testified to. To do so exacts the exercise of extraordinary imaginative powers of such high order as not to be imputed to persons pursuing the ordinary walks of life, and, this being so, the note could not have been accorded potential consideration as an item of impeaching evidence. In my opinion, the ruling excluding the testimony of its contents was without prejudice, and the judgment should be affirmed."

Speaking for himself, the writer is constrained to say:

Upon analysis, this is an assertion that, first, no error was committed, and, second, that, if there was, the record shows it was without prejudice. The argument for these positions is:

(a) The statement, "the reason why I told people what I did was because I thought they would then let us get married," does not carry an implication that what she "told people" was untrue, and every word written is entirely consistent with the accusation made by her being a truthful one.

(b) No inference may be drawn from this that the accusation that prosecutrix had made is false.

(c) It cannot be inferred that what was written was not written solely to bring about a marriage.

(d) The true construction is that she would not have told what was true except for a compelling desire to clear the way for marriage.

(e) And that, therefore, if the note had gone to the jury, it could not possibly have inferred therefrom that any denial of the truth of the accusation had been made.

The finding that there was no prejudice divides as follows: (1) It is undisputed that the two occupied the same bed often. (2) Though this had continued ever since the girl was 4½ or 5 years old, this does not justify the con-

tinuance of this practice after the mother had died, in November, 1914, at which time the girl lacked some 4 months of being 15 years old, and when she had passed the age of puberty. (3) The truth of the accusation has corroboration, because it is scarcely possible that this child of the deceased wife, scarcely 15 years old, would have written of her affection and desire to marry if there had not been previously existing meretricious relations. (4) The entire note is so worded that, when backed up by the testimony tending to show that the accusation was a truthful one, it becomes very clear that there was no intention to deny that she had told the truth. (5) For which reasons, the jury could not have accorded the note potential consideration as an item of impeaching evidence, and to have inferred from the note a confession that the accusation was false, exacts the exercise of extraordinary imaginative powers of such high order as not to be imputable to persons pursuing the ordinary walks of life.

With all due respect, the writer of this dissent thinks that, passing all else, the majority has confused error with rendering error non-prejudicial, overlooked the difference between a jury question and what is established as matter of law, and has so intermingled what is sound, standing alone, as that the deduction from the combination is untenable. Assume, with the majority, that the evidence of intercourse was exceedingly strong. That may work that error in excluding the note was not prejudicial. But it does not sustain the argument that, therefore, the note did not contain an admission that the writer had falsely accused defendant of having had intercourse. That is self-evident. For, if the note had the words, "I swore falsely in saying you had connection with me," the statement would be in the note, and the jury would have to find that it was, even if defendant admitted the intercourse. So of a related argument. Even if it be true that people

rarely say they have testified falsely when they have testified truly, that would hardly be material if the admission is made. And on the other hand, if there be no such admission, that such an one is rarely made is quite immaterial and irrelevant.

He agrees that, if the note as matter of law contains no admission of a false accusation, it had no direct matter of potential impeachment, but is not able to agree that, if the jury could find that the writing had such admission, it was right to exclude the writing because the evidence of guilt was strong. The fact that the jury believed the prosecutrix gave the evidence its greatest item of strength. Without believing her, it is highly probable that there would have been no conviction. It was surely never before held that, because testimony is strong, it was not permissible to show that a witness who contributed greatly to its strength had stated out of court what vitally discredited his testimony. In the last analysis, the majority holds, on this head, that because, when a thing is *not* said in a letter, the letter has no impeaching effect, therefore it was not said.

If the note had stated, "The reason why I swore falsely to what I did was to bring about our marriage," the majority would be with the writer. If it stated, "I truthfully swore you had intercourse with me because I believed that would promote our marriage," he would still think the note should not have been excluded. For the jury could find that the desire for marriage was a motive for making the accusation, falsely. But in the supposed case, he would agree that the note contained no *direct* admission that the accusation was false. Unfortunately for ease in settling the question before us, prosecutrix made neither of these plain statements. What she did say was: "The reason why I told people what I did was because I thought they would then let us get married." He agrees

that this is not saying, in so many words, "The only justification I had for accusing you is that I wanted to promote our marriage." But what is enumerated excludes what is not. And, while the jury could find that here was no admission of false accusing, and that all that is admitted is that the truth was told to help bring about the marriage, it could, he thinks, find also that, when one writes he told something for the reason that he hoped thereby to bring about a marriage, he admits there is no other reason for having told it, which excludes the reason that he told it because it was the truth. He agrees that the jury could find that no false accusation is admitted, but does not believe that either the trial or this court has the right to say that no juror could reasonably say that such an accusation was admitted. That is just what the majority effectuates. It is no answer to say that any juror who did so would have to have extraordinary imaginative powers of such high order as may not be imputed to persons pursuing the ordinary walks of life. We may assume that the panel would not have twelve men thus endowed, or burdened, as you please. But it might have *one* who had more power to infer than is possessed by judges of this court. That he has is no reason why he should be not allowed to vote against conviction; no reason why he should not be allowed to consider some item of evidence in fear that he was able to see something in it that these judges would not be able to see. It is no ground for challenging a juror that he has more than average faculty for inference, analysis and deduction, or even that he has a powerful imagination. The facts are to be found by juries, and by use of such powers as they have, even if these differ from those we have. We may not say that a jury may not find a fact which, with our own endowment, we would not have found. The writer thinks, too, that another argument of the majority is two-edged. True, the

jury could have found from the letter that there had been illicit relations, because the girl would not write as she did if there had not been. At the outset, if the letter had both good and ill for defendant, that was no justification for excluding it over his objection. He had the right to take the chance whether one view of it would help him more than another would hurt. But, aside from that, even as the tone of the note might tend to prove intercourse, it might lead a jury to think that no such affection as the note evinces would exist if defendant had wronged its writer.

The essence of the error of the majority is that it holds that the letter can bear but one construction, as matter of law. The writer thinks that reasonable men could so construe it, and that equally reasonable men could find the construction which defendant urges. Even for this ultimate view, I find that I am not wholly without support. In *Sparf v. United States*, 15 Sup. Ct. Rep. 273, at 324, the majority upheld a trial court in instructing a jury that they must convict of murder or nothing. Justices Gray and Shiras dissented from such conclusion, and in so doing, said:

"He (the trial court) thus substituted his own decision upon this question of fact for the decision of the jury, to which the defendants were entitled under the Constitution and laws of the United States. If all the justices of this court should concur in the opinion of the judge below upon this question of fact, still the defendants have not had the question decided by the only tribunal competent to do so under the Constitution and laws."

The writer agrees that a case for the State might be so strong as that excluding some evidence would be proven to be error without prejudice, but does not agree that here is such a case. The defendant denies guilt. The testimony of the prosecutrix is weakened by this letter, which

we must consider on the question of whether the strength of the evidence cures excluding the letter. While it is true that the parties occupied the same bed, it is also true that this was done with absolute lack of concealment, and that there is no dispute of his statement that she came to his bed because she was frightened, which sustains defendant in his claim that no wrong was thought of, or done. The writer has no desire to deny that the practice was highly repugnant to the usual standards of refined living. But there are many who are coarse and have no conception of these standards. That disregard invites missionary work, but must still be an argument for innocence when practiced by those who have no appreciation of these standards.

In the opinion of the writer, the cause should be remanded for a new trial on account of the exclusion of the letter, but, as the majority think otherwise, the judgment below will stand—*Affirmed*.

All concur as to Divisions I, II, III and IV of the opinion. As to affirmance, Ladd, Weaver, Evans, Preston and Stevens, JJ., concur.

J. J. WILSON, Appellee, v. ASA GIBBS, Appellant.

BROKERS: Compensation—Express Contract—Evidence and Con-
1 **clusions.** A broker who bases his right to recover commission on an express contract providing a stated sum per acre, must establish such express contract *by showing the language used by the parties*, not his (the broker's) legal conclusion drawn from such language. So held where the broker, having obtained the owner's price, assumed that, if he sold the land at an advance of \$5 per acre, such \$5 would be his commission.

BROKERS: Compensation—Action to Recover—Evidence—Suff-
2 **iciency.** Evidence reviewed, and held insufficient to show such *performance* by a broker of his alleged contract for commission (assuming the same to be established) as to justify recovery.

BROKERS: Compensation—Mutual Substitution of Contract—Effect. A broker forfeits his right to base a claim for commission on a certain specified contract negotiated by him, when, after so negotiating it, he, without making any claim to a commission thereunder, acquiesces in the substitution of a new agreement between the parties.

BROKERS: Compensation — Sale — Producing Purchaser — Essentials. An agent, to be entitled to recover commissions upon an alleged sale, or for the production of an alleged purchaser, must show what authority was given him by the principal, what terms he was authorized to make, and that he made a sale on the very terms authorized, or produced a purchaser ready, willing and able to purchase upon the precise terms authorized. Where the agent had *forgotten* part of the terms, *held*, he was not entitled to recover.

Appeal from Hancock District Court.—C. H. KELLEY,
Judge.

MONDAY, DECEMBER 18, 1916.

REHEARING DENIED FRIDAY, JUNE 22, 1917.

ACTION at law upon an alleged contract by which the defendant undertook to pay the plaintiff a stipulated compensation for the production of a purchaser ready, willing and able to buy the defendant's land.—*Reversed and remanded.*

Blythe, Markley, Rule & Smith, and John Hamill, for appellant.

Seneff, Bliss & Witwer, for appellee.

WEAVER, J.—The plaintiff alleges that he is a real estate agent, and that defendant listed with him a farm of 280 acres for sale at \$115 per acre *net*; that, on the following day, plaintiff found a purchaser for the property ready, willing and able to buy the same at \$120 per acre on the terms prescribed by defendant, but defendant refused to make or complete the sale, and he therefore asks

judgment for the recovery of his commission at the rate of \$5 per acre. By an amendment to the petition, it is alleged that said agreement sued upon was partly in writing and partly oral, and that the written portion is embodied in a letter written to plaintiff by one Arnold, saying:

"I want to tell you that one 80 of the Gibbs farm has been sold today at \$95 per acre; another 80 will probably be sold within a few days at the same figure; this leaves 280 acres with all the improvements. The price will be changed on this 280 to \$115 per acre. If you think of doing anything with this, I believe it will not be long till the whole farm is sold."

The answer of defendant denies the petition. He further denies having any dealing with the plaintiff, except as follows: That plaintiff, with one Stauffer, another real estate dealer, and one Guth, came to defendant's home, exhibiting the letter written by Arnold. Plaintiff or Stauffer made inquiry concerning the land, and defendant told them his price was \$120 per acre. Thereupon, Stauffer said he would take the land at \$120 per acre. Defendant knew Stauffer to be a man of no means, and declined to consider the offer. Just at this time, according to his story, another party of real estate agents, led by one Kluckhorn, drove up, and Kluckhorn asked for and was given an option until the following Monday morning to make the purchase at that price. Learning of this, Stauffer then asked for an option to buy at \$120 per acre if Kluckhorn did not take the land. Plaintiff, Stauffer and Guth then drove away, but soon returned, and then for the first time informed defendant that Guth, instead of Stauffer, was the man who wanted to make the purchase, and Guth said that if Kluckhorn did not take the property, he would himself buy it at \$120 per acre; but before the interview was concluded, Guth raised his offer for the land to \$125, if the sale to Kluckhorn did not materialize, and, upon the

strength of this offer, the defendant agreed that, in the event Kluckhorn did not exercise his option to purchase, he would sell to Guth at the last mentioned price, and would pay plaintiff a commission thereon. Later, on the same or the following day, and before the expiration of the Kluckhorn option, Guth notified defendant in writing that he would not buy the land unless he could get it at \$115 per acre, and informed him that he need not delay another sale because of the option given him at the larger price. Defendant further pleads that plaintiff, Stauffer and Guth were all present when the agreement was made between himself and Guth on the basis of \$125 per acre, and acquiesced therein, plaintiff making no claim that he had earned or was entitled to any commission on any other basis or consideration than the completion of the proposed sale to Guth at \$125 per acre.

The issues thus joined were tried to a jury, which returned a verdict for plaintiff for the full amount of his claim. From the judgment on this verdict, defendant appeals.

1. **BROKERS: compensation: express contract: evidence and conclusions.** I. At the conclusion of the testimony, defendant moved the court for an instruction to the jury that plaintiff had failed to produce evidence of the making of the contract sued upon. This, with other requested instructions, tantamount to a peremptory direction for a verdict in defendant's favor because of insufficiency of evidence, was overruled. In his motion for new trial, defendant again raised the objection that the verdict is without sufficient support in the evidence. The issues joined by the petition and answer leave no room for a recovery by plaintiff upon an implied agreement or upon *quantum meruit*. To recover at all, he must prove an express contract to pay him the commission for which he demands a recovery. In this, we are of the opinion that plaintiff distinctly failed. In

the first place, the letter of Arnold, pleaded as part of the contract, and spoken of in argument as constituting the plaintiff an agent for the defendant, has no such apparent meaning or effect. Plaintiff, in his testimony, says no more than that Arnold had issued a circular (not in evidence), listing or advertising something over 400 acres of defendant's lands for sale, and had handed or sent him a copy of the circular, and that thereafter he had received this letter. There is nothing in the letter expressly or impliedly authorizing plaintiff to act as agent of either the defendant or Arnold, and no suggestion of commissions in any amount. Coming next to the interview between plaintiff and defendant, in which mention was made of this letter, we find it quite barren of evidence of the alleged contract sued upon. The contract or agreement was made, if at all, on the morning when the plaintiff, Stauffer and Guth went to the defendant's farm. On arriving at the place, plaintiff says he left the automobile and went into the yard, where he found the defendant, and there ensued the conversation on which he relies. Neither Guth nor Stauffer was present, and for the facts as to their conversation, we have to look only to the testimony of the plaintiff and defendant. The defendant denies having then made any agreement with the plaintiff authorizing him to sell the land, but says he told him the selling price was \$120 per acre, and that nothing whatever was said about commissions. The plaintiff says he showed defendant Arnold's letter, and asked, "Can I go on and sell the farm?" and that defendant said he could. To the question, "What did you say to him about the price?" plaintiff answered, "Well, I said \$115; there I told him—he said I could have all over that I could get." It will be observed that the answer is in the nature of the conclusion of the witness, rather than an attempt to state the exact language of the defendant from which it is drawn, and furthermore does not state the con-

tract as it is pleaded. That it was a mere conclusion or inference, and that as such it was without real foundation, is demonstrated when the witness was led to repeat, as best he could, the very conversation had. And this is his version of it. He says:

"I told him Mr. Arnold wanted me to sell the farm. He said, 'All right; you can go ahead and sell it.' And I said, 'I have a buyer for it;' and he said, 'At \$115?' and I said, 'Yes.' He said 'All right.' He said, 'The best thing to do is to sell it;' then I went out. I went out and told him the place was for sale; showed him the letter and told him that Mr. Arnold had asked me to sell the place. Q. Was the conversation as you swore to it at the last term? A. Yes. He told me to go ahead and sell it at \$115 an acre. *I understood from that he had authorized me to sell the land at \$115 an acre.* Then I immediately went to see Mr. Guth. Mr. Stauffer was with me. Q. Now when you went out to see Mr. Guth, you told Mr. Guth that Mr. Arnold's price was \$120 an acre, didn't you? A. That was my price. Q. You told Mr. Guth that the price of the land was \$120 an acre, didn't you? A. I did so. Q. And you told him also that Arnold or Gibbs had raised the price? A. I don't remember if I did, I am sure. I might have said that Gibbs had raised the price to \$120 an acre; I don't remember now. Q. Your understanding was that you were to sell this land for \$120 an acre, and that you could take the difference for your commissions? A. I was to get all over \$115. Q. Were you to get all the money that Gibbs received for that land over \$115 an acre? A. I was pricing it at \$120 and he was pricing it at \$115. I was to get the \$5 an acre. *I assumed that I would get the \$5 an acre for my commission.* Q. But you and Mr. Gibbs didn't talk anything about that? A. *Well, I was giving him what he asked.* Q. You were going to take all you could get above that? A. I was getting \$5."

In another place, he says that, because Gibbs said his price was \$115, "for that reason I thought that anything I could get above that should be mine." In short, plaintiff proceeds upon the theory that, having ascertained defendant's price for the land, he was at liberty to speculate upon it by quoting a higher price to his alleged customer and retaining for himself all the margin of profit. That such theory of the law, though perhaps quite largely entertained by agents, is erroneous, no lawyer will question. It is not necessary to charge plaintiff with bad faith in such assumption. It is sufficient that his own statement of the facts does not in law justify his conclusion as to the effect of the agreement to which he testifies. It is true also that, if he were suing on a *quantum meruit* for the value of his services, if any, his testimony would probably be sufficient to sustain a finding that he was authorized to sell or find a purchaser for the land, but this, we have seen, is not enough under the issues, and to recover, he must, as we have already said, establish the agreement as alleged, and this is to be done by showing the language used by the parties at the time, and not simply the plaintiff's legal conclusion drawn therefrom.

II. Even if the correctness of the foregoing be thought open to doubt, and if we should assume that plaintiff made a case sufficient to support a finding that a contract such as he alleges was entered into with the defendant, we are still of the opinion that, as a matter of law, the evidence of performance by the plaintiff is not sufficient to sustain a verdict in his favor. Plaintiff's story is that, after his talk with defendant, he went back to Guth, told him that the price was \$120 per acre, and that the latter finally said to him (plaintiff) that he would take the land. This he says he reported to defendant when, to use the language of the witness:

2. BROKERS: compensation: action to recover: evidence: sufficiency.

"He wanted to make his find-out; he would see; said he would think it over."

Whatever may have been the reason for this hesitation, whether it was to satisfy himself as to the financial ability of the proposed purchaser or for any other reason sound or unsound, it is clear that the seller and buyer were not yet brought together. It was during the interim caused by this hesitation on defendant's part that, according to plaintiff, the other party of real estate agents appeared on the scene, and, before anything further passed between the parties to this action, defendant gave to Kluckhorn an option until the next Monday morning to buy the land at \$120 per acre. Of this act on the part of defendant, plaintiff and Guth appear to have made no complaint, except a remark by one of them that they had not been treated right; but an understanding was finally reached that, if Kluckhorn did not take the land on Monday, plaintiff or his customer could have it at the same figure—\$120 per acre. There is dispute over this matter, but such, in substance, is the statement of plaintiff. Plaintiff, Stauffer and Guth then drove away, but within an hour came back, and reopened the matter with defendant, and finally Guth offered \$125 an acre for the land, provided Kluckhorn did not take it on Monday. This, according to plaintiff, was agreed upon, and that, in case such sale was made, defendant was to pay a commission of \$5 per acre. Later, on the same day, Guth notified the defendant in writing of the withdrawal of his offer, and refused to take the land at any price in excess of \$115 per acre. Guth as a witness says that he had no personal talk or negotiation with defendant until he came back with plaintiff the second time, and the entire evidence strongly tends to show that this was the first time that defendant was given to understand that Guth, instead of Stauffer, was the proposed buyer. Guth's version of his own connection with the transaction is as follows:

"I was a witness at the former trial. Know J. J. Stauffer and J. J. Wilson. I went out to Gibbs' farm with Stauffer and Wilson on the 29th of May. When I went out there, I didn't say anything to speak of. I left it to Stauffer and Wilson, the first time. The second time, I told him it was me that wanted the place. That was after I came back. Then I told him it was me that wanted the place, and Gibbs said Kluckhorn had an option till Monday. Before that time, J. J. Stauffer had been talking with Mr. Gibbs about buying it. I did not ask Gibbs his price the first time I was there. Q. No, but the second time you were there, what did you say? A. Yes, I knew the price was \$120, and we offered him \$125 the second time. Wilson and I did not talk it over before I offered Gibbs \$125 an acre. Before we left Gibbs the first time, I heard from Wilson and Stauffer that Gibbs had given an option to Kluckhorn; then I started away and went back, and then I told Gibbs that I was the man that wanted to buy it. He told me there was an option on it. Q. Now did Mr. Wilson at any time say to you, Mr. Guth, that you would have to make a payment of \$2,400, first payment? Cash payment? A. No, sir. Q. Did you have \$2,400 to make a cash payment? A. No, sir. Q. Was any kind of a sale ever made known to you, except after this \$125 contract was made? A. No. Q. Was there anything said at all about what was to be done or how long a time was to be on the balance, or how much interest there was to be, or anything about the abstracts, or anything connected with the general terms of sale, until after you went back there the second time and talked about the \$125? A. No. Q. And when did you ask Mr. Gibbs as to the terms? A. That was the next day. I authorized Mr. Nisson to write exhibit 'E,' and I mailed it the 31st of May.

"Exhibit 'E' offered in evidence. No objections. Reads as follows:

"Farmers Savings Bank, Meservey, Iowa, May 29th, 1912. Mr. F. A. Arnold, Cashier, Klemme, Iowa. Dear sir: Mr. August Guth is just in here and requested me to write you that he would not take the Gibbs farm, unless he could get it at \$115, as he first offered you, and you are not to delay another sale for him, because the deal was to be kept open till Monday. Yours truly, A. J. Nisson, Cashier.

"After I came back, there was talk that I would take it at \$125 an acre, in case Kluckhorn didn't buy it. Nothing by Gibbs about a commission.

"Cross-examined: I testified at the previous trial that the reason that I wrote the letter was because I thought Gibbs was trying to play me up against other buyers. At the former trial the question was asked: Q. What did you say as to the matter of terms, whether they were satisfactory? A. I don't know as we talked about terms; maybe, but I have forgotten. Q. That is the truth, isn't it? A. Yes, sir. I testified I don't remember what was said at that time about terms, but I know I said I would take the land at \$120 an acre. I wasn't going to get it for \$120. I told Wilson I would take it at \$120. I testified I would take it at \$120 an acre, and whatever terms Mr. Wilson made were satisfactory. Don't recall what Mr. Wilson told me about terms. Q. Then there is another question: 'When Mr. Wilson told you that you could buy the place at \$120 an acre, state whether or not you were ready, willing and able to buy this farm at that time on the price and terms as given you? And your answer was, 'Yes, sir, I was.' A. I testified so. I then testified that Mr. Kluckhorn arrived. Q. You don't remember the details of the terms, but whatever they were, they were satisfactory to you, and you said you would take them? A. Yes, sir. Q. I believe that is all. Oh, just a minute. Mr. Guth, you were able to raise \$2,400? A. Yes. When Mr. Gibbs came back he did

not say he would try to spoil the other deal. He said he got an option until Monday, and I will have to see Kluckhorn; said he would try to get it for him. There had been talk of Stauffer and I buying it together, but before I left the place, Kluckhorn came. I told Stauffer I would like to take the place by myself.

"Redirect examination: The first time I was there, I didn't talk to Mr. Gibbs at all. The second time, or before I went away, I understood from either Wilson or Stauffer that he had given an option to somebody else. Up to the time that I made the offer of \$125 no terms were talked over or agreed upon at all.

"Recross-examination: I don't remember of talking over terms with anybody. There was something said about five per cent, but that was the next day, when I was there with Gibbs alone. I saw Gibbs when I was there the first time, but didn't talk to him. Mr. Wilson was doing the talking with Gibbs."

"Redirect examination: The result of Mr. Wilson's talk was that he informed me that Mr. Kluckhorn had an option until Monday. Later, I went back and made the contract at \$125."

Plaintiff's story, as developed on cross-examination, concerning the interview with defendant and the arrangement to sell to Guth at \$125 per acre, contingent upon the failure of Kluckhorn to take advantage of his option, is here quoted from the record. After stating his recollection of what had occurred up to the arrival of the Kluckhorn party, he proceeds:

"I don't remember anything further that was said between Mr. Gibbs or between Guth and Gibbs, until after the other car came in. Mr. Gibbs came back from the car and said he would give those people an option until Monday at \$120 an acre, and if they didn't take it, we could have the farm. Q. You could have the farm at what?

A. Yes, that is, Guth could have it at \$120. Q. If these people didn't take it on Monday or by Monday, you could have it at \$120? A. Yes, we could have the farm. Q. Well, then, what was said after that? A. Well, Mr. Guth told him, told Mr. Gibbs, that he was not treated right on the farm, and we talked there awhile. I don't remember all that happened, but we went away. Q. You went away with the understanding that Mr. Guth could have the land on Monday for \$120, provided Mr. Kluckhorn did not buy it in the meantime, didn't you? A. No, he told Mr. Guth he could have the place, providing Mr. Kluckhorn's man would not take it; that he gave them an option until Monday. Q. Then when you went away, you supposed that it would be a sale to Guth, provided Kluckhorn's man didn't take it by Monday, didn't you? A. I didn't know whether they would take it or not; I couldn't tell; I didn't know whether Guth or Kluckhorn's man would take it. I couldn't tell you. Q. Well, if Kluckhorn's man didn't take it, Guth was to take it on Monday? A. No, he made him that proposition that he would take it, if the other fellow didn't. We went away for about two miles and then came back. At the former trial, I testified that I had not made any deal the first time, and so we came back to buy it at \$125 an acre. Q. You testified to that? A. Yes, sir. Q. You had not made a deal the first time, and so came back to buy it at \$125 an acre? A. That is right. At the former trial, I testified as follows: 'Q. And at that time you made a deal? A. Well, he said he would take. We got in the car and was going to town and he said he would take it. Q. And left with the understanding that Guth was to pay \$125 an acre, and he was to pay a commission to you? A. Yes, sir. Q. That was the understanding? A. Yes, that is right. Q. You left there finally with the understanding that this land was sold to Guth at \$125 an acre, provided Kluckhorn didn't buy it by Monday.

didn't you, Mr. Wilson? A. Why, we went to town, and Guth offered him \$125 an acre. It was a calculation of settlement. Now I am going to tell you just where we went. We went over there in front of the restaurant. Met Mr. Arnold. Mr. Gibbs, he told his troubles to his son-in-law in regard to the deal, and they said that they would let him have this farm, and they would go down and see this man and queer the deal to let our man have it. The offer he made him last was \$125, as I told you; he said he would let him have the place and go down and spoil the deal with this man at Belmond, and let him have the farm; that is just what he said. Guth said he would take it at \$125. I did not know before I commenced this suit that Guth refused to take it. Q. You supposed that he was going to take it at \$125 an acre, did you? A. Yes. Q. When you commenced the suit, did you think that Guth had bought the land at \$125 an acre? A. Well I thought that it was his; that he had bought the farm. Q. You thought that he had bought the farm at \$125 an acre, didn't you? A. Yes.' At the former trial I testified: 'Q. It was your understanding at the time this was commenced, Mr. Wilson, that you had been instrumental in making a sale of this land to Mr. Guth at \$125 an acre, and that Mr. Gibbs had promised you a commission of \$5 an acre if that sale went through, wasn't it? A. Well, yes, sir.' Just as I said before, if he got \$150, it wouldn't make any difference to me. Q. Well, the testimony at the former trial was as follows: 'Q. You say that you went back the second time, and Mr. Guth then agreed to take the land at \$125 an acre, and that Gibbs then told you that he would pay you \$5 an acre commission? A. Yes. Q. That is, in case Mr. Guth would take it at \$125 an acre? A. Yes. Q. And it was based on that that you brought this suit, wasn't it? A. Yes. Q. That was your testimony, wasn't it? A. Probably. Q. And that is the way you understand it now, isn't

it? A. No, I think not. I meant that on \$115, Mr. Markley; I might have overspoken there, in that way, but a man with common sense would know that I would not say that it was based on that. I testified on the former trial that, when I went to talk to Mr. Gibbs, after riding out there to the farm, I showed him the letter, and the price, \$115 an acre, and he said that was all right. I said, 'Do you care if I go ahead and sell the farm?' and he said, 'No,' to go ahead and sell it; and I said to him that I had a buyer in the car, and one of them might buy it. I don't remember that I testified on the former trial that Guth said he wanted to look at the premises. Then we talked it over and Mr. Guth said he would take the place. I don't think Mr. Guth asked Mr. Gibbs the price of the farm, because I told him the price before I went over there. I don't remember that I testified at the former trial that Guth asked the price, and Mr. Gibbs told him. Q. \$120 an acre, that first conversation after you had your talk with Mr. Gibbs and got Guth and went over there, didn't Mr. Guth ask Mr. Gibbs the price and Mr. Gibbs tell him the price? A. I guess maybe he did. Q. Yes, you remember it now, do you? A. No, I don't remember all of it. I don't know what price Mr. Gibbs gave him. I gave the price, I know that. I did testify at the former trial that Mr. Guth asked the price and Mr. Gibbs told him. I don't remember whether Mr. Gibbs' price to Mr. Guth was \$115 or \$120 an acre. I don't remember what it was. \$2,400 was to be paid in cash; no time was set when the contract would be made. It is the usual thing just as soon as they agree. I knew the land. It was Mr. Gibbs' homestead. I testified as follows at the former trial: 'Q. So after he told you that he had given the other fellows an option on it, you knew then that you couldn't get it unless the other fellows couldn't get it or didn't take it, didn't you? A. I knew he said he had given the other fellows an option on it, but I figured that I had earned my

commission; I was trying to have my commission. Q. That is, on Monday, if the other fellows didn't take it? A. That is right.' I also testified: 'Q. You figured you ought to have a commission of whatever was paid over \$115 an acre? A. Yes, sir, because that is what he said he wanted, and for that reason I thought that anything that I could get above that should be mine. In other words, I take it that was the net price to the owner. I didn't ask Mr. Gibbs \$10 an acre commission. He said he wanted \$115 an acre for the land, as the letter said, and told me to go ahead and sell it, and as I had a customer there for \$120 an acre, I figured that I had earned that \$5 an acre. *The reason I thought I was entitled to the \$5 an acre was that he said I could sell it for \$115 an acre.* I later asked Mr. Gibbs for a commission; and J. J. Stauffer was along.'

"Redirect examination: I also testified at the former trial that, when I commenced suit, I still thought that my customer would take the land at \$125 an acre, but it didn't make any difference to me, but I was figuring my suit as the difference between \$115 and \$120 an acre. I also testified that I figured that I sold the place fair, or had a customer for it at \$120 an acre, and if \$115 an acre was his price, I was entitled to my commission of \$5 an acre. I also testified that before he came back and offered \$125 an acre, there had been talk of a commission. Guth did not offer \$125 an acre when we were there at first, but after we had gone away a couple of miles, he said, 'I am going back; the place suits me, and I will give \$125 an acre for it;' then we drove back. He went to Klemme that same evening to dig up the \$125 and Gibbs went with him. He brought Gibbs back home.' He says, 'August, if I can fix the deal with those fellows down there, and clear the deal,' he says, 'I will let you have the place and I will give \$5 an acre commission.' That is what was said exactly. Q. Now with reference to your \$5 an acre, it is immaterial, I

believe you said, as to what he sold the farm for; you wanted your \$5 an acre commission. You were willing to let Gibbs make a better deal, if he could, if he would pay you \$5? A. Yes, sir."

We think the record as a whole is without any substantial ground on which a finding may be justified that Guth was presented to the defendant as a proposed purchaser of the land until after Kluckhorn left the premises and plaintiff and his party returned to the farm a second time; but, should we be disposed to say there is some evidence tending to sustain the plaintiff in this respect, it seems to us very clear that there was, by common and mutual consent of all the parties, including the alleged agent or agents, an abandonment of such proposed sale and a substitution therefor of another arrangement, by which Guth would buy the land on the following Monday at \$125 per acre, if Kluckhorn did not sooner take it, and, in event that such sale to Guth was consummated, defendant would pay an agent's commission. He concedes that he did promise a commission if this sale went through, but denies that the amount of such commission was agreed upon or mentioned. Plaintiff, as we have seen, also claims he was promised a commission on this sale, but says it was to be at the rate of \$5 per acre, and that it was upon the supposition that the sale to Guth had in fact been consummated that he brought this action. The only reasonable conclusion from this statement on his part is that he brought this suit upon the theory that defendant owed him a commission under the last mentioned agreement, for producing a customer to whom a sale had been actually made at \$125 per acre, and later, having learned that the customer had refused to complete the purchase and the sale had proved abortive, he shifted his ground and seeks recovery upon an alleged first contract, which, according to his own showing, had been mutually

abandoned; and, if this be true, no recovery can be had in this action.

III. Bearing upon the same feature of the case, defendant asked the court to instruct the jury as follows:

2. **BACKBIS: compensation: mutual substitution of contract: effect.**

"If you find from the evidence that, on the trip to defendant's farm, August Guth made an oral contract with the defendant to purchase the land at \$125 an acre, provided Kluckhorn did not take it by the Monday following, and that the plaintiff J. J. Wilson was present with Guth and the defendant, and knew of said offer, and acquiesced therein, and made no claim for compensations at that time, then the plaintiffs cannot recover in this action."

This request was refused, and the proposition stated therein was not contained or embodied in any part of the court's charge. For the reasons stated in the preceding paragraph of this opinion, the instruction as asked, or some other of like tenor and effect, should have been given to the jury. The ruling was erroneous. It was entirely competent for the parties to modify a contract theretofore made between them, or to mutually abandon an agreement and terminate its binding obligation upon them, or to substitute a new and different agreement for an earlier one. The original consideration, the change in the relations of the parties in respect to the subject-matter of the agreement, the substitution or change of one obligation for another, is ordinarily sufficient consideration to render such transaction valid and binding. 3 Elliott on Contracts, Sec. 1865; 3 Page on Contracts, Sec. 1340; *Cleveland City R. Co. v. City of Cleveland*, 94 Fed. 385; *Consumers' Cotton Oil Co. v. Ashburn*, 81 Fed. 331; *Hall v. Wright*, Ann. Cas. 1912 A, 1255, and note.

IV. Plaintiff, according to his version

4. BROKERS: compensation: sale: producing purchaser: essentials. of the alleged contract made at the first interview with defendant, says he was authorized to sell the land at \$115 per acre on a payment of \$1,000 down, and the remainder on certain deferred installments, the particulars of which he professes to have forgotten. He admits that he reported the price to Guth at \$120 per acre, and demanded a cash payment of \$2,400, and \$4,000 on March 1st following; and as to the other terms, while he cannot remember what they were, he still is sure that he reported them correctly to Guth and they were satisfactory to him. Question is raised by appeal whether, even on plaintiff's theory of the contract, he can be permitted to recover when he confessedly misquoted to the buyer the price at which he was authorized to sell, demanded a greater initial payment than was required by defendant, and cannot now tell what the other terms were on which he was authorized to sell. On this point, it should also be said that Guth forgets entirely whether, before their second call on defendant, plaintiff had reported to him the terms of defendant's proposed sale, and, if such report was made, he does not know what they were; but in answer to plaintiff's counsel, he says it is possible plaintiff did so report, and, if so, he answered that the terms were satisfactory. The clear tendency, however, of his story as a whole, is to the effect that he heard nothing about the terms at that first interview. Nor is there any evidence that plaintiff advised the defendant of his act in swelling the demand for down payment from \$1,000 to \$2,400, in order that his alleged commission should be included therein, or that such act was in any manner approved or ratified. It is, of course, elementary that, for an agent to be entitled to recover commissions upon an alleged sale, or for the production of an alleged purchaser, he must show what authority was given him by the principal and what terms he was au-

thorized to make, and that he made a sale on the very terms authorized, or produced a purchaser ready, willing and able to purchase upon the precise terms of the authority so vested in him. May such agent recover when he says:

"I do not know or do not remember the terms authorized by my principal, or the terms which I was expected to exact from my customer, but feel sure that, whatever the terms were, I repeated them correctly to the customer and obtained his consent thereto?"

As we look at it, this is neither more nor less than a confession of the plaintiff's inability to produce evidence of one of the facts essential to sustain his right of action. This defect in his case is aggravated rather than remedied by the production of the customer who says:

"Wilson did not tell me I would have to make a cash payment of \$2,400. Nothing was said at all about what was to be done, or how long the time was to be on the balance, or how much interest there was to be, or anything about abstracts or anything connected with the general terms of sale until after I went back there the second time and talked about the \$125."

This failure of proof of performance, even upon plaintiff's own theory of the contract, is sufficient to forbid a recovery upon the record before us.

The further question whether an agent having an agreement with the owner to sell his land or produce a buyer therefor at a named net price is thereby authorized to demand of the buyer any such greater price as in his discretion he may place thereon, and have or retain to himself the excess so realized over the net figure mentioned in his contract of employment, we think it unnecessary now to decide. If there be, as counsel seem to admit there is authority for saying, difference between an agent's authority to sell at a "net price," and authority to sell and have as his compensation all which may be realized over and above a stated

price, it is to be noted that plaintiff in this case expressly pleads and founds his claim for a recovery upon an alleged contract of the first description—that is, a contract authorizing him to sell at a net price; and it is upon the contract pleaded that he must recover, if at all. See *Jordan v. Hill*, 172 Iowa 414; *Allen v. Klopton*, (Tex.) 135 S. W. 242; *Louva v. Worden*, (N. D.) 152 N. W. 689; *Matheney, Beasley & Koon v. Godin*, (Ga.) 61 S. E. 703.

V. Other points made in argument are controlled by the conclusions hereinbefore announced, or are of a character not likely to arise on another trial, and we will not extend this opinion for their discussion.

The judgment appealed from must be reversed, and the cause remanded to the district court for a new trial.—*Reversed and remanded.*

DEEMER, EVANS and PRESTON, JJ., concur.

CITY OF VALLEY JUNCTION, Appellee, v. THOMAS P. McCURNIN et al., Appellants.

HIGHWAYS: Establishment—Dedication—Evidence—Sufficiency.

- 1 Evidence reviewed, and held ample to establish the dedication of a highway by the three tenants in common.

HIGHWAYS: Establishment—Dedication—Acceptance—Sufficiency.

- 2 Unequivocal recognition by a city of a highway constitutes sufficient acceptance of the dedication thereof. Evidence reviewed, and held to establish such acceptance.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

SATURDAY, JUNE 23, 1917.

SUIT to enjoin the obstruction of an alleged street resulted in a decree as prayed. Defendants appeal.—*Affirmed.*

N. E. Coffin and James A. Howe, for appellants.

L. L. Thompson and Parsons & Mills, for appellees.

LADD, J.—I. This is a suit to enjoin the obstruction of an alleged highway by the erection of fences at each end of it. The building of the fences is conceded by defendants, but they insist that they never dedicated the strip of land in controversy as a highway, and that, if dedicated, there was no acceptance. One Murrow owned the northwest quarter of Section 11 in Township 78 North, Range 25 West of the 5th P. M., and lying between the boundaries of the cities of Valley Junction and Des Moines. Through the settlement of Murrow's estate, title to said land, with the exception of the First Addition to Valley Junction, which had been platted and disposed of, passed to two of his daughters, Mrs. McCurnin and Mrs. Henry, and the husband of the former, Thomas P. McCurnin. The corporate limits of Valley Junction were extended in 1911, so as to include the entire tract, and in 1912, the owners caused what is known as Murrow's Second Addition to be platted. This was immediately north and east of the First Addition, in the southwestern part of the farm, and adjoining the settled portion of Valley Junction. Hillside Avenue extended from the west line of the land, or Eighth Street, on the north side of the plat easterly to Fourth Street, on the eastern boundary thereof. The street railway connecting the cities extends up Fifth Street, turning into Vine Street, east to Fourth Street, where it curves across to a right of way extending to the north, forming the eastern boundary of said Fourth Street. This street is platted to a point 692 feet north of Vine Street. The road in controversy runs from the end of Fourth Street, as platted, north, parallel with the street railway, and turns slightly north of east, extending to a point west of the concrete bridge over Walnut Creek in Grand Avenue and on the boundary between the cities, the right of way of the street railway company forming

1. HIGHWAYS: establishment: dedication: evidence: sufficiency.

the east and the south boundary of the road. A temporary way 40 feet wide began about 600 feet west of the city boundary and ran north and northeasterly to Grand Avenue, as originally laid out. The only question for our decision is whether defendants have dedicated the strip of land as a highway, and whether the plaintiff accepted such dedication prior to August 29, 1913, when said road was fenced in at the end of Fourth Street and immediately across the new road extending from Grand Avenue to the road north, known as the "River to River Road." The law with reference to the common-law dedication of a highway or street is fully settled, and only issues of fact are for our decision. In so far as Thomas P. McCurnin is concerned, the evidence is all but conclusive. In the early fall of 1912, he caused a fence to be constructed 66 feet west and north from that marking the right of way boundary, and also the road to be graded the entire way, and gutters to be plowed on either side. Formerly, Grand Avenue turned to the northwest, upon reaching the Chicago, Milwaukee & St. Paul Railway Company's track, and crossed Walnut Creek between 600 and 700 feet north and west of the present concrete bridge, to what is known as the "River to River Road." In the first place, the road in controversy turned north at a point about 600 feet west of such boundary, and ran north and then northeast to the River to River Road. McCurnin, with the aid of the engineer who laid out the addition, appeared before the officers of the city of Des Moines having control of such matters, and before those of the city of Valley Junction, and arranged that Grand Avenue be extended directly west over Walnut Creek, instead of veering to the northwest, as described above, and for the erection of a concrete bridge over said creek, and the construction of a road west of the creek from the end of Grand Avenue northwesterly to the River to River Road, and the abandonment of the old

road connecting the avenue with the River to River Road. In carrying this out, defendants conveyed to the city of Valley Junction a strip 66 feet wide for the new street from Grand Avenue to the River to River Road, and the city conveyed to defendants that portion of the abandoned road within its limits. Enough of the plat prepared by his engineer and exhibited to the officers of the respective cities and showing the situation is annexed to demonstrate the utter inconsistency of what was done with any course other than a design of establishing the road in controversy. Indeed, two of the councilmen of the plaintiff city testified that he stated before that body that he had laid out the road and given it to the public. The district court, after an accurate review of the legal questions involved and of the evidence, enumerated the matters, which, taken together, manifested the *animus dedicandi*:

“(1) The laying out of the road itself; (2) the grading of same; (3) the fencing of the road; (4) the fact that the width of the road was made 66 feet, the usual width of a street; (5) the paying for the grading of the road out of the common fund of the defendants; (6) the erecting of a sign ‘To Des Moines,’ near the connection of the road in controversy with Fourth Street in the city of Valley Junction; (7) the erection of the sign ‘To Valley Junction,’ near the intersection of the road in controversy with the Grand Avenue or River to River Road; (8) the erection of a large sign showing the Murrow’s Second Addition plat along the roadway in controversy, on which plat were the words, ‘To Des Moines;’ (9) the plat of Murrow’s Second Addition filed of record shows the beginning of the roadway in controversy; (10) the plat showing the change in Grand Avenue to location of the new bridge across Walnut Creek, etc., shows the road in controversy; (11) a three or four-foot cut was made in one place while grading the road; (12) the testimony of two members of the city coun-

cil of Valley Junction to the effect that Mr. McCurnin had said that he had graded the road and given it to the public; (13) the negotiations with the city council to secure the approval of the plat to Murrow's Second Addition; (14) the negotiations with the city council of Valley Junction with reference to the roadway extending from the new bridge across Walnut Creek in a northerly direction to the River to River Road; (15) the negotiations with the officials of the city of Des Moines with reference to changing Grand Avenue and the erection of the new bridge across Walnut Creek; (16) the selling of the greater portion of the lots in Murrow's Second Addition after the roadway in controversy was opened to the free use of the public in November, 1912, and the leaving of the same open until on or about August 29, 1913."

These facts, as we think, are fully established by the record, and lead to but one conclusion, and that is that McCurnin intended to dedicate to the public this way as a street or highway. True, he undertakes to minimize his negotiations for the changes made, denied having made the statements attributed to him by the two members of the city council, and explained that his purpose in laying out the road was to ascertain whether there was any demand for acreage tracts, and if so, in what size, and to be better able to bring them to public attention, and that he had no intention of permanently establishing a street or highway, and never mentioned such a matter to his wife or Mrs. Henry. Everything he did, however, indicates a purpose to dedicate, and what was done is more persuasive of what he then intended than is his subsequent explanation. A more reasonable theory is that what he did was with the intention of establishing a highway, but that this was abandoned upon discovery that there was no demand for acreage lots, rather than that the way was experimental, and only intended to ascertain whether there

was such demand. Any other conclusion is inconsistent with his negotiations for the straightening of Grand Avenue. What interest was this to him, but for the connection with the highway he had laid out? In accomplishing this, he conveyed more land than he received. He says he fenced the way to keep cattle out; why not allow the right of way fence to serve this purpose, and employ gates, if the way were private—if it were merely a private way? There is a trite saying that "actions speak louder than words," and it finds an apt illustration in this case. A careful examination of the record has convinced us that, in so far as McCurnin is concerned, he intended to establish the road and dedicate it to the public.

II. The only doubt we entertain is as to the other tenants in common. These joined in platting the subdivision. Mrs. Henry kept the accounts in detail of the receipts and expenses of the land. She denied having conferred any authority on McCurnin to dedicate or give away any of the land. But he was authorized to attend to all matters in relation to surveying and platting the addition. From the time the road was opened, about November 1, 1912, it was the most traveled highway between the two cities, and, though not talked of to purchasers of lots in the addition, it was open prior to the sale of most of them, and, as a witness testified, "was one of the features that made this a desirable location." Mrs. Henry and Mrs. McCurnin joined in paying the expense of fencing and grading. That is, these were paid out of the common fund of the three owners, but it is not clear that they were aware of this prior to the latter part of December. The former testified that she knew nothing of the road until December, 1912, when she was told that "it was put through to see if there would be any more sales for acreage or of the land, and, if so, it would be made a permanent road, and if not, it would be closed up, because we

had never made a deed;" that this information came from her husband; that she talked with McCurnin about negotiating for the conveyance of a strip of land for a street and receiving one back for land then used for that purpose, and about the changes incident thereto, including all about the construction of the concrete bridge, but she left the details to McCurnin, and knew nothing of the annexed plat or of its exhibition to the city authorities. Mrs. McCurnin was in ill health at the time of the trial, but, in the absence of other evidence, it is to be inferred that the payment for the fence and grading was with her approval, and that, in joining in the conveyance to the plaintiff city and in accepting the deed from it, which is to be presumed from its recording, she acted with knowledge of the purposes being accomplished thereby. The road had been continuously and extensively traveled, precisely as though a public highway, since November 1st previous, and it is impossible to explain these conveyances and the straightening out of Grand Avenue and procuring the concrete bridge, as consistent with any other attitude than the permanent establishment of the road in controversy. On what other theory could these defendants have been especially interested in straightening Grand Avenue, or the construction of the bridge, or the change of the route, or the temporary continuance of the connection of the road next to the street railway with the River to River Road, until the proposed improvements and changes might be made? But for this road along the street railway, it was better for them that Grand Avenue turn to the northwest, and that the bridge be farther to the north; for then the street through their land would be along the right of way of the Chicago, Milwaukee & St. Paul Railway Company, and only part of the diagonal portion taken from their land, whereas the new street is almost entirely from their land, and a considerable area cut off thereby, lying be-

tween the street and said right of way. Were these defendants about doing good merely, without taking into account any advantages to themselves? Surely, McCurnin, in exhibiting the map to Carss, the city engineer, and Myerly, of the city council of Des Moines having charge of the streets, represented an extension of Grand Avenue to Valley Junction, and Mrs. Henry and Mrs. McCurnin, in executing and accepting the deeds, so did for the purpose of better connecting the road laid out by McCurnin with one of the main thoroughfares of the city of Des Moines; and we are of opinion that, even though they may not have known of McCurnin's action in laying out the street originally, the subsequent payment of their portion of the expenses incurred, and the execution and exchange of deeds in connection with what he did, in view of the scope of his authority, satisfactorily evidence their confirmation of all previously done, and establish the *animus dedicandi* on the part of the three tenants in common.

III. Was there an acceptance by the plaintiff? No resolution was adopted, and this was not necessary. *Byerly v. City of Anamosa*, 79 Iowa 204; *Hunter v. City of Des Moines*, 144 Iowa 541. The road was put in such condition by McCurnin (and he was required to grade the streets of the addition as a condition precedent to its approval by the city council of Valley Junction) that little additional was necessary, but it was dragged twice, and a little grading done thereon by the city, and this, in view of its general and beneficial use, we are inclined to regard as sufficient to warrant a finding of acceptance. All essential is that the street be unequivocally recognized as such by the city, and what was done surely did this much. Where a way is convenient and beneficial to the public, slight evidence, if amounting to recognition, as above indicated, will suffice in establishing acceptance. *Incorporated Town of*

2. HIGHWAYS: establishment: dedication: acceptance: sufficiency.

Cambridge v. Cook, 97 Iowa 599, and cases collected. We are of opinion that the street 66 feet wide, extending from the boundary of the two cities to the end of Fourth Street of Valley Junction, was dedicated by defendants and accepted by that city, and that the court rightly enjoined them from obstructing the same.—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

FRANK FUEHR, Appellant, v. EWERT & RICHTER EXPRESS
AND STORAGE COMPANY, Appellee.

ATTORNEY AND CLIENT: Authority—Appearance to Action. An attorney retained in a controversy "to settle and not to get into a law suit," possesses no authority to appear in an action based on the controversy, nor to authorize another attorney to do so, and a personal judgment based on such an appearance is void for want of jurisdiction.

Appeal from Scott District Court. M. F. DONEGAN, Judge.

SATURDAY, JUNE 23, 1917.

ACTION on a judgment entered in the justice court by W. E. Harlan, Esq., of Gray Township in the county of White and state of Arkansas resulted in the dismissal of the petition. The plaintiff appeals.—*Affirmed*.

Cook & Balluff, for appellant.

Bollinger & Block, for appellee.

LADD, J.—This action was begun March 5, 1915, and is based on a judgment entered in justice court in White County, Arkansas, in words following:

"On the 12th day of September, 1914, the plaintiff filed before me his cause of action against defendants for \$188.50. Thereupon, a writ of attachment was issued against the

defendants, returnable on the 17th day of October, 1914, at 10 o'clock A. M., and delivered to the constable of Gray Township. Now on this day comes the plaintiff, Frank Fuehr, in person and by his attorneys, Brundidge & Neely: also comes the defendant, Ewert & Richter Express and Storage Co., by their attorney, Eugene Cypert, and both parties announcing ready for trial, the jury being waived, this cause is submitted to the court sitting as a jury upon the pleadings filed in the cause, the testimony of Frank Fuehr. It is, therefore, by the court considered ordered and adjudged that the plaintiff do have and recover of and from the defendant, Ewert & Richter Express and Storage Company, the sum of \$188.50 and his cost herein expended. And it further appearing that the Bank of Searcy having been garnished in this action, and it appearing that the bank has in its hands \$81.07 belonging to the defendant, Ewert & Richter Express and Storage Co., it is by the court considered ordered and adjudged that said Bank of Searcy be and is hereby directed to pay over to the plaintiffs the sum of \$81.07. Given under my hand on this 17th day of October, 1914. W. E. Harlan, J. P."

A transcript thereof duly certified was presented, and the only defense interposed was that the court was without jurisdiction, in that Eugene Cypert appeared in court for defendant without authority. It appears from the stipulation of facts on which the case was submitted, that the defendant is a corporation organized under the laws of Iowa, and that plaintiff is a resident of Arkansas. On and prior to September 4, 1914, the plaintiff had in storage at the warehouse of the defendant at Davenport, Iowa, certain household goods, and on the named day, at plaintiff's request, said goods were shipped to Searcy, Arkansas. A draft for the amount of the storage charges on bank at Searcy, Arkansas, with the bill of lading for the goods, was forwarded to the bank. Upon the arrival of the goods,

plaintiff paid the draft and obtained the bill of lading, and immediately commenced action for the value of goods alleged not to have been returned, aided by attachment under which the bank was garnished. On being advised of this, otherwise than by service of process, and on the same day, October 1, 1914, one of defendant's officers took to the office of Bollinger & Block his copy of the warehouse receipt, hereinbefore referred to, and certain of his other papers and correspondence about said shipment of said goods, and advised James W. Bollinger of the commencement of said suit; but neither such officer nor any officer of the defendant ever instructed Bollinger & Block or any attorney to appear in said case before said Justice Harlan. It appears that such officer left such papers with said James W. Bollinger, and told said James W. Bollinger to settle the suit, and left the matter with said James W. Bollinger for attention; and further, that said officer told said James W. Bollinger to settle the matter and not get into any lawsuit.

On the same day, said Bollinger addressed and mailed the following letter:

"October 1, 1914.

"Bank of Searcy,

"Searcy, Arkansas.

"Gentlemen: In re Fuehr v. Ewert & Richter Express and Storage Company: We are writing you in behalf of Ewert & Richter Express and Storage Company of this city. On September 4, 1914, our client shipped to Fuehr a certain lot of household goods which had been stored with them. This shipment was made by draft attached to bill of lading, and we understand that Fuehr paid the draft and got the goods from the railroad company and then brought suit by attachment against the Storage Company and garnished you. From correspondence between Mr. Fuehr and our client, we understand that he has a claim

against the company for \$188.50, consisting of one bundle of rugs lost, worth \$185, one stool at \$1.00, and one stepladder at \$2.50. We wish you would do what you can to settle this thing up for us. Our company knows nothing of the bundle of rugs. As to the stool, you will find that it is listed in his bill of lading as crated with a library table. If he insists he didn't get it, allow the \$1.00. As to the stepladder, our company never had the same and none was ever listed, and so, under his bill of lading receipt, which we are sending you herewith, we are not liable for that. As to the \$185 for the bundle of rugs, under Clause 7 of the warehouse receipt, which we are also enclosing, and of which Fuehr has a copy, the company's liability is limited by contract to \$50 for loss. So that, at the very most, \$51 is the limit of any claim which he can have against us. We understand you were garnished in the sum of \$81.07, the amount of the draft he paid you. Please, therefore, close the matter up with him by allowing him the sum of \$51, and send us the balance less your fees. If you cannot make a settlement with him for us at substantially this basis, will you kindly hand the enclosed warehouse receipt and bill of lading to some reputable attorney and ask him to take charge of it and to correspond with us at once? Thanking you, we are,

"Yours truly,

"Bollinger & Block,

"Per Jas. W. Bollinger."

This letter reached the bank in due course, and, not succeeding in adjusting the matter, the bank turned the letter over to Eugene Cypert, an attorney at law at Searcy. No response thereto from the bank or Cypert was made until after the entry of the judgment sued on. Cypert entered his appearance in the cause, and on October 17, 1914, the return day, filed an answer in words following:

"Comes now the defendant and offers to confess judgment in the sum of \$51, but as to each and every other item of account filed herewith, deny that they are indebted in any amount to plaintiff. Eugene Cypert for defendants."

Judgment was thereupon entered for the amount prayed, and the amount of money in the hands of the garnishee ordered applied thereon.

The good faith of all parties is conceded, the only issue being whether the court acquired jurisdiction over defendant. This, of course, depends on the terms of the employment of Bollinger & Block and the construction of the letter addressed by that firm to the bank. As contended by appellee, an attorney, by virtue of being retained, may not waive or accept service of process for his client. To do so, he must be specially authorized, and therein would act as agent or attorney in fact, and not because of his relation as an attorney at law. *Masterson & Hoyt v. Le Claire*, 4 Minn. 163; *Reed v. Reed*, 19 S. C. 548; *Rice v. Bennett*, (S. D.) 137 N. W. 359; *Bradley v. Welch*, 100 Mo. 258 (12 S. W. 911); *Ashcraft v. Powers*, 22 Wash. 440 (61 Pac. 161).

But there was no attempt to accept or waive the service of process, save as this may be implied from the appearance of Cypert ostensibly for defendant. To appear in court, either after or before service of process on defendant, is within the scope of an attorney's employment as such; and, where a judgment record recites that an attorney appeared for a party, it is presumed that such appearance was authorized by such party. *Wheeler v. Cox*, 56 Iowa 36; *Harshey v. Blackmarr*, 20 Iowa 161; *Uehlein v. Burk*, 119 Iowa 742; *Walsh v. Doran*, 145 Iowa 110.

The burden of proof is upon those asserting that an attorney recited in the record to have appeared, did not do so, and, as a solemn record of court is being assailed, to

do so by satisfactory evidence. See *Bond v. Epley*, 48 Iowa 600, and the cases last above cited. Ordinarily, an attorney may not delegate his authority (Weeks on Attorneys, Sec. 246); and, in any event, may not, by employing an attorney in a distant place, confer authority in excess of that possessed. The letter to the bank is somewhat ambiguous with reference to what the attorney at Searcy was expected to do—take charge of the settlement merely or of the case. If the bank were unable to settle, why turn the matter over to an attorney? If that were impossible, was it not intended that the attorney should take charge of the litigation pending, and do whatever was required to present the defense outlined in the letter? On the other hand, the entire letter indicates that settlement was the aim, and the inference is open that, in directing the bank to ask a reputable attorney to “take charge of it,” the writer had reference to the settlement. The latter interpretation is in harmony with the terms of the employment of Bollinger & Block, and, as said, the scope of Cypert’s authority could not be broader than that of the firm directing that he take charge. The record discloses that Bollinger was directed by the officer of defendant retaining him (1) to settle the case, (2) to give the matter attention, and (3) not to get into a law suit. Surely, defendant had the right to have a settlement undertaken and the firm give such matter appropriate attention without engaging in the litigation pending. This was precisely what Bollinger & Block were directed to do, and, if it may be inferred from their letter to the Bank of Searcy that the attorney engaged by it was to appear in the cause pending in court, or to have any connection therewith, save in the way of settling outside of court the claim involved, then said firm undertook to do what they were expressly directed not to do, and defendant is not bound thereby. The defendant conferred no authority on anyone to appear

in the court of Squire Harlan, and the judgment, in so far as it is personal, was without jurisdiction and void. The district court rightly dismissed the petition.—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

LEOTA STUTSMAN, Appellee, v. DES MOINES CITY RAILWAY COMPANY, Appellant.

APPEAL AND ERROR: Harmless Error—Improper Questions—In-

- 1 **nocuous Answer.** An improper question followed by an innocuous answer works a harmless error. So held where a physician was asked whether an injured party had told him anything about having been injured, and answered that all the injured party said was as to the time and place of the injury.

WITNESSES: Impeachment—Collateral and Immaterial Matters.

- 2 Witnesses may not be impeached on collateral and immaterial matters. So held in an action for personal injury, wherein it was sought to show that the injured party had stated that her husband was drunk at the time of the injury, there being no substantive evidence that the husband was drunk.

DAMAGES: Evidence—Personal Injury—Abnormal Childbirth.

- 3 An injured party may show that, following an accident to her, the birth of her child was attended with far greater suffering than that attending all her previous confinements, and, by other testimony, that such added suffering was caused by the accident in question.

TRIAL: Reception of Evidence—Objections—Sufficiency.

- 4 Principle recognized that a general objection to testimony is properly overruled when the testimony is competent for any purpose.

TRIAL: Reception of Evidence—Right to Object—Waiver and Es-

- 5 **toppel.** Permitting testimony of an alleged fact to be given by one or more witnesses, *without objection of any kind*, works an estoppel to insist that proof by other competent witnesses to the same fact is immaterial or incompetent.

WITNESSES: Cross-Examination—Nonrelevant Matters.

- 6 Cross-examination should be confined to matters relevant to the mat-

ters brought out on direct. Evidence reviewed, and *held*, certain matters were properly excluded as not proper on cross-examination.

EVIDENCE: Opinion Evidence—Results Flowing from Assumed
7 Facts—Form of Question. Opinions as to results need not go beyond a statement of the *probable* results. Like results from other causes need not be negatived. The latter is properly left to cross-examination.

TRIAL: Instructions—Form, etc.—Argumentative Instructions. Ar-
8 gumentative instructions are properly refused. So held as to an instruction on the effect of testimony relative to the prior immorality of an injured party.

DAMAGES: Injuries to Person—Permanent and Continuing Inju-
9 ries Contrasted—Instructions. An instruction that, if the jury finds that plaintiff's injuries are reasonably certain to *continue* in the future, she would be entitled to recover therefor, is not a submission of the question of *permanent* injuries.

TRIAL: Instructions—Applicability to Pleadings and Evidence. In-
10 structions not applicable to the pleadings and evidence are properly refused. So held as to one directing the jury to allow nothing for a possible future surgical operation, neither the pleadings claiming nor the evidence showing any claim in relation thereto.

TRIAL: Verdict—\$2,500—Excessiveness. Verdict for \$2,500 sus-
11 tained. Plaintiff suffered a severe injury to her genito-urinary organs, which resulted in the premature birth of a child, and the probable future necessity for a surgical operation.

Appeal from Polk District Court.—WM. H. McHENRY,
Judge.

SATURDAY, JUNE 23, 1917.

ACTION at law to recover damages for personal injury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed*.

Cummins, Hume & Bradshaw, for appellant.

Roy E. Cabbage, for appellee.

WEAVER, J.—The plaintiff alleges that, on September 19, 1914, she was being carried as a passenger on one of defendant's street cars, which stopped at the corner of East Thirtieth and Walnut Streets for her to alight, and that, as she was in the act of leaving the car, and in the exercise of due care on her part, the car was started without any warning or signal thereof to her, jerking and dragging her to a considerable distance, and bruising and wrenching her person and causing her great pain and serious bodily injury. She further alleges that she was at the time in an advanced state of pregnancy, and that, by reason of the injuries occasioned as above stated, her child was prematurely born, and she was thereby made to suffer unusual and excruciating pain.

The defendant denies the petition generally. On trial to a jury, there was verdict and judgment in favor of plaintiff for \$2,500.

I. Dr. Lambert, one of the physicians called by the plaintiff after her alleged injury, being examined as a witness on the part of plaintiff, was asked, "Did she relate anything to you at that time about having been injured in a street-car mix-up?" To this the defendant objected, as calling for hearsay, self-serving and irrelevant declarations. The court ruled that the testimony called for was not admissible as substantive evidence of the truth of her statements to the physician, but could properly be shown as being the basis or part of the basis on which the witness based his professional opinion. Whether, as an abstract proposition, this ruling was right or wrong, we think it was in no manner prejudicial to the defendant. The answer of the witness went no further than to state that plaintiff told him she injured her back in getting off a street car, but he did not remember whether she said she slipped or fell, or whether she said the car started up. In other words,

1. APPEAL AND
ERROR: harm-
less error im-
proper ques-
tions: innocu-
ous answer.

so far as the witness was able to say, she told him no more than the time and place of her alleged injury, and he is unable to state whether she said anything concerning the cause or manner of it. The innocuous character of the evidence in this respect is too evident to require argument, and the assignment of error thereon is not well laid.

2. WITNESSES:
Impeachment:
collateral and
immaterial
matters.

Other exceptions to rulings on evidence are as follows: Plaintiff, as a witness in her own behalf, testified that, on the evening in question, she with her husband took passage on one of defendant's cars from West Des Moines to their home in East Des Moines; that, as the car approached the corner of East Thirtieth and Walnut Streets, she signalled for a stop; that the car did stop, and that she, following other passengers, undertook to alight; that, as she was in the act of leaving the car, holding on to the rail by her right hand, the car started, jerking her around, twisting her back and shoulders, and making her so sick she could hardly get home. She further testified that, the car having stopped a second time, she loosed her hold on it, and staggered around until her husband caught her and led her to the sidewalk. On cross-examination, she was asked, in substance, if she had not told a Mrs. Thompson that her husband was drunk on that occasion, and that she had been of more assistance to him than he could be to her. She denied having made such statement. Thereafter, plaintiff's husband testified in her behalf concerning the alleged injury received by her, and as to his catching and assisting her, substantially as she had related the incident to the jury. His direct examination was closed as follows:

"Q. Now, Mr. Stutsman, there is one question I want to ask you, because you will understand why, whether or not you were drunk as you came home that night, as has been insinuated in some of the questions that were asked

you? (Objected to by defendant as incompetent, irrelevant and immaterial. Question not answered.) Q. I will ask you this question, Mr. Stutsman, were you, when you came home that night, in condition so that you could observe and remember what happened on that trip? (Same objection by defendant. Overruled. Defendant excepts.)

A. I was in as good condition as I ever was."

Later on, Mrs. Thompson, a neighbor of the plaintiff's, testifying for the defendant, said that, on the evening when plaintiff claims to have been hurt, and while in her own home, she heard plaintiff and her husband pass, and thought she detected something unusual in the husband's voice, and that, during the following week, she asked plaintiff what was the matter. Counsel then asked, "What did she say about Mr. Stutsman's condition?" and plaintiff's objection to the materiality of the inquiry was sustained. Thereupon, defendant made the following offer:

"Mr. Clark: The defendant, as bearing on the testimony of plaintiff and her husband in regard to Mr. Stutsman's assisting his wife home, offers to show by the witness that Mrs. Stutsman thereafter told the witness in substance that she brought Mr. Stutsman home rather than he assisted her, and in substance that Mr. Stutsman was under the influence of liquor to the extent that he was of no assistance, and that she had to follow him up and bring him out of several places at Des Moines in the city, the understanding she conveyed being that they were places where he was drinking."

Objection to this offer was also sustained. Of these several rulings, the defendant complains. We confess to surprise that counsel should gravely argue the soundness of these exceptions. Proof that Stutsman was intoxicated to an extent to prevent him from rendering the simple assistance to which his wife had testified, or to see or to know what had occurred at that time, might possibly have

been pertinent and proper testimony, but no witness testified to such condition on his part, or to any fact or circumstance tending in that direction. Defendant offered no evidence of that character. Its counsel did not even ask the wife whether her husband was drunk, but contented themselves with asking her if she did not say something of that nature to a third person. It is probably true that plaintiff was under no necessity to offer evidence of Stutsman's condition of sobriety, because it had not been impeached or attacked by any competent testimony; but the party who, by hint or indirection, seeks to leave an injurious impression upon the mind of the jury concerning his adversary, is not prejudiced if the suggested fact be denied. So far as this particular phase of the evidence is concerned, if Stutsman was drunk, surely, defendant's servants in charge of the car, or his fellow passengers leaving the car at the same stop, should be able to speak of it from direct personal knowledge; but no such evidence was offered, nor any reason suggested for failure to produce it. The only manner in which the husband's name was brought into the story of the alleged injury was by the wife's statement that, as she staggered away from her grasp on the car, her husband caught and led her to the sidewalk—an act by no means impossible and by no means inconsistent with a considerable degree of intoxication. The statement of the wife which counsel sought to show was no part of the *res gestae*, nor did it have the slightest tendency to show that the alleged accident and injury to her did not occur precisely as she testified on the trial. Neither did it conform to the rules governing impeaching testimony.

Another assignment of error is presented in connection with the testimony of plaintiff and her husband. The wife first testified, and offered other testimony in corroboration, that she was pregnant at the

8. DAMAGES: evidence: personal injury: abnormal child-birth.

time of the alleged injury, and that, from the time of such injury, she experienced great pain and suffering, which, in the course of about two months, culminated in the premature birth of her child. She further testified, without objection made or exception taken, that she had gone through seven or more previous confinements; that the pain and suffering accompanying this last premature confinement were unlike those she had suffered on former occasions. On cross-examination, defendant's counsel led her into a specific recitation of the circumstances of her prior confinements, and of the difficulties experienced and injuries resulting therefrom, and of the time it ordinarily required for her to recover her usual health. Later, when her husband was on the witness stand, he was asked, and, over defendant's objection, was permitted to answer, that, in her former confinements, she would ordinarily go into labor in the evening and the child be born some time in the morning, and added, "She was never in childbirth labor four days, like she was at this time, in her previous confinements." He also testified that, on other occasions, she would be able to get up and assist in her work in a few days, but this time it was six weeks before she had so far recovered. It is argued for the defendant that this testimony was incompetent, immaterial and irrelevant, and that the "apparent deduction was not warranted." There are two sufficient reasons for sustaining the court's ruling. In the first place, there appears to be no sound reason for holding the testimony inadmissible. In itself, it does not, of course, have any tendency to prove that plaintiff was injured by the negligence of the defendant, or that the premature birth of her child and attendant suffering were caused by her alleged injury in alighting from the car. But plaintiff was clearly entitled to show, as one of the elements of her right to recover, the fact that her confinement was in truth abnormal or untimely, and that she

was thereby caused to undergo suffering and sickness which would not have resulted to her from a normal delivery. This being established, it would still be incumbent upon her to show by other evidence that such untimely confinement was the result of her alleged injury. For the restricted purpose above indicated,—the showing of the abnormal character of the delivery,—we think it was entirely proper to show the fact that she had before been frequently confined, and knew the nature and character of a normal delivery and the experiences attendant thereon, and that her experiences in this last confinement were not such as characterized childbirth in due course of nature. There is a clear distinction between the case thus presented and *Etzkorn v. City of Oelwein*, 142 Iowa 107, 110. There, the testimony was met with timely objection, and the ground upon which its admission was held erroneous was not that the testimony was incompetent for any purpose, but that, as there stated:

“Counsel, in offering this testimony, was not trying to prove her physical condition prior to the birth of her last child. His effort undoubtedly was to have the jury believe that, as she had not previously suffered from childbirth, her suffering which she described as accompanying the birth of her last child *must have been due to the accident upon the walk.*”

For such purpose, as we have already said, the evidence could not properly be considered. But the general denial of the defendant in this case put in issue not only the matter of plaintiff's injury, but also the alleged premature character of her confinement, and upon this issue, we think the testimony of the husband and wife had material bearing. If the testimony was competent and material for any purpose, however restricted such purpose may have been, then there was no error in overruling a gen-

4. TRIAL: reception of evidence: objections: sufficiency.

eral objection thereto; and this is especially true where there is no request for an instruction to the jury limiting its effect.

Another feature of this record necessitates the same conclusion. This testimony was first offered when the wife was on the witness stand, and was given by her without objection or exception preserved thereto, nor was it made the subject of a motion to strike. Later, when the husband came to testify, and his attention was directed to the same subject-matter, defendant objected thereto, the objection being to the quality of the evidence, and not to the competency of the witness. For the reason stated, if for no other, there was no error in overruling this objection. Where objection has once been made in a proper and timely way, it is ordinarily held that the party against whom the ruling is made does not waive the error by failing thereafter to repeat the objection every time other testimony of the same character is offered. But to hold that a party may permit testimony of an alleged fact to be given by one or more witnesses without objection, and then insist that proof by another competent witness is immaterial or incompetent, would be quite unreasonable. One party to a suit should not be permitted to dictate his adversary's selection of witnesses by saying in effect, "You may prove the fact by A, but I will not allow you to corroborate him by B." Such course would be manifest trifling with the court.

In cross-examination, Dr. Roberts, a witness for the plaintiff, was asked the following question:

6. WITNESSES:
cross-examination:
non-relevant matters.

"The prolonged labor in confinement was caused in its most obvious explanation by the bursting of the sacs, and it therefore being a dry birth, was it not, Doctor?"

The answer was ruled out, upon plaintiff's objection that the inquiry was not proper cross-examination. This, counsel complains, was a "harsh exercise" of the trial court's discretion. The objection is not well founded. The witness did not attend plaintiff in her confinement, and we find nothing in the record making this inquiry clearly relevant to anything he had said on direct examination. The witness had examined the plaintiff after her confinement and before the trial, and testified to the conditions he then discovered indicating a diseased or unnatural state of the parts. He also said, in substance, that a wrench or jerk of the body of a pregnant woman would be likely to cause what is known as a dry birth, and that a dry birth would make the labor pains long and severe. The subject of the "bursting of the sacs" was not mentioned by him. Again, the question asked, when reduced to its briefest terms, is whether the fact of a dry birth is not an explanation of the prolonged and severe character of the labor pains, and this is precisely what the witness had already said, and the defendant sustained no prejudice from the exclusion of its repetition.

Again, exceptions are taken to the form of the inquiry by plaintiff's counsel in asking for the judgment or opinion of her expert witnesses. The point is that the questions objected to call only for mere possible or conjectural results. Some of the questions were, no doubt, too broad and indefinite, but were met by objections and rulings resulting in such modifications of expressions as brought the testimony fairly within the rule confining the opinion given by the witness to the likely or probable results of the combination of circumstances assumed by the interrogator. But counsel for defendant, impliedly conceding this situation, contends that, even in this form, the testimony was still inadmissible, and that, to obviate the ob-

7. Evidence: opinion evidence: results flowing from assumed facts: form of question.

jection, the inquiry must be so framed, or the answer of the witness so expressed, as to "exclude other likely causes" than those to which the attention of the witness has been specifically called. No authority for this proposition is cited, nor do we think it justified by any recognized principle of the law of evidence. The limitations of human knowledge are such that no expert, however learned or experienced, can speak with absolute certainty of the cause and effect of all conditions affecting the health of any given individual. Experience and observation may fairly demonstrate that certain injuries or certain abnormal conditions are likely or may reasonably be expected to produce certain results, and of these the expert may speak. To qualify him to so speak, he is not required to negative the possibility of like results from other causes. Indeed, his expressed opinion that a result designated by him is likely or probable, while it does not exclude all other causes, implies that the result mentioned is the one most reasonably to be expected in cases of that character. If it be claimed by the opposing party that the witness' opinion is erroneous, or that its value is lessened by the existence of other possible causes productive of like results, that fact may either be developed upon cross-examination or established by the testimony of other witnesses. Counsel concede that there is authority in our precedents sustaining the competency in evidence of expert opinion as to likely results of given conditions, and we discover in this case no good reason to abandon or restrict the rule so established. *Voss v. Shorthill*, 130 Iowa 538.

8. TRIAL: Instructions: form, etc.; argumentative instructions.

II. The defendant was permitted to introduce evidence tending to show that plaintiff's husband had at one time brought suit against a third person to recover damages for alienating the affections of his wife, and that, as a witness for her husband in that case, she had

admitted acts of adultery with such person. Presumably on the strength of this testimony, defendant requested the court to instruct the jury as follows:

"Instruction No. 1. Ordinarily, evidence of facts showing evil conduct or moral degeneracy of a party or witness cannot be admitted on the trial of a case, unless such facts are relevant to the particular issues to be determined by the jury, nor can parties ordinarily be examined or required to make admissions of facts of such character, unless relevant to the issues of the case being tried. One reason for this rule is that the court cannot undertake to try collateral matters or to determine their truth. When, however, such evidence is introduced as having a legitimate bearing upon the issues on trial, the court cannot relieve the witness of the effect of admissions or evidence showing immorality or degeneracy as bearing on the moral character or credibility of the witness, nor can the court require the jury to separate such evidence from the general facts and circumstances out of which it is entitled to determine the weight and credit to be given to the testimony of the party or witness."

This request was refused, and the court instructed the jury that immoral conduct of plaintiff in the past constituted no defense to her claim for damages in this case if she had shown, by a preponderance of the testimony, the truth of her alleged injury by the negligence of the defendant, but that such testimony might be considered as bearing upon the question whether her physical condition, which she attributed to the alleged accident, was in fact the result thereof, or of her own immoral conduct. The objection taken to the foregoing ruling and instruction is without merit. Indeed, the record so made was clearly more favorable to the defendant than it was entitled to ask. The occurrence affecting the moral character of the plaintiff took place 4 or 5 years before the alleged accident on which this action is based, and the story appears to have been dragged into the

record now, not as having any natural or fair relevance to the issues being tried, but to effect, by indirection, an impeachment of plaintiff's moral character, and thereby injuriously affect her credibility as a witness without attacking the same in the manner provided by statute, and the requested instruction is at best an elaborate and ingenious argument framed to emphasize that effect. The impeachment of a witness is a right to which a party may resort on all proper occasions, but it is the right of the witness and of the party by whom he is called to insist that such impeachment be accomplished, if at all, in accordance with the well-defined rule.

9. DAMAGES: injuries to person: permanent and continuing injuries contrasted: instructions.

The defendant also requested an instruction that the evidence does not warrant a verdict on the theory that plaintiff's injuries are permanent, and error is assigned upon the failure to so charge the jury. It is sufficient to say, in this regard, that the court did not submit to the jury the question of permanent injury. They were told that, if they found for plaintiff, and further found that her pain and suffering caused by the defendant's negligence were reasonably certain to continue in the future, then she would be entitled to compensation therefor. The testimony in the case clearly justified this instruction, and the refusal of the defendant's request was proper.

10. TRIAL: instructions: applicability to pleadings and evidence.

Defendant requested and the court refused a still further instruction as follows: "Some evidence has been introduced tending to show that a surgical operation might relieve plaintiff of some of the matters wherein she claims to be suffering as the result of the alleged accident. There is, however, no evidence of what the expense of such operation would be, and the jury will accordingly not take such matter into consideration in

event you find for the plaintiff, or allow her anything therefor."

The refusal of this request was not erroneous. Its effect would have been simply to create the appearance of withdrawing from the jury an issue or subject nowhere suggested by the record. No such element of damage was pleaded, and no testimony bearing thereon had been introduced. Even when instructions are strictly limited to questions in issue, it is not always easy for the trial court to cover them all fully and preserve the brevity, clearness and directness which are essential to a proper statement of the case, and it is neither proper nor desirable that its charge to the jury be confused with discursive directions as to matters not in dispute.

III. In conclusion, objection is made to the award of damages as being excessive in amount. In support of this contention, it is said that the damages so given are for pain and suffering alone, leaving the defendant still liable to another action in favor of plaintiff's husband for her loss of time and for expenses incurred. But counsel is not quite correct in this assertion. The petition sets up a claim not merely for pain and suffering, but for actual physical injuries of which the alleged pain and suffering were the accompaniments, and if the evidence in her behalf was believed by the jury, as it evidently was, it was sufficient to justify the finding that she sustained serious injury to her genito-urinary organs, resulting in an impaired state of health and the probable necessity of subjection to surgical operation. The compensation or damages which may be awarded for physical injury, impaired health and strength, bodily and mental pain and anguish, is not, and in the nature of things cannot be, the subject of any definite mathematical rule of statement or measurement. Indeed, "compensation" is a somewhat misleading term in this connec-

11. TRIAL: Verdict: \$2,500: excessiveness.

tion, and is made use of only because we have no other word more nearly expressing the thought of the law, which permits recovery for an imponderable and intangible thing for which there is no equivalent in terms of money. If the right to a recovery of this nature be established, the jury is charged with the duty of assessing such damages as, in its fair and impartial discretion, is the nearest practical approximation to what is called compensation in the business world. When it has done so, then, in the absence of other sufficient ground for ordering a new trial, the court will not interfere with the verdict, unless the amount assessed is so extraordinary as to clearly indicate that the jury was influenced by passion or prejudice, or by a radical misconception of its duty in the premises. We are not prepared to say that such is the showing in this case.

We find no reversible error in the record, and the judgment of the district court is therefore—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

J. E. CALHOUN, Appellee, v. C. B. ROBINSON, Appellant.

PLEADING: Amendment—Dictating into Trial Record. An amendment, dictated to the reporter and entered in the shorthand notes of the trial without objection by the other party, has the same standing as one made on separate paper, as required by Section 3603, Code, 1897.

EQUITY: Decree—Scope and Extent—Making New Contract for Parties. Equity, under a prayer for general equitable relief, may, in an action to enforce a contract *which proves utterly impractical*, so shape its decree as to depart from the strict terms of the contract when, by so doing, the actual purposes of the parties will be carried out and justice be done to both parties. So held where, by contract, a tile drain was to be placed in a

specified course across certain lands, which course proved utterly impracticable, owing to the topography of the land. See Section 3775, Code, 1897.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

MONDAY, JUNE 25, 1917.

ACTION in equity to enjoin defendant from laying certain tile from his land to a ditch on the plaintiff's land, contrary, as plaintiff alleges, to the terms of a written contract between the parties in reference thereto, by reason of which plaintiff alleges that defendant is collecting water from his land by tile drains and casting it upon the land of plaintiff. There was a decree for plaintiff, and the defendant appeals.—*Affirmed.*

Voris & Haus, for appellant.

A. W. Fisher and *C. W. Kepler*, for appellee.

PRESTON, J.—The petition alleged, in substance, that the parties were each owners of 40 acres of land, that of the defendant lying to the north of and adjoining plaintiff's land; that the north side of plaintiff's land is somewhat lower than the land of the defendant and is very level, having no ditch or watercourse through it, and slopes very gently to the south for some 55 rods, to an open or artificial ditch on plaintiff's land, running east and west, which last-named ditch carries off to the west the water entering it; that, while defendant's land is lower than plaintiff's, the same is very swampy and wet, and the water stands thereon; that, to carry off this surplus water, defendant has put in two strings of tile, each about 160 rods in length, and extending down to within a few feet of the south line of his land; that, where the said two strings of tile stop, near the line between the parties, the tile are at a depth of only about 18 inches from the surface; that the said tile empty their surplus water which is drained from defendant's land

on the surface, and it spreads out over about 10 acres of plaintiff's farm, making it too wet to farm; that said water so cast upon plaintiff's land would, if not so tiled, stand upon defendant's land until it soaked away or evaporated; that the flow of water upon plaintiff's land has been materially increased and materially damaged his land; that, in order to take care of the said surplus water, the parties entered into a written agreement on May 29, 1915, whereby defendant agreed to take care of the surplus water and to carry the same in a string of 6-inch tile to the east and west ditch south of defendant's line and across the land of plaintiff, and to put the said tile in the ground in good condition; that, notwithstanding the agreement, defendant has constructed a ditch across plaintiff's land from 16 to 25 inches in depth, and is intending to and will place the said 6-inch tile therein; that said agreement expressly states that the said 6-inch tile shall be put in in good condition, and in order to do so, the tile ditch should be from 36 inches to 42 inches in depth; that, when said 6-inch tile are so placed in the ditch, the top of the tile will be from 10 to 18 inches from the surface; that said defendant has also constructed his tile ditch lower through portions of this course than at the outlet of said ditch, so that the water will not run out of said tile, but will back up and fill the tile on plaintiff's land, causing the water to soak out through the tile and again overflow plaintiff's land, causing him irreparable injury; that the tile so placed at a depth of from 10 to 18 inches from the surface will be easily misplaced by the farming of the land, and will fill up in a short time, and will not discharge the water flowing into them from the defendant's land. He prays that defendant be restrained from putting in said tile at or near the surface, and that defendant be made to place the said tile in the ground at a depth of from 36 to 42 inches, to carry off the said water.

Answering, defendant admitted certain of the allega-

tions of the petition as to the lay of the ground, the tiling on his own land, and so on, and averred that the east and west ditch on plaintiff's land had been constructed many years ago, and had become enlarged so as to become a well-marked watercourse, with channels and banks; admits also the execution of the contract, and that it was in order to adjust the contention between plaintiff and defendant on account of the water flowing from the ends of defendant's two strings of tile; says that plaintiff knew, prior to the execution of the written contract, that defendant's tile drains were about 20 inches below the surface of the ground at their terminal points; that the written contract was entered into as a settlement of the controversy, and that thereby defendant was to put a 6-inch tile across plaintiff's land, to run south, or in a southerly direction; that, in compliance with the contract, defendant purchased sufficient 6-inch tile to connect his two tile ditches with the ditch on plaintiff's land, and began the laying of tile in a ditch dug for that purpose, just as deep in the ground as the same could be laid between the two ends of the said 6-inch tile and leave fall enough so that the water would flow in said tile, on account of the level condition of plaintiff's lands and the depth of the terminal points or ends of defendant's two tile drains and the depth of said ditch on the lands of plaintiff, and had the same nearly completed, when stopped from fully completing the contract by the temporary injunction; that the depth at which the said 6-inch tile would have to be laid between the terminal points of defendant's two strings of tile and the bottom of the ditch on plaintiff's land, and the level condition of plaintiff's land between, were known to plaintiff at and prior to the making and entering into the said written contract; that, had defendant been permitted to complete the laying of said 6-inch tile, same would completely carry off and discharge all the water from defendant's tile, and the 6-inch tile on plain-

tiff's land would have been of sufficient depth as to in no manner interfere with the successful cultivation of plaintiff's land.

The written contract provides:

"That, whereas the party of the first part (Robinson) has constructed two strings of tile of about 320 rods in length on his farm (description), and carries his surplus water from the said land down to and casts the same on the surface at or near the south line of the said land where the said tile empty all their water on the surface at or near the north line of the second party's land (description), causing the same to overflow on said land, and

"Whereas the party of the first part is desirous of taking care of said water and not allow the same to overflow land of said second party,

"It is therefore agreed by and between said parties that said C. B. Robinson, party of the first part, shall put in a string of 6-inch tile connecting with the two said strings of tile, and run the same straight south across the land of the second party to the creek about 55 rods south. Said party of the first part to furnish said tile, put the same in in good condition, and as all tile are placed in the ground, at his own expense, as soon as the weather and condition of the land will admit, but said party of the first part shall not be liable for any damages to the crops that he may injure while putting in said tile."

It will be noticed that, while the contract provides that defendant is to put in the 6-inch tile across plaintiff's land, which are to run straight south, it does not state the depth at which the same should be placed. There is testimony on behalf of plaintiff tending to show that the ground is a little higher immediately north of the east and west ditch than it is further north. It appears that plaintiff had prepared injunction papers against defendant, which were exhibited to the defendant on the day of, but prior to, the ex-

execution of the contract. It is quite clear from the record that the main purpose of the agreement was to enable defendant to take care of the surplus water which had been discharging on plaintiff's land, and plaintiff contends that the arrangement was for the benefit of the defendant, and that plaintiff consented to such arrangement as a matter of neighborly accommodation. The defendant began digging the ditch for the 6-inch tile at the east and west ditch on plaintiff's land, and worked north from this ditch. At this point, the east and west ditch is about 17 inches deep, where defendant began to tile, and about 12 inches wide, and increases as it goes west, both in depth and width.

The court, by its decree, found that it is impossible to place the 6-inch string of tile straight south from where the water is brought down and cast upon the land of plaintiff by defendant, owing to a rise in the surface of the ground near the open ditch, which rise of ground was unknown to the parties to the contract when the same was entered into; that the natural slope of the land from where the water is brought down and cast upon the land of plaintiff is south about 200 feet, thence gradually sloping in a southwesterly direction about 48 rods to the open ditch; that, owing to the rise of ground near the open ditch, defendant was unable to place the tile at the proper depth to carry off the water, and that said water remained on plaintiff's land, to his detriment; that the tile so placed in the ground should be removed; that, in order to carry out the agreement and intention of the parties to the contract, the tile should be placed where it can be laid at a proper depth, and carry off the said surplus water which the defendant cast upon the land of plaintiff; that plaintiff should remove the south 600 feet, or thereabouts, of the tile in the ditch now constructed, and fill the same at his own expense; that defendant could use said tile in a new ditch to be constructed as required by the

court. The decree required defendant to take up the north 200 feet of the tile now in the ditch and replace the same in the same ditch at the proper depth, not less than 30 inches from the surface of the ground, and to construct the rest of said ditch in a southwesterly direction from said point to the open ditch, about 48 rods southwest, and to properly lay said tile at a depth of not less than 36 inches, and that plaintiff should pay defendant the sum of 40 cents per rod for digging the said 600 feet of tile ditch so abandoned, and furnish at his own expense, for the defendant's use, not to exceed 5 rods of tile.

1. **Pleading:** 1. The prayer of plaintiff's petition
amendment: did not ask for general equitable relief.
dictating into The abstract recites that, before the evidence
trial record. was closed:

"At this stage in the proceedings, the plaintiff, by his attorney C. W. Kepler, asked leave of court to amend his petition by adding, 'For such other and further relief as to the court may seem proper,' and such attorney, C. W. Kepler, said, 'With leave of court first had and obtained, the plaintiff at the close of the testimony amends the prayer of his petition, and amendment thereto, by adding thereto: "And such other and further relief in equity as to the court may seem equitable and just between the parties."' No such amendment was ever made or filed in said cause, and nothing further done in relation thereto, and the above and foregoing leave to amend was asked as stated, and an oral statement of plaintiff's attorney in relation thereto as above quoted from the record."

We take it from this that plaintiff orally dictated into the record, which was taken down by the reporter, this so-called amendment, because the abstract recites that the statements so made were as quoted from the record. It is contended by appellant that the court had no authority to grant general equitable relief, because this amendment was

not made in accordance with Code Section 3603, which provides substantially that amendments must be made upon separate paper, which shall be filed, and constitute, with the original, but one pleading.

We think it is common practice for counsel, during the hurry of a trial, to dictate amendments or pleadings into the record, in order to save the time of the court. This is often done, with the consent of counsel, or sometimes it is so taken by the reporter and run off and filed afterwards. The defendant made no objection at the time to the amendment's being made in this manner, and made no motion to strike it because not filed in accordance with the statute. By his conduct, we think appellant consented to the amendment's being made in this way, and waived the objection now made, and that the court, in the determination of the case, properly considered this as an amendment to the prayer of the petition.

2. EQUITY: decree: scope and extent: making new contract for parties. Appellant's next proposition is that, and since the contract provided that the 6-inch tile should be laid by defendant straight south, the court had no authority to grant plaintiff the relief it did by requiring the tile to be laid in a southwesterly direction a part of the way. Reliance is placed upon Section 3775 of the Code, which provides:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he has demanded in his petition. In any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issue."

Cases are cited in support of the proposition. The thought of appellant is that the court made a new contract for the parties. Among other allegations of the petition, it is charged that the tile, as it was being laid by the defendant, was not deep enough to carry off the water into the open ditch, and that, as the tile was being laid, it was

throwing the water back on plaintiff's land. The petition asked, substantially, that appellant be decreed and ordered to place his tile over plaintiff's land so as not to damage him. This was substantially the prayer of his petition, especially so when, under the amendment, general equitable relief was asked. We think the relief granted was consistent with the case made by the petition and the answer, and therefore embraced within the issues.

There is testimony on behalf of the plaintiff, though denied by the defendant, that the lay of the land immediately north of the open ditch was higher than it was some distance farther north, and that it would be impossible for the water to flow into the open ditch through the tile laid at the depth and in the manner in which it was being laid by the defendant; and it is undisputed that, because the open ditch running east and west was deeper and wider a short distance west of a point straight south, and because of the lay of the ground, the tile could be laid in such a way and to such a depth as to carry off the water by running the ditch west and south to the open ditch. We think the evidence justifies such a finding.

We shall not review the testimony at length, because it is somewhat extended, and this point seems to have been really the main controversy on the trial. It is not our practice in equity cases to set out the evidence in detail, since it can serve no useful purpose. In addition to the testimony introduced on behalf of plaintiff, we think the physical facts are such as to corroborate his testimony at several points. The defendant admits that, as he at first prepared the ditch for the 6-inch tile, it was wrong; that the tile was lower some distance north of the open ditch than at the point where it empties into it; but he claims to have remedied it. He admits also that, during the progress of the work, plaintiff's attorney desired that he (defendant) should put the ditch deeper at the south end. The attor-

ney requested that he put it 3 feet deep, and defendant admits that he told the attorney he would put it deeper, provided plaintiff would furnish him an outlet. This could not be done at a point straight south, because the tile as laid into the open ditch was laid in the bottom of it. There was a dispute in the testimony as to some other points; for instance, as to whether the tile, as laid so near the surface, would be heaved by the frost, and as to whether horses would break through in farming, and as to whether the condition as described by some of the witnesses one time was not occasioned by the injunction's stopping the work so that the ditch became filled with mud, etc. But we do not regard these circumstances as controlling.

There was also testimony on behalf of plaintiff, though denied by the defendant, that, at the time of the execution of the written contract, it was not known that the land was higher just north of the ditch than it was farther north. It is contended by appellee that this was somewhat in the nature of a mistake, which, under the circumstances, a court of equity would be justified in considering, in order to carry out the purpose and intention of the parties. The recital in the contract that the 6-inch tile was to run straight south is a mere incident to the main purpose of the parties in entering into the contract. As before stated, it is clear that the purpose of the parties was to take care of defendant's surplus water, by taking it to the open ditch through a 6-inch tile, in order to relieve the defendant of threatened litigation, and that plaintiff should not suffer damage by reason of defendant's collecting the water and throwing it upon plaintiff's land. Under the circumstances, it was impossible to do this by carrying the water straight south, because to so do would nullify entirely the provisions and the main purpose of the parties in entering into the contract, and thus plaintiff would secure no relief whatever, and would be compelled to submit to the water's

being brought from defendant's land onto plaintiff's land, some 400 or 500 feet north of the open ditch. Running the 6-inch tile to the west and south, instead of straight south, would require the laying of about 10 rods more tile, and, under the decree, the plaintiff was required to bear a part of this expense, and plaintiff was also required to pay a considerable part of the expense of changing the course of the other part of the ditch, and the laying of the other tile. The plaintiff has not appealed, and makes no complaint of this, but we think the decree was just and equitable to the defendant in this respect.

It should have been stated before that the laying of the tile was not entirely completed, although the ditch for the 6-inch tile was dug from the open ditch on plaintiff's land to, or nearly to, the south end of defendant's two strings of tile; but the tile had not all been laid therein.

Appellees cites Story's Equity Jurisprudence (13th Ed.) Vol. 1, as follows:

"Sec. 27. But there are many cases in which a simple judgment for either party, without qualifications or conditions or peculiar arrangements, will not do entire justice *ex aequo et bono* to either party. Some modifications of the rights of both parties may be required; some restraints on one side or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some compensatory or preliminary or concurrent proceedings to fix, control or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries. In all these cases, courts of common law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form. From their very character and organization, they are incapable of the remedy which the mutual

rights and relative situations of the parties, under the circumstances, positively require.

"Sec. 28. But courts of equity are not so restrained. Although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties."

Appellee contends that the decree of the trial court was more favorable to the appellant than to the appellee; but, as said, appellee makes no complaint of this. At any rate, applying the rule as laid down by Story, we think the court was warranted in rendering the decree it did, which enables the parties to carry out the purpose of the contract and metes out substantial justice to the parties.

It is our conclusion that the decree of the trial court was right, and it is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

GEORGE B. CARLISLE, Administrator, Appellant, v. SELLS-FLOTO SHOWS COMPANY, Appellee.

NEGLIGENCE: Acts Constituting—Obstructing Street with Circus

- 1 —**Evidence.** Unloading, under municipal license, a circus and attending paraphernalia in a public street, does not necessarily constitute a public nuisance, under Section 5078, Code, 1897. Evidence reviewed as to the manner in which the unloading in question was done, and held not to show negligence.

NEGLIGENCE: Acts Constituting—Menagerie on Public Street—

- 2 **Odor of Animals—Fright of Teams.** Taking a lawful thing upon a public street, with a degree of care commensurate with

the danger, excludes all basis for a charge of negligence, even though the thing so taken upon the street is liable to frighten horses thereon. So held as to a licensed menagerie, in brilliantly painted wagons and flapping canvas, with an odor from the animals which was calculated to frighten horses.

NEGLIGENCE: Acts Constituting—Acts not Negligent Per Se—

3 Necessity for Evidence. An act not negligent *per se* may not, manifestly, be denominated negligence, unless accompanied by evidence so showing. So held where negligence was sought to be predicated on the flapping of canvas on circus wagons, but the record revealed no evidence beyond the naked fact that there was a high wind.

NEGLIGENCE: Acts Constituting—Absence of Barricades and

4 Warnings—Self-Evident Dangers. Omitting barricades and warnings furnishes no basis for a charge of negligence, when the dangers sought to be guarded against are equally evident to everybody. So held where deceased was killed by a team frightened by the unloading of a menagerie.

NEGLIGENCE: Acts Constituting—Attractive Nuisance—Unload-

5 ing Menagerie. Negligence may not be pronounced on the mere act of unloading a menagerie from railway cars in proximity to a schoolhouse.

PLEADING: Amendments—Related Amendments. Amendments

6 setting up new claims and issues, filed *subsequently to the overruling of a motion for a new trial*, without the express or implied authorization of the court, and without the knowledge or consent of opposing counsel, are wholly unauthorized and properly stricken on motion. So held where an amendment so filed embraced several new and distinct grounds of negligence.

PLEADING: Motions—Motion to Strike—Negligent Delay. A de-

7 lay of some four months in moving to strike an unauthorized pleading will not be considered dilatory, when counsel, until the expiration of said time, had no reasonable occasion to know that such a pleading had been filed.

Appeal from Polk District Court.—WM. H. MCHENRY,
Judge.

MONDAY, JUNE 25, 1917.

ACTION for damages to the estate of a child seven years old, killed by a team which was frightened by the un-

loading of the paraphernalia of a circus and the accompanying menagerie into the street, resulted in a directed verdict for defendant, and judgment thereon. The plaintiff appeals.—*Affirmed.*

E. C. Corry and Nesbitt & Johnston, for appellant.

Carr, Carr & Evans, and John T. Bottom, for appellee.

LADD, J.—I. The defendant is a corporation organized under the laws of Colorado, and engaged in the business of making circus and menagerie exhibitions in different cities of the country, traveling by railway. It entered the city of Des Moines, May 17, 1906, having obtained a license from the city authorities to parade the streets and give an exhibition, and proceeded to unload from the train, in Southeast Fifth Street, where it crosses the tracks of the Chicago, Burlington & Quincy Railway Company, horses, wagons, light and heavy, tents and other accoutrements, elephants, camels, and animals in cages on wagons, some of them with canvas flapping. The wagons were run from the ends of the flat cars over plank to the ground, pulled into the street north of the tracks, and backed on each side of the street. Animals were making the usual noises on being disturbed. A number of wagons were left south of the tracks on the west side of the street, and on the east side, near the unloading, were the spectators, among whom was Roscoe Carlisle, seven years of age, who had left home at about 8:30 A. M. About this time, one Ungles approached from the north, driving a team of horses attached to a bakery wagon, and, when about 40 or 50 feet north of the tracks, he was signaled to stop, by the person superintending the unloading. After the wagon being taken from the cars was hauled to the north past Ungles's team, the superintendent motioned him to proceed. The horses, though gentle, were excited and had been rearing about; and, as Ungles loosened the reins, they plunged forward, and ran

at full speed for some distance before he regained control of them. As they neared where the decedent was standing, he undertook to cross the street, apparently to avoid them, and was run down, and so seriously injured that he died the same day.

It was made to appear that the odor of wild animals caused fear in horses; that the street was one of those most traveled in the south part of the city, and of unusual width between the curbs; that there were no ropes nor barricade along the street, nor guards on the ground to warn spectators or drivers of danger; and that, after the wagons were placed in the street, teams of 2, 4, 6, or 8 horses were hitched to the wagons, and these hauled to the grounds for the exhibition, on East Twentieth Street. This is a suit to recover damages to the child's estate consequent on his death; and, as a verdict was directed for defendant, the sole inquiry is whether the evidence was sufficient to carry to the jury the issues raised.

The grounds of negligence charged in the petition are that defendant, "disregarding its duty to protect the citizens and public from dangers resulting from the nature of unloading show equipment, animals, etc., and disregarding its duty to keep the street in a reasonably safe condition, did carelessly and negligently commit a nuisance by unloading the same in the street without providing any safeguard to the public whatever, and without providing any agents or employees to warn the public, or to prevent the children from the school near by to be attracted on the street and subjected to the dangers necessarily arising from the unloading of the brilliantly painted wagons, filled with animals, on the street."

What seems to be charged is the commission of a public nuisance by obstructing or incumbering a public street otherwise than by fences or buildings. Sections 5078,

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5081. Code. If so, it is plain that the evidence was not such as to warrant an affirmative finding on the allegations. Such exhibitions are not necessarily unlawful. Power to regulate, license or prohibit circuses and menageries is expressly conferred on cities and towns. Section 703, Code. Only when given in disregard of the exercise of this power can they be said to be unlawful. The defendant had obtained a license from the city authorities to parade its streets and to give exhibitions. The latter were to take place on grounds at the corner of Grand Avenue and East Twentieth Street. The train containing paraphernalia of the circus and the menagerie was on the side track of the Chicago, Burlington & Quincy Railway Company, south of what are known as the old depot grounds, and was being unloaded by hauling the wagons to the ends of the cars, and then on plank extending from the ends to the ground in Southeast Fifth Street. The main track also was on this side of the grounds, while another side track extended north thereof, and, as we understand it, a spur track ran across said grounds. The depot was unoccupied. The area of the grounds does not appear, though referred to by some as a vacant lot. A witness, George Eaton, well described the situation and the manner of unloading the cars:

"They were unloading some of the wagons from the cars, and a crowd of people standing around here and there and every place. They were unloading these heavy wagons. There was a canvas over most of them, and they were loading them from the east to Fifth Street. The car stood east of Fifth, and the gang plank ran down to the approach of the cars there and landed them on Fifth Street crossing, and trailed them over there north to the K. D. tracks, come across the K. D. tracks on both sides of the street. They had a couple of snub teams with snub ropes. I should think about 25 feet. A man walks on the edge of the car, and hooks the ring on the corner of the wagon.

another man driving the team from the back end of the gangplank. A couple of fellows with poles guide the wagons as they came along, and another fellow there with a team to haul them up. Fifth Street was paved to the Q. tracks. When they came down into the paved street, they generally stopped the wagons within 7 or 8 feet of the gangplank with the snub rope. They had an extra team there to snap on them to pull them away. As these wagons came off of the cars, they snap an extra team and pull them up the road north as far as the K. D. tracks. Then they hooked 4 to 6 and 8 head of them to pull them to the ground. I never paid any attention as to how long any particular wagon was left, but there was, I should judge, 15 or 20, and maybe more wagons standing there at a time, from the time they began until they got them all off. There were not so very many people on the west side of the street where I was standing, but there was quite a few on the east, men, women and children."

Ponies had been placed on the depot grounds—how many does not appear. It is apparent that the wagons must have been unloaded from the ends of the cars; for, without the great inconvenience of turning on the car, these could not have been taken from the side, and, as the tracks were considerably above the surface on either side except at the crossing, they must have been taken down on the street, if unloaded at the ends of the cars. As they were to be hauled away to the show ground as soon as the facilities had would permit, it ought not to be said that defendant was negligent in backing the wagons to the curbing on either side of the street, with tongues diagonally toward the center, so that the 2, 4, 6 or 8-horse teams might be conveniently attached thereto when hauling them away. The way between these rows of wagons appears to have been kept open, save during the process of lowering from the cars, and occupancy of the street during these brief

intervals could not well have been avoided. To have hauled the wagons therefrom over on the depot grounds, and shortly thereafter to have attached the teams thereto and hauled them back again to the highway, would seem useless, and not calculated to relieve the situation or to have rendered passing along the street less dangerous. Indeed, it would seem that such a course would have tended to create confusion and would have increased the danger in the making use of the street. The system, while making full use of the street, had the virtue of simplicity, and, in so far as the record discloses, the unloading proceeded in an orderly fashion and with great rapidity. Besides, there is nothing in the record indicating that the depot grounds were suitable for use for storing the wagons thereon, or that they were large enough for handling them and the many horse teams thereon.

But it is said that the odor from the animals, the noises by them emitted, were calculated to frighten the horses; and this was proven to be so. That something is calculated to scare horses, however, will not require it to be kept from the street. Run-

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ning a wheelbarrow or engine or other vehicles on the street has that tendency. In *Bostock-Ferari Amusement Co. v. Brocksmith*, (Ind.) 73 N. E. 281, the judgment defendant's employee was leading an ugly-looking but docile bear, securely chained, along the street, when complainant's horse became frightened, and in a suit, he recovered for consequent damages. In reversing the judgment, the court, speaking through Comstock, C. J., said:

"The liability of the appellant must rest on the doctrine of negligence. The gist of the action as claimed by appellee is the transportation of the bear, with knowledge that it was likely to frighten horses, without taking precaution to guard against fright. An animal *ferae naturae*,

reduced to captivity, is the property of its captor. 2 Black. Comm. 391, 403; 4 Black. Comm. 235, 236. The owner of the bear had the right to transport it from one place to another for a lawful purpose, and it was not negligence *per se* for the owner or keeper to lead it along a public street for such purpose. *Scribner v. Kelley*, 38 Barb. 14; *Macomber v. Nichols*, 34 Mich. 212 (22 Am. Rep. 522); *Ingham on Law of Animals*, 230. The conducting of shows for the exhibition of wild or strange animals is a lawful business. The mere fact that the appearance of a chattel, whether an animal or an inanimate object, is calculated to frighten a horse of ordinary gentleness, does not deprive the owner of such chattel of his lawful right to transport his property along a public highway. *Macomber v. Nichols*, *supra*; *Holland v. Bartch*, 120 Ind. 46 (22 N. E. 83, 16 Am. St. Rep. 307); *Wabash, etc., Co. v. Farver*, 111 Ind. 195 (12 N. E. 296, 60 Am. Rep. 696); *Gilbert v. Flint, etc.*, 51 Mich. 488 (16 N. W. 868, 47 Am. Rep. 592); *Piollet v. Simmons*, 106 Pa. 95 (51 Am. Rep. 496). One must use his own so as not to unnecessarily injure another, but the measure of care to be employed in respect to animals and other property is the same. It is such care as an ordinarily prudent person would employ under similar circumstances. This is not inconsistent with the proposition that, if an animal *ferae naturae* attacks and injures a person, the negligence of the owner or keeper is presumed. The evidence is that the horse was of ordinary gentleness, but this fact would not deprive the appellant of the right to make proper use of the street. If the bear had been carelessly managed, or permitted to make any unnecessary noise or demonstration, it would have been an act of negligence. It is not uncommon for horses of ordinary gentleness to become frightened at unaccustomed sights on the public highway. The automobile, the bicycle, the traction engine, the steam roller, may each be frightful to

some horses, but still they may be lawfully used on the public streets. King David said, 'An horse is a vain thing for safety.' Modern observation has fully justified the statement. A large dog, a great bull, a baby wagon, may each frighten some horses, but their owners are not barred from using them upon the streets on that account. Nor, under the decisions, would the courts be warranted in holding that the owner of a bear, subjugated, gentle, docile, chained, would not, under the facts shown in the case at bar, be permitted to conduct the homely brute along the public streets, because of his previous condition of freedom."

In *Scribner v. Kelley*, 38 Barb. (N. Y.) 14, a like doctrine was applied to an elephant.

"Wild animals collected and moved about the country for exhibition are always more or less likely to frighten domestic animals, but they may, nevertheless, be lawfully taken on the public highway under proper precautions." *Macomber v. Nichols*, 34 Mich. 212.

All exacted of defendant in unloading the train, or in hauling the brilliantly painted wagons and the animals along the street, was that ordinary care—that is, that degree of care commensurate with the danger therein—be exercised; and a thorough examination of the record before us has not disclosed any omission to do so. Owing to the distance to the show ground, the unloading proceeded faster than the wagons were drawn away; but these could not well be precisely timed, and the circumstance that 15 or 20 wagons, instead of a lesser number, stood at the street side, cannot be said to have increased the danger to passage. The matter of numbers could not be said to have determined the effect of the odor or noises on the passing horses. For all that appears, there is no room for saying that a brilliantly painted wagon or a sin-

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gle caged tiger would not have produced as great fear in the passing team as if it had been accompanied by other wagons or by cages containing other animals. There was a high wind, and there appears to have been some flapping of canvas, but whether this was due to leaving parts flying, or too loosely drawing over the bows or frame, or some other cause, does not appear. How such canvas should have been secured, or whether the flapping was incident to the unloading of the cars, was not explained in evidence, and we are not ready to say that knowledge of these matters is so common as that the jurors are to be assumed to know without proof. It is possible that, owing to the heat of the summer, a portion of the covering was removed, and that the so-called flapping resulted from this. However this may be, certain it is that matters of this kind are incident to changes such as were being made, and, being temporary, are not, in the absence of other evidence, to be denounced as constituting negligence. There was no showing that wagons and their covering were other than are ordinarily employed in transporting wild animals, nor that the unloading was done otherwise than in the usual manner. George Eaton was asked if this circus was different from any other, and answered :

“Why not so much as I could see, more than they were—seemed to be noisier, and practically a little later than the others. Q. They were in a little bigger hurry on account of being a little late in the morning? A. I should judge that was their reason for being in a little bigger hurry. They were moving these wagons away pretty rapidly. As fast as they could get them off the car, they had an extra team there, a man carrying doubletrees, and another man holding the lines. These 4 and 6 and 8 horses hauled these wagons up to Grand, and out to Twentieth. The circus grounds was at East Twentieth. That was the regular circus ground. The manner of taking the wagons off the

cars was the same as I have always seen other circuses, practically."

Another criticism is that no barricade was placed to keep the people present back, or to warn them of the danger of passing teams. Though the license to parade and exhibit impliedly authorized the defendant to unload into the street for these purposes, it did not confer upon it the right to obstruct the street in so doing, further than essential in accomplishing the purpose. No danger from the mere unloading was shown to have menaced those present. They had the right to the use of the street, the same right as did defendant, and there was no showing whatever that they unduly obstructed the street or stood otherwise than they would had a rope or other obstruction been on the streets, or that defendant was authorized to exclude them therefrom by such means. Nor can it be said that any warning by agents or others was essential to apprise those present of the danger incident to their location. All stood on the street side, and, for all that appears, the child would have been as likely to have undertaken to escape from harm from the approaching team with a side barricade or rope as without. The situation was as apparent to those present as agents of defendant might have made it, and we are not inclined to say that defendant was lacking in care because of omitting the construction of a barricade or stretching a rope, or in not undertaking to warn people of danger which was as apparent to them as to the employees of defendant.

Appellant argues as though defendant's superintendent directed Ungles to drive his team through. He had no control over Ungles or his team, nor had he the right to dictate when and how he might use the street. All the superintendent undertook to do was to signal the team to stop until the wagon being taken from the car was hauled

out of the way, and when this was done, to signal that the way was clear. He cannot be said to have breached his duty to Ungles or the public in any respect. Whether Ungles, in persisting in driving his team ahead under the circumstances, was negligent, we have no occasion to determine.

The criticism for unloading in the proximity of a schoolhouse and failing to prevent the children from being attracted by the unloading of the train would seem to require no attention. As long as children are curious to know, they will be attracted by the unusual, and there is a well-grounded suspicion that, with respect to the circus and menagerie, adults are not different; and it would be casting entirely too great a burden on exhibitors of animals to exact of them the prevention of the attracting of young or old to whatever place these are being handled or exhibited. Nor does it appear that the deceased or those present were exposed to the slightest danger by the mere unloading of the animals. This was done in a lawful manner, and the injury resulted from the fright of a team, improvidently driven, when known to be frightened, through the zone of the odor and the noises of wild animals and the unusual equipments incident to the giving of exhibitions of the kind. That such exhibitions are lawful is put beyond all question by the authorities, and, this being so, the use of the street in the manner shown cannot be denominated as wanting in the exercise of ordinary care, nor within the prohibition of Section 5078 of the Code. The court rightly directed a verdict for defendant.

II. On the day after the verdict, which, on motion, was directed for defendant, counsel for plaintiff filed an amendment to the petition, stating eight grounds of neg-

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6. PLEADING:
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ligence. This was without having obtained leave of court, unless this happened by acquiescence. This amendment is included in the abstract, and, on August 15, 1916, counsel for defendant moved that the record be corrected by expunging said amendment and striking same from the files, on the grounds: (1) That the same was filed without leave of court; and (2) neither the defendant nor the court had knowledge of the filing of the same. This motion was sustained, and from the ruling, plaintiff has appealed. Several errors are assigned.

(a) The first is that appellee was dilatory in filing the motion. It appears that the original abstract was filed March 27, 1916, and plaintiff's brief, August 8th following, and counsel for appellee contends that their attention was first directed to this amendment upon reading of appellant's argument. The attorney who had entire charge of the case testified, in support of his motion to correct the record, that he was in California when the abstract was served, and, upon his return, stayed away from his office for some time, by direction of his physician, and that, upon beginning work again, other matters demanded attention, so that he did not examine the abstract until appellant's brief was served, and that, prior to that time, he knew nothing of the amendment's having been filed. Evidently counsel's delay in discovering the amendment and filing the motion to correct the record was excusable, if he was without knowledge that such an amendment was to be presented; for there was no occasion for giving the appeal attention until this was required in order to amend the abstract or prepare the brief in time for submission in this court.

(b) It is insisted, however, that both counsel and court had knowledge of what was to be included in the amendment, and that it would be filed before the court ruled on the motion to direct verdict. The attorney who

7. PLEADING: motions: motion to strike: negligent delay.

tried the cause for defendant and was present and orally argued this motion testified that he did not know that there was an amendment until he observed the printed copy in the abstract; that, if anything was said in oral argument about an intention of filing one, or the contents thereof, he was not present when this was done, and that the proposition to so file would have been so unusual that he would have remembered it had it been made. At appellee's request, the trial court made a statement as follows:

"When I ruled on the motion for a new trial, I had no knowledge there was any amendment on file at all. When I ruled on the motion to direct a verdict, I had no agreement or understanding with anybody that an amendment was to be filed whatever. I never make such an agreement with anybody, for it is surely difficult enough for a court to rule correctly upon things that are on file, and on which he has knowledge, and I would never attempt to rule upon allegations of negligence that were not made when ruled upon and were to be made in the future."

On the other hand, one of the attorneys for plaintiff swore that, in making oral argument, in resistance of the motion to direct a verdict, in the course of argument he said:

"We would want to amend our petition, setting out specifically the grounds of negligence. Not that I thought it was necessary, but in order that the grounds might be set out more clearly, and that the pleadings and the proof might conform in any event."

He stated also that he had a sheet of paper on which the said grounds to be included in the amendment were written, and read them to the court in presence of appellee's attorney. Another of appellant's attorneys testified that, in his argument, he directed attention to the evidence bearing on each ground of negligence alleged in the amendment, and urged these facts as being negligent acts, and that he attached to the motion for new trial a written argument

directing attention to all the grounds of negligence alleged in the amendment, and that the court read the same. He also testified in corroboration of what the previous witness had said concerning the filing of an amendment, as also did another attorney. But, though the grounds stated in the amendment were referred to in the written argument attached to the motion for new trial, the amendment was not mentioned. Nor was the court's attention called thereto upon the filing of the amendment. It will also be noticed that nothing was said as to when the proposed amendment was to be filed. Nor does there seem to have been any reason for delaying the filing thereof until after the ruling on the motion to direct a verdict, for counsel had the noon recess of two hours within which to prepare the paper, and, as the ruling was made at about 3:30 o'clock in the afternoon, probably time for that purpose would, on request, have been allowed by the court. It is not claimed that the court granted leave or assented to the subsequent filing of an amendment, save by acquiescence. But for the motion to strike, the amendment could not well have been considered. *Hartkemeyer v. Griffith*, 142 Iowa 694. Amendment to answer may be filed only on leave, but, if filed without leave, will not be stricken on motion, if leave might properly have been granted upon application. *Hanson v. Cline*, 142 Iowa 187; *West Side Lumber Co. v. Hathaway*, 115 Iowa 654; *Rice v. Bolton*, 126 Iowa 654. An amendment to conform the pleadings to the proof is permitted, even after verdict, and, as judgment is to be entered immediately upon the return of the verdict, after the entry of judgment. *O'Connell v. Cotter*, 44 Iowa 48; *Cole v. Thompson*, 134 Iowa 685; *Squires v. Jeffrey*, 101 Iowa 676; *Gray v. Sanborn*, 178 Iowa 456; *Matthys v. Donelson*, 179 Iowa 1111; *Davis v. Chicago, R. I. & P. R. Co.*, 83 Iowa 744. Under the guise of so doing, however, new claims, causes of action or new issues may not be injected into the pleadings. In

speaking on this subject in *Bicklin v. Kendall*, 72 Iowa 490, and referring to the section of the Code of 1873 of which 3600 is a copy, Beck, J., observed:

"Code Section 2689, which permits a party 'at any time' to amend his pleadings, contemplates that it shall be done pending the proceedings in the case, and not after the case is decided, the rights of the parties settled, and a judgment entered finally disposing of the questions involved. If a party may amend a pleading in nine months or a year after final judgment, he could do so in five or ten years. Judgments are settlements of controversies, and parties cannot be permitted to relitigate, after judgments, by filing new pleadings raising new issues. Amendments under the statutes, in proper cases, may be 'at any time' during the pendency of the action; but when there ceases to be a case for litigation, when the plaintiff's claim is merged in a judgment, and the rights of the parties involved in the issues are decided and settled by a judgment, then all pleadings must cease. It may be that after judgment an amendment may be permitted to conform a pleading to the proceedings, but this is very different from an amendment setting up new claims or new issues."

In *Harrington v. Christie*, 47 Iowa 319, the court refused leave to file an amendment, after verdict, 'alleging that annual interest had not been paid, and the court, in approving of the refusal of leave, said:

"It was not a mere amendment to make the pleading correspond with the proof. It was a material allegation upon which the defendant would have had the right to take issue."

These and the other cases cited indicate plainly enough that new issues or allegations of negligence may not be added by amendment to the petition, or new defenses to the answer, after submission or verdict, and that, at best, amendments then filed are only permissible to clarify these,

or make them more specific, and possibly add matters uncontroverted, or rectify an inadequate prayer, as in *O'Connell v. Cotter*, supra. The amendment in this case adds new and distinct grounds, as: (1) In unloading the wagons into the street and passing the team of Ungles while the canvas on the wagons was loose and flapping; (2) in moving the wagons over loose pieces of sheet iron on the flat cars, thereby making loud noises calculated to scare horses; (3) in motioning Ungles, when his team was frightened and trying to escape, to stop it in the street, and proceeding to unload the wagon in front of the frightened horses; (4) in beckoning Ungles to drive the team across the track when in a frightened condition and trying to escape, without attempting to assist the driver in controlling the team, or to protect the people; (5) in hauling the wagons taken from the cars past Ungles' team on the left-hand side of the road, contrary to Section 1569 of the Code; (6) in failing to unload the cars on the vacant depot grounds instead of into Fifth Street; and (7) "in collecting its wagons and other material on East Fifth Street when there was ample room to have collected the same on the open space on the old depot ground."

Some of these may touch the allegations in the original petition, but manifestly not for the purpose of clarifying or rendering these more specific. All, with the possible exception of the 4th and 7th, assert entirely new grounds of negligence, and for this reason, the amendment was not such as was permissible subsequent to verdict returned, unless, as contended by appellant, a proposition to so amend was made prior to the submission of the motion to direct; and, as to that, more later on. It was not an amendment to conform the pleadings to the proof, but to assert new grounds of negligence; and, though the evidence may have borne on some of these, all introduced was admissible and received on the allegations

of the petition. *Dikenberry v. Edwards*, 67 Iowa 14. To have granted leave to amend, and thereby to import these new issues into the case subsequent to the ruling on the motion, would have authorized the allegations to be changed after judgment. We entertain no doubt that to have granted leave to amend under these circumstances would have been bad practice and intolerable, in the absence of the consent or full acquiescence of counsel for the adverse party. If, for any reason, counsel has not been able to reduce to writing the amendment proposed, time should be allowed. Surely, the court, before making the decisive ruling in a case, should have exact knowledge of the precise issues being passed on, and as surely, is counsel entitled to be advised of what the claims of the adverse party are, before submitting his motion to direct. Only with such knowledge will he be able to conform his motion to the issues, or properly argue the questions involved. For these reasons, the court, as well as opposing counsel, might well have assumed that, if counsel suggested an amendment, this would be filed before the ruling on the motion to direct. It is urged that the court's remarks in ruling on the motion indicated that he was passing on the grounds found in the amendment said to have been proposed, but all said had a direct bearing on the allegations of the petition, and the matter of a possible amendment was not even hinted at. Even if some remarks might be construed as referring to grounds therein, these might well have been in response to arguments of counsel. In any event, the record contains no intimation of an intention on the part of counsel for appellant to file an amendment to the petition subsequent to the ruling on the motion to direct, and, even though there may have been talk of filing an amendment, both the court and counsel for defendant had the right to assume from the failure to do so that such purpose had been abandoned. One of the con-

sequences of argument often is that opposing counsel and litigants are convinced that their positions are fallacious, and, as a result, these are abandoned. We do not say that this was true of counsel for appellant, but the court and counsel for defendant had the right to rely upon this having been done. It must not be inferred that we are inclined to hold that a cause of action was made out on the issues raised by the amendment. We merely say that these were not before the court, and that, even though the matter of filing an amendment may have been mentioned by appellant's counsel, as claimed, it was to be inferred that this was intended to be done prior to the ruling, and that, in the absence of leave granted, the court and counsel for the adverse party had the right to assume that the purpose to amend had been abandoned. It follows that the motion to correct the record by striking the amendment was rightly sustained.

Motion to strike appellee's amendment to abstract is overruled.—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

CEDAR RAPIDS & MARION CITY RAILWAY COMPANY, Appellant, v. CITY OF CEDAR RAPIDS, Appellee.

MUNICIPAL CORPORATIONS: Public Improvements—Street Railways—Tracks on Paved Street—Reimbursement of Property Owners. A street railway company which, under franchise, lays its tracks upon a paved street, prior to any legal proceedings by the city to repave the street, and in so doing replaces, in accordance with the franchise, the old pavement in the space between its rails and one foot outside thereof with a new pavement, becomes obligated to pay the city, for refund to the abutting property owners, the reasonable value of the old pavement removed, even though, following the laying of the tracks, the

city did proceed to repave said street; and especially is this true when the necessity for repaving was traceable, in some degree, to the damages done to the old pavement by the company in laying its tracks. Sec. 835, Code Supp., 1913.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

MONDAY, JUNE 25, 1917.

JUDGMENT was entered in the court below against appellant for the value of old paving injured while laying its tracks upon a portion of Third Avenue in the city of Cedar Rapids. The facts are stated in the opinion.—*Affirmed.*

Barnes, Chamberlain & Randall, for appellant.

O. N. Elliott, F. H. Randall, F. F. Dawley and C. F. Luburger, for appellee.

MUNICIPAL
CORPORATIONS:
public improve-
ments: street
railways:
tracks on paved
street: reim-
bursement of
property own-
ers.

STEVENS, J.—On March 17, 1913, the city of Cedar Rapids granted to appellant a franchise to construct certain additional tracks and to operate its railway upon and over a portion of Third Avenue in said city. As a part of the conditions on which the franchise was granted, appellant agreed to, and did, pave the street between the rails and double track and for one foot on each side of the outer rail, and also to reconstruct such curbing as was rendered necessary by the company improvement. On June 12, 1914, the city council passed a resolution fixing the value of the old pavement at the sum of \$1,344, and requiring appellant to deposit with the city treasurer such sum as rebate to the property owners on account of damages to the old paving as required by Section 835 of the Code. The resolution adopted by the city council found the value of the old paving on Third Avenue from Fourth to Twelfth Streets to be

40 cents per square yard, and from Twelfth to Beaver Streets to be 60 cents per square yard. Upon receiving notice of the above resolution from the city clerk, appellant filed objections thereto, urging, among other grounds, the following: (a) That the price fixed for the old paving was excessive; (b) that the old paving was practically worn out and worthless; (c) that the city council had, about the time of granting the franchise, agreed to order the street in question repaved, at the time the work of appellant was to be done; and (d) that the entire space occupied by the new tracks was repaved by appellant, and that no charge should be made against it on account of the old paving.

These objections being overruled by the city council, the street railway company appealed to the district court of Linn County, where said cause was tried before the court upon a stipulation, and without formal pleadings. The stipulation, in substance, provided that the court should determine: (a) Whether the railway company was liable for the value of the old paving; (b) that, in the event the court so found, it should fix the amount to be paid by the railway company. The cause was tried to the court, and judgment was rendered against the defendant for \$672. Defendant appeals.

I. It is contended on behalf of appellant that the city council was proposing to repave the street in question at the time it was granted the franchise in question; that said street was shortly thereafter repaved; and that, under Section 835 of the Code, it was not liable for the value of the old paving or for injury or damages thereto. This section provides:

"Before any street railway company shall lay its track upon any street that has been paved, and which at the time is not being repaved, it shall pay into the city treasury the value of all paving between its tracks, and one foot

outside thereof, which value shall be determined by the city council, but in no case shall exceed the original cost of the paving, and the money thus paid shall be refunded to the abutting property owners on said street in proportion to the amounts originally assessed against the property abutting thereon."

Evidence offered upon the trial showed that, on July 10, 1914, a resolution of necessity providing for the repavement of the street in question was filed in the office of the city clerk, and, on the 7th of the following month, same was passed by the city council. On the 18th day of August, a resolution ordering the repavement of the street in question was passed by the city council, and, on the 28th day of the same month, a contract for the work was let to the Ford Paving Company of Cedar Rapids. The bid of the Ford Paving Company proposed to allow the city 20 cents per square yard for the brick in the old paving. Other contractors proposed to allow from 28 to 40 cents per square yard therefor. The franchise above referred to required appellant to complete its contemplated improvement on or before January 1, 1915. The evidence showed that, in making its improvement, appellant to some extent disturbed and injured the old paving. The resolution passed by the city council August 4, 1914, took cognizance of this fact, as it recited that—

"Whereas, owing to the double track on Third Avenue from Fourth to Fourteenth Streets, the old brick paving has become disturbed, and the street is in a very unsatisfactory condition."

It is also claimed by appellant that, at the time the franchise was granted to it, it was understood that the street in question was to be ordered repaved by the city authorities.

The exact time is not shown when appellant completed its improvement, nor when the street in question

was repaved; but the resolution ordering the repaving provided that the work should commence on the 28th of August, 1914, and be completed on the 15th of October of the same year. Presumably, the work was done within the time required. The objections filed by appellant to the resolution June 12, 1914, were doubtless filed within a few days after said date. The record is that same was filed "immediately thereafter." It was stated, in the objection filed on the above date, that the entire space occupied by the new tracks had been entirely repaved by appellant, so that it may be assumed that its improvement had been completed prior to the adoption of the resolution of June 12th. At this time, no steps had been taken by the city council for the repaving of the street in question; but, as above stated, the resolution of necessity was filed in the office of the city clerk for public inspection on July 10, 1914. It appears, therefore, from the evidence, that the repaving of the street in question was not ordered by the city council until after the completion of appellant's improvement; hence, the street was not being repaved at the time appellant was laying its new tracks.

This statute, however, required appellant to pay to the city treasurer the value of the old paving, same to be fixed and determined by the city council. The resolution passed was in compliance with the statute, and for the purpose of informing appellant of the value fixed by the council of the old paving, and to demand the payment to the city treasurer of the amount thus fixed. This being true, the court rightly found that the street railway company was liable, and should pay to the city treasurer the value of the old paving.

The purpose of the statute evidently is to preserve to the property owners the fair value of the old paving. The evidence showed that, while the paving was in bad condition and would soon have to be replaced, it was of some

value to the property owners, and, under the provisions of the statute, it was the right of the city council to fix the reasonable value of the old improvement, and the duty of appellant to pay to the city treasurer the sum so fixed by the city council, for the use and benefit of the owners of the property abutting upon the portion of the street in question.

II. The only remaining question requiring the consideration of the court relates to the amount of the damages allowed. Upon this point, the evidence was in conflict, but tended to show that the pavement had been laid a good many years; that it was badly worn, and that the street was much in need of new paving; but the successful bidder for the work of putting in the new pavement proposed to allow 20 cents per square yard for the old brick. This is substantially the value found by the court. We see no reason for interfering with this finding. In any event, the question under the stipulation was one of fact, and, under the well-known rules of this court, has the effect of a verdict of the jury, and will not be interfered with on appeal, where there is a conflict in the evidence.

The amount found by the trial court appears to have been well sustained by the evidence. We discover no reversible error in the record, and the judgment of the lower court should be affirmed.—*Affirmed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

FRANCES GLENDY, Appellant, v. NATIONAL TRAVELERS BENEFIT ASSOCIATION, Appellee.

INSURANCE: Accident Insurance—Negligent Failure to Issue Policy—Evidence. Evidence reviewed, in an action for negligence in the non-issuance of a policy of accident insurance, and, in view of the short time elapsing between the making of the ap-

plication and the injury of the applicant, and the further fact that payment of the required first premium was not made to an alleged agent until less than two days prior to said injury, held not to establish the negligence charged.

TRIAL: Directed Verdicts—Overruling Motion—Right to Change
2 Ruling. The overruling of defendant's motion for a directed verdict at the close of plaintiff's evidence is no obstacle to sustaining the same motion at the close of defendant's evidence, *when, as a matter of fact, plaintiff's evidence has at no time been sufficient to present a jury question.*

APPEAL AND ERROR: Review, Scope of—Questions Failing to
3 Disclose Proposed Evidence. When the form of a question does not disclose (a) what the answer would have been, or (b) whether its exclusion was prejudicial, counsel must disclose what fact he desires or expects to prove, in order to render the objection to its exclusion reviewable.

Appeal from Tama District Court.—B. F. CUMMINGS,
 Judge.

MONDAY, JUNE 25, 1917.

ACTION at law to recover \$1,000 on account of the alleged negligence of the defendant and its agents in not issuing a policy for accident insurance. Trial to jury, and, at the close of all the evidence, the court sustained defendant's motion for a directed verdict. The plaintiff appeals. —*Affirmed.*

S. C. Huber and M. W. Hyland, for appellant.

No appearance for appellee.

PRESTON, J.—1. Plaintiff is administratrix of the estate of deceased, Charles Harding, and was named beneficiary in an application for accident insurance policy in defendant company. Deceased was a son of plaintiff's. On July 1, 1914, deceased made written application to one M. T. O'Connell for an accident policy of \$1,000 in defendant company. O'Connell, as a wit-

1. INSURANCE:
 accident insur-
 ance: negligent
 failure to issue
 policy: evi-
 dence.

ness, says he had no license from the state of Iowa to write insurance. At the time O'Connell took this application, his business was driving for one Leanord, who was agent for defendant company. Leanord had been out of town for some days, or perhaps weeks, before O'Connell took the application in question. O'Connell claims that he had some arrangement with Leanord to take applications, and that Leanord left him some blanks; although O'Connell says he thinks the Harding application was not made on one of the blanks left by Leanord. O'Connell says that he sent in other applications, some of which were accepted by defendant, and that the company sent him blank applications and a letter requesting him to write applications. This is denied by defendant, and the letter was not produced. The defendant also denies that it issued policies on applications sent in by O'Connell previous to the application in question. It may be that, under the record, it should be held that, within a short time after deceased was injured, O'Connell was authorized to take applications. But the question is, of course, whether O'Connell was the agent of defendant at the time Harding's application was taken. This is one of the questions argued, but we think the case should be determined on another ground.

On the back of the application is a statement, "First payment, with application, \$4.00," and appellant concedes in argument that, "On the back cover of the application there is a statement to the effect that the first premium must accompany the application;" but argues that, because of the position of this statement on the application, it would not bind the applicant. The evidence of the defendant's officers, testifying as witnesses, is that it was the universal rule of the company that the money must accompany the application. At one place in his testimony, O'Connell says he thinks that he sent the application and

the premium to the company in the same envelope, and that the first payment was sent by post-office money order. The money order or the record thereof in the post-office department was not produced. The application was received by the defendant company in Des Moines, July 7, 1914, and the company has ever since retained the application. No policy was ever issued. Defendant denies that the premium was received at the time of the application, and shows that it never was received by it. O'Connell testifies that Harding did not pay the \$4 at the time that he made the application, but that he was to come in later and pay it, and that he did so either on July 4th or 11th. Both of these dates are on Saturday. We shall later set out the evidence on this point, but say now that, under the record, there can be but little, if any, dispute but that, taking the record altogether, it was on Saturday the 11th.

Deceased was injured by a fall from a hayrack on Monday, July 13th. The time of day is not shown, but it was before 4 o'clock in the afternoon; he was taken to the hospital at or before 4 o'clock. The undisputed evidence is that, in the ordinary course, it would take from 2 to 4 days for an application to be sent from Tama to Des Moines and for a return of the policy; that the average would be 3 days, but that this would depend somewhat upon the number of applications being received by the company; and that they were taken up in the order of their receipt. Testimony also shows that, during the month of January, 1914, defendant received about 3,000 applications, and in July, 1914, 6,000, and that the increase was so great that the company could not break in help sufficient to take care of the increase in business.

The defendant's motion to direct a verdict was upon several grounds, and, if it was good upon any ground, it would work an affirmance. We think the motion was good on the ground that, under the undisputed evidence,

and as a matter of law, the plaintiff failed to show any negligence of the company or its agents. We think it was not required to issue a policy until the first premium had been paid. We think that the payment of the premium was required, and that the company would not be required to issue a policy, nor would the agent be required to send in the application, until it was paid; at least, the company could not be held to be negligent for not issuing the policy if it refused on that ground. It is at least doubtful, under the record, whether O'Connell was at that time the agent for defendant. If he was not, then defendant would not be required to issue a policy on the application alone, even though O'Connell had received the premium. The premium never was received by the company, and, as said, it was not paid by the applicant to O'Connell until Saturday evening, July 11th, at 9 or 10 o'clock; so that, at the most, it was at least 2 days from the time of the payment of the premium to O'Connell to the time when deceased was injured, and one of these days was Sunday, leaving less than 2 days' time within which the application could be sent in to Des Moines, acted upon, and the policy returned to Tama.

Appellant relies upon the case of *Duffie v. Bankers' Life Assn.*, 160 Iowa 19, where it is held, substantially, that, where the applicant has done all he could, or was required to do, it should be held that there is reasonable probability that the policy would have been issued, but for the delay and negligence of the company or its agents. Appellant says, too, that, under the doctrine of that case, the question as to whether there was unreasonable delay was for the jury. That was the holding in that case, where the delay was about 30 days. But where, as in the instant case, the circumstances were such and the time so short, as shown by the undisputed evidence, it becomes, as we have said, a matter of law.

Referring a little more in detail to the testimony of O'Connell as to the date of the payment of the premium, and some other matters, he says:

"After taking the application, I did not report to the company until it was sent in; did not ask company anything relative to it before sending it in; remitted the money for Harding's application to the company when I gave the receipt. He (Harding) told me he would pay me the next Saturday night after this application, and I gave him the receipt when he paid. That was Saturday, and it went in Monday, if I remember right. Do not remember date I gave receipt to Mr. Harding; I think it was Saturday, because he said he would be in Saturday, and it seems to me it was Saturday evening, 9 or 10 o'clock. Yes, it was Saturday evening previous to when he was hurt. I could not tell you if he was hurt the Monday after he paid me. If July 4th was on Saturday and July 11th on Saturday, I would not say which date he paid, because I did not keep any track of it. If the receipt shows July 11th, it must be the date he paid me the money. If the receipt shows July 11th, I sent the application in the Monday following, which was the 13th, I think."

Redirect examination:

"It was the 4th day of July he paid me, or the evening before, but he agreed to pay it Saturday night."

Appellant concedes that the receipt given by O'Connell for the premium is dated July 11th. We think that, under the record, a finding that deceased paid this premium prior to Saturday evening, July 11, 1914, would not sustain a verdict of the jury had they so found. It should be said further that the application shows that applicant was a farmer, and one of the questions therein is as to whether his total income was at least \$600 annually, and he answered, "No." The evidence of the defendant's off-

cers is that they did not issue a policy on Harding's application because there was no money accompanying the application, and because the applicant could not qualify for insurance; that they did not issue policies where the income of a farmer is less than \$600; and for other reasons. We are of opinion that, under this record, a verdict for plaintiff could not be sustained, and that, therefore, the court rightly directed a verdict.

2. **TRIAL: directed verdicts: overruling motion: right to change ruling.** 2. At the close of plaintiff's testimony, the defendant moved the court for a directed verdict, which was overruled; and, at the close of all the testimony, the motion was renewed, with an additional ground, and this was sustained. Appellant concedes the rule to be that appellee, to save his motion, must renew it at the close of all the evidence, but says that, under the rule announced in *Phillips v. Phillips*, 93 Iowa 615, and like cases, the court, having held in the first ruling that there was sufficient evidence to take the case to the jury, could not put himself in the place of the jury and weigh the evidence and pass upon the credibility of the several witnesses. This is the rule where plaintiff has, as this court found in the *Phillips* case, made a case. But, as said by Mr. Justice Deemer in *McGlade v. City of Waterloo*, 178 Iowa 11, there are some exceptions to this rule. In the *Phillips* case, at page 617, the court said that, at the conclusion of plaintiff's evidence, the district court held that plaintiff had made a case requiring its submission to the jury, and that that holding was undoubtedly correct; and again, at page 618, the court said that if, as the court properly held, the contestants, when they closed their evidence in chief, had overcome the burden which the law cast upon them, and had, in addition thereto, made a prima-facie case requiring the submission of the issue of mental capacity to the jury, it did not matter what evidence was thereafter introduced

—the case was for the jury. But suppose the court, in ruling on the first motion, was in error, and that, in fact, the evidence was not sufficient to sustain a verdict for plaintiff, had one been returned, is the court thereafter precluded from changing his mind, if satisfied that he was in error in the first ruling? And would he be precluded from granting a new trial if he was satisfied from the entire record that the verdict was not sustained? It was said in the *McGlade* case that, "If, at the conclusion of plaintiff's testimony, there is enough to take the case to a jury," etc. We think this means that, if there is in fact sufficient evidence to take the case to the jury, then the introduction of further testimony by defendant leaves the matter for the determination of the jury, unless, as in that case, the physical facts are such and so strong as to show that, on the whole case, a verdict for plaintiff was not warranted; then the court may sustain the verdict at the close of all the testimony. In the present case, one of the questions was whether it was reasonably probable that defendant would have issued the policy had defendant and its agents been free from delay and negligence. The trial court may have thought, at the close of plaintiff's testimony, that there was a jury question as to whether deceased, Harding, had done all that was required of him in the payment of the premium on July 4th or 11th, and that, if the jury should find that it was on the 4th, there might be a jury question as to whether there was unreasonable delay.

We think that the testimony of O'Connell itself, taken altogether, shows that it was on the 11th; but the defendant introduced in evidence a letter from O'Connell, which, we think, has a tendency to show that he did not enclose the post-office order for \$4 with the application, and that it had not then been paid. There is some other testimony bearing on this question, and, as said, the receipt shows that it was paid on the 11th of July. In addition to this,

the officers of defendant testified that the policy would not have been issued, for the reasons before stated. So that, taking the entire record together, we think that a verdict for plaintiff could not be sustained.

3. Lastly, it is urged by appellant that the court erred in refusing to permit plaintiff to introduce testimony as to oral statements made by the agent at the time of the taking of the application. Such statements might or might not be proper. If the agent had attempted to give his legal opinion in regard to some question in connection with the application, it might not be proper. Appellant states in argument what he expected to show, and, if we could consider that, it is, to say the least, doubtful whether it would be competent; but there is nothing in the record to indicate, either from the form of the question or by an offer to prove, what plaintiff sought to show.

It is our conclusion that the judgment of the district court was right, and it is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

ESTELLA HOWE, Appellant, v. SIOUX COUNTY, Appellee.

LIMITATION OF ACTIONS: Injuries to Person—Defective Bridge

1 —**Notice—Sufficiency.** An action for injury to the person on account of a defective road, bridge, etc., is barred in three months from the time the action accrues, unless the written notice, which is designed to extend said period to two years, specifies the time of the injury. So held where the notice stated the place and circumstances but not the time of the injury. Sec. 3447, Par. 1, Code Supp., 1913.

LIMITATION OF ACTIONS: Injuries to Person—Defective Bridge

2 —**Insufficient Notice—Estoppel and Waiver.** The good-faith act of the board of supervisors in investigating and rejecting a

claim for personal injury on account of a defective bridge, does not estop the county, when sued on the claim, to plead the insufficiency of the written statutory notice which was served on the county, and which was designed to prevent the bar of the claim after the expiration of three months from its accrual; neither will the county's right to a sufficient notice be waived by such investigation and rejection.

ESTOPPEL: Equitable Estoppel—Performance of Legal Duty. An
3 estoppel *in pais* may not be predicated on the doing of exactly that which the law requires to be done.

PRINCIPLE APPLIED: Plaintiff filed before the board of supervisors a claim for damages caused to her by a defective bridge. For the purpose of preventing the action's being barred in three months, she inserted in the claim a notice of the place and circumstances of the injury. This was insufficient to toll the statute, because it omitted to state the time of the injury. Sec. 3447, Par. 1, Code Supp., 1913. The law requires the board to allow or reject every unliquidated claim filed with it. Sec. 3528, Code, 1897. The board at once investigated the claim, visited the place of the accident, interviewed witnesses, learned of the time of the accident, and, within three months after the accident, made an offer of settlement. This was rejected, and plaintiff made a counter offer. The board at no time objected to the sufficiency of the notice as embodied in the claim, but was guilty of no fraud in their negotiations with plaintiff. No promise was made that the claim *would be settled*. Evidently plaintiff delayed bringing her action because she felt she could effect a settlement. No settlement was effected. Plaintiff brought her action long after the expiration of three months from the time of injury.

Held, the board had done no more than the law required it to do, and that the county was not estopped, when suit was brought, to plead the insufficiency of the notice to toll the statute of limitation.

Appeal from O'Brien District Court.—W. D. BOIES, Judge.

MONDAY, JUNE 25, 1917.

APPEAL from a judgment in favor of the county for costs in an action for damages on account of injuries resulting from an accident on a county bridge.—*Affirmed.*

C. A. Plank and C. E. Gantt, for appellant.

Anthony Te Paske and T. E. Diamond, for appellee.

STEVENS, J.—Estella Howe, plaintiff.

1. LIMITATION OF
ACTIONS: in-
juries to per-
son: defective
bridge: notice:
sufficiency.

brought her suit in Sioux County for damages resulting from an alleged defective approach to a county bridge, causing her to suffer a severe nervous shock and severe injuries to her side, back, hips and kidneys. The injury is alleged to have occurred June 29, 1914, and on July 20th, she caused a claim for damages in the sum of \$1,000 to be filed in the office of the county auditor. On motion of plaintiff, the cause was, on January 4, 1916, transferred to O'Brien County for trial. The defendant filed answer in the district court of Sioux County on November 23, 1915. On March 23, 1916, defendant filed an amended answer, pleading, among other defenses, the statute of limitations, basing said plea on the ground that plaintiff's action was not brought within three months from the date of the injuries, and that no notice stating the time, place and circumstances of the injury was served upon defendant within 60 days. On the same day, defendant, by permission of the court, withdrew its answer, and filed a demurrer to plaintiff's petition, upon the ground that the cause of action was barred by the statute of limitations before suit was brought. The demurrer was sustained. Permission was granted plaintiff to file an amendment to her petition, which she did on April 1, 1916, alleging that plaintiff served proper claim for damages on the defendant county by filing same with the county auditor; that the board of supervisors of defendant county met in session on July 29, 1914, on which date counsel for plaintiff appeared and presented said claim; that the board investigated the merits of the claim, interviewed witnesses and plaintiff's physician; that the officers of defendant at all times treated the notice as sufficient under the statute, made no objection thereto, and were in no wise misled by the failure of the claim or notice to state the time of the

accident; that propositions were made by both parties for settlement. Later, plaintiff filed a second amendment to her petition, stating the above matters in substance, and, in addition thereto, alleging that defendant was estopped from setting up the statute of limitations, and from objecting to the sufficiency of the notice. Later, defendant filed a motion to strike the amendments to plaintiff's petition, upon the ground stated in the demurrer, stating that all matters therein set forth were passed upon by the court at the time of ruling upon the demurrer; that the notice was insufficient; and that the notice required by statute was not served upon defendant within the time required thereby; and that the amendments were not filed in the time required by the order of the court. The motion to strike was sustained. Plaintiff elected to stand upon the ruling of the court. Judgment was entered against her for costs, from which judgment she appeals.

I. The demurrer to plaintiff's petition and the motion to strike her amendments thereto were sustained upon the ground that her cause of action was barred by the statute of limitations. To sustain this position, appellee relies upon Subdivision 1 of Section 3447 of the Supplement to the Code, 1913, which, with the first clause of said section, is as follows:

"Actions may be brought within the times herein limited, respectively, after their causes accrue, *and not afterwards*, except when otherwise specially declared.

"(1) Those founded on injury to the person on account of defective roads, bridges, streets or sidewalks, within three months, unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury."

Subdivision 3 of said section authorizes actions founded on injuries to the person, whether based on contract or tort, to be brought within two years. It will thus be seen that, under the provisions of Subdivision 1, plaintiff's cause of action became barred within three months after she received the injuries complained of, unless a written notice specifying the time, place and circumstances of the injury was served upon defendant within sixty days after the happening of the injury.

It was contended by the defendant in the court below, as it is here, that plaintiff did not serve the required notice upon the defendant within sixty days, and that, because of her failure to do so, her cause of action was barred by the statute of limitations at the end of three months after the happening of the injury. The foregoing statute permits actions to be brought within the time designated in the statute, "and not afterwards." This language is mandatory, and required plaintiff to bring suit within three months after the happening of the injury, or, if she desired to preserve her right to bring same after three months, to serve the written notice above referred to.

A notice was served upon the defendant on or about July 20th following the injury, which occurred on June 29, 1914, which notice clearly designated the place of the accident and the injuries which plaintiff claimed to have received on account thereof, but contained no statement as to the time of the happening of the accident. Appellant strenuously maintains that, while the notice is clearly defective in the particular mentioned, defendant cannot avail itself of such defect, for the reasons: (a) That the giving of such notice is not jurisdictional; (b) that the sufficiency of the notice should be determined in view of the circumstances of the case; (c) that defendant treated the notice as sufficient, and made a full investigation into the circumstances of the accident, and made an offer of

compromise; (d) that the object of the statute was fully met, and that defendant was in no wise misled or injured because of the failure of appellant to state the exact time of the injury.

It is evident that the theory of the legislature, in enacting the foregoing statute, was that actions based upon injuries resulting from defective roads or bridges be early prosecuted, or that the notice provided for therein be given within sixty days, thereby securing to the county an early opportunity to make full and thorough investigation of the injuries and the accident complained of, to the end that testimony may be preserved and preparation made for the defense of any suit that may be brought against it for damages resulting from such accident. To enable the officers of the county sought to be charged to make such investigation, the notice must specifically state the time of the injury, the place where the same happened, and the circumstances surrounding the transactions. With this information, the board of supervisors or other officers of the county are enabled to investigate and determine whether the county is liable, and, if so, what course to pursue with reference to the matter of making settlement or preparing to make defense to any suit that may be brought against the county.

The question as to the sufficiency of a given notice has often been before this court, but this is the first time it has been called upon to determine the effect of the omission of the time of injury. All of the cases heretofore decided by this court have involved the question of the sufficiency of the notice to designate either the place or the circumstances of the injury. Attention is here called to a few of the decisions of this court.

In *Buchmeier v. City of Davenport*, 138 Iowa 623, the court said:

"A notice which in fact points out the place of the

accident with sufficient definiteness to reasonably enable the officers of the city to investigate the conditions under which it is alleged to have happened, sufficiently complies with the purpose of the statute. * * * The statutory requirement of notice is to be liberally construed, to the end that parties having meritorious claims shall not be cut off by a mere technicality as to the form of notice to be required."

In *Perry v. Clarke County*, 120 Iowa 96, the court, having under consideration a notice which had been served upon the defendant county, said:

"It is not entirely formal, perhaps, but the substance is there. It gives notice of the accident, and of the time, place, and circumstances, in reasonably specific terms, and was received and filed in time by the officers upon whom notice could properly be served. To hold that this is not a substantial compliance with the statutory requirement would be excessively technical, and serve no just purpose. The fact that the paper is called a 'petition,' instead of 'notice,' is immaterial."

In *Giles v. City of Shenandoah*, 111 Iowa 83, the court, in construing the following notice, "You, and each of you, are hereby notified that the undersigned has for collection and adjustment a claim on account of an injury that occurred to Mrs. J. L. Giles, at the intersection of Church Street and Clarinda Avenue, on the evening of April 21st," said:

"This did not purport to give any of the circumstances of the injury, as required. So far as conveying information, the accident may as well have resulted from a falling sign, as in *Bliven v. City of Sioux City*, 85 Iowa 346, or the breaking down of a bridge, as in *Sachs v. City of Sioux City*, 109 Iowa 224, or the running away of a team, as from a defective sidewalk. The object of the statute is to apprise the city authorities of the location of

the defect, and the circumstances attending the accident, with such reasonable certainty as shall enable them, not only to investigate the city's liability while the facts are fresh, but also to ascertain what evidence there may be of conditions then existing, and of the character of the injury, while witnesses are at hand."

The court, however, used the following significant language:

"It is enough, however, that the legislature has prescribed the service of a notice specifying 'the circumstances of the injury' within sixty days, to prevent the bar of the statute of limitations within ninety days; and, as this was omitted, the action cannot be maintained."

The foregoing language referring to the object of the statute is quoted with approval by this court in *Schnee v. City of Dubuque*, 122 Iowa 459.

In *Neeley v. Incorporated Town of Mapleton*, 139 Iowa 582, it appeared that the notice served upon the town clerk complied with the requirements of the statute in all respects, except that same was without signature. The court said:

"Its principal contention is that the notice is fatally defective for want of signature, and this presents the most doubtful question in the case. This court has heretofore held that the absence of signature to an original notice was fatal to the notice as such. *Hoitt v. Skinner*, 99 Iowa 360. It has applied the same rule to a notice of appeal to the Supreme Court. *Doerr v. Life Assn.*, 92 Iowa 39; *State Savings Bank v. Ratcliffe*, 111 Iowa 662. It was held in these cases that the jurisdiction of the court was dependent upon the legal sufficiency of the notice. On the other hand, the notice under consideration was in no sense jurisdictional, and the tendency of the courts is to construe the requirements of the statute liberally in favor of this kind of a notice; and this is especially so if it has accom-

plished the purpose intended. It has been said by this court that the purpose of such a notice is to convey to the town council prompt information of the time, place, and circumstances of the injury, so that an investigation may be had while the facts are fresh, and, if the notice furnished conveys such information, and has caused such investigation by the town council, it has answered all the purposes of the statute. *Owen v. Fort Dodge*, 98 Iowa 286; *Pardey v. Mechanicsville*, 112 Iowa 73. * * * In view of the fact that the notice in this case conveyed the required information in writing, and that the town council was in no manner prejudiced by the absence of a signature, we are of the opinion that it was sufficient notice within the meaning of the statute, and the trial court properly admitted it in evidence, in avoidance of the plea of the statute of limitations."

In *Harrison v. City of Albia*, 144 Iowa 132, the notice served upon the city described the location of the accident, but fixed it something like 210 feet from where the accident occurred, stated that it was between Harrison and Clinton Streets, and charged that the sidewalk was out of repair and in a dangerous condition. The court reviews many of the authorities above cited, approves the rule established by them, and apparently gives effect to the fact that the plaintiff's attorney called the attention of the city council to the place of the accident before the statute had barred the action.

The notice in *Sollenbarger v. Incorporated Town of Lineville*, 141 Iowa 203, fixes the place of the accident "on West Third Street, Lineville, Iowa." The evidence showed that this street was three quarters of a mile in length. The court held the notice insufficient. The court in this case again reviewed numerous of the authorities construing notices of the character in question, and approved the doctrine of its prior decisions. The court said:

"Some reliance is placed on *Owen v. City of Fort Dodge*, 98 Iowa 281, where extrinsic evidence was received, not to supplement the notice, but to show that the city was not misled by it. As there said, it need not point out the exact spot, but if, notwithstanding inaccuracies, it contains the necessary information to enable the officers of the city to locate the place, it is good, and that they did find it is mentioned merely as a fact confirming the sufficiency of the notice."

It will be observed that the court, in *Buchmeier v. City of Davenport*, supra, held that the notice pointed out the place of the accident with sufficient definiteness; and in *Perry v. Clarke County*, supra, that the notice was sufficient in the statement of "time, place and circumstances;" and in *Harrison v. City of Albia*, supra, that the notice sufficiently designated the place of the accident; and in *Sollenbarger v. Lineville*, the notice was insufficient because it did not designate the place with sufficient definiteness so that it could be readily located by the officers of the city; and in *Giles v. City of Shenandoah*, supra, because the notice failed to state the circumstances sufficiently. That is, the court held in each instance, in effect, that the requirements of the statute as to notice were complied with as to the three particulars designated by the statute, except in the two latter cases, in one of which the notice failed to state the place, and in the other the circumstances, of the injury. In these two, the notice was held insufficient and the cause of action barred by the statute of limitations.

If, therefore, a notice is insufficient to meet the requirements of the statute for the reason that it failed to designate the place, notwithstanding it pointed out the time and circumstances of the injury, or because it failed to state the circumstances of the injury, notwithstanding it pointed out the time and place, the requirement of the

notice as to time being of equal importance with the other two, it follows that a notice which failed to state the *time*, although it points out the place and circumstances, is also insufficient.

It was said, in *Nceley v. Incorporated Town of Mapleton*, supra, that "the tendency of the courts is to construe the limitations of the statute liberally in favor of this kind of a notice, and this is especially so if it has accomplished the purpose intended;" but the court interpreted the purpose of the notice to be "to convey to the town council prompt information of the *time, place and circumstances* of the injury, so that an investigation may be had while the facts are fresh."

The notice referred to has been liberally construed by the courts generally, but, so far as we have been able to find, no court has ever held a notice sufficient which omitted to state one or more of the three essential requirements of the notice. As was stated in *Sollenbarger v. Lineville*, supra:

"The statutes exacting notice differ somewhat from ours in some states, in that the notice is a condition precedent to the maintenance of the action, but the purpose is not different from that in statutes like that of this state."

This distinction has apparently been overlooked in some of our decisions.

In *Klingman v. Madison County*, 161 Iowa 422, the court apparently overlooked this distinction, and said that the service of a notice specifying the matters above stated is a condition precedent to the commencement of a suit. The service of the notice here referred to is clearly not a condition precedent to the commencement of the action under our statute, but same is served solely for the purpose of preventing plaintiff's cause of action from becoming barred at the end of three months after the happening of

the injuries. In some other jurisdictions, the service of a similar notice within the time designated is a condition precedent to the commencement of an action against the municipality.

The purpose of the legislature in fixing the period of limitation at three months, unless the notice was served, evidently was to require the cause of action to be speedily prosecuted, in which event a proper investigation could be made by the county or other municipality, or that a notice be served setting forth the time, place and circumstances of the accident, so that investigation might be made by the officers of the municipality sought to be charged.

From the holding in the above cited cases, as well as the plain requirements of the statute, it necessarily follows that the notice in question was insufficient.

II. Plaintiff's petition was filed October 20, 1915, in the district court of Sioux County, and defendant's answer on the 23d day of November, 1915. On January 4, 1916, on motion of plaintiff, the cause was transferred to O'Brien County for trial. On March 23, 1916, defendant filed an amendment to its answer, and on the same day withdrew its answer and amendment, and demurred to plaintiff's petition upon the ground that same was barred by the statute of limitations. On the same day demurrer was sustained, and plaintiff given ten days in which to file an amendment to answer. On April 1, 1916, plaintiff filed an amendment to her petition, reciting that she served her claim on the defendant July 20, 1914; that the board of supervisors of said county met in session July 29, 1914, and on said day started investigation, inspected the place of the injury, made search for witnesses, interviewed plaintiff's physician and other persons having some knowledge of the accident; that said board had full knowledge and notice of the time, place and circumstances of the ac-

cident within 60 days; that, within 90 days after said accident, defendant made plaintiff a proposition of settlement and received a counter proposition from plaintiff; and that, because thereof, the said defendant waived any defect that might be claimed in said notice, and at all times treated the notice and claim as sufficient, and, in rejecting said claim, passed on the merits thereof. On the 22d day of May, 1916, plaintiff filed a second amendment to petition, reciting, in substance, the matters above stated, and averring that, by reason of the matters set forth, defendant was estopped from pleading the statute of limitations, and from objecting to the sufficiency of said notice. Upon motion of defendant, both amendments to plaintiff's petition were stricken from the files. Appellant, therefore, contends: (a) That defendant waived the defects in the notice; and (b) that, by reason of the conduct and acts of the board of supervisors of defendant county, it was estopped to plead the insufficiency of the notice or the statute of limitations.

A waiver has been held to be "the voluntary and intentional relinquishment of a known right. It may be shown by the express contract or other affirmative act of the party charged therewith, or it may be inferred from such conduct as warrants the conclusion that a waiver was intended. * * * The distinction between an estoppel and a waiver is not always apparent, and the terms are sometimes used interchangeably. The term, 'waiver' generally implies an intention on the part of a person possessing some right under a contract, or the law, to relinquish it for the benefit of another. Waiver is ordinarily personal, and, in the absence of some special agreement or consideration, its existence is to be determined solely from the conduct of the party making it, independent of the acts of any other party affected by it. In estoppel, this distinctly personal element is not an essential, nor is the intention to relin-

quish the right necessarily present. An estoppel *in pais* arises where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse. Its existence is determined by the acts, knowledge and conduct of both parties." *Johnson v. Spencer*, (Ind.) 96 N. E. 1041.

"Waiver is the voluntary relinquishment of some known right, benefit or advantage which, except for such waiver, the party otherwise would have enjoyed." *Peabody v. Maguire*, (Me.) 12 Atl. 630.

"Waiver belongs to the family of estoppel, in a sense, and yet an estoppel *in pais* has connections that are no kin to waiver. Waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do." *Kennedy v. Manry*, (Ga.) 66 S. E. 29.

The foregoing definitions of waiver are substantially the same as those adopted by this court and courts generally. *Currie v. Continental Casualty Co.*, 147 Iowa 281; *Schillinger Bros. v. Bosch-Ryan Grain Co.*, 145 Iowa 750; *Norton v. Catholic Order of Foresters*, 138 Iowa 464.

What matters were pleaded by plaintiff in either of the amendments to her petition that, under the foregoing definition, amounted to a waiver of the right on the part of defendant to plead the statute of limitations? It is claimed that the officers of defendant, upon receipt of the notice, made full investigation as to the facts, circumstances and merits of appellant's claim, and also offered some inducements to appellant to settle the same. The relation existing between the county and plaintiff was one of hostility, and it cannot be said that the former owed any duty to the latter to aid her in presenting or preserving her claim against it. Surely the county did not intend, by making the investigation or inducement to settle, to relinquish to plaintiff any of its rights whatever. No benefit could accrue to defendant by voluntarily waiving its right to plead

the 90-day statute of limitations, and thereby extend the time within which action could be brought from 90 days to 2 years. Appellant was not only bound to take notice of the statute of limitations, but, as appears from her petition and amendments thereto, she actually claims to have undertaken to preserve her right to bring suit within 2 years by serving a notice upon defendant. If plaintiff, for any reason, did not desire to bring suit within 90 days after the happening of the injury, she had a right to serve a proper notice, and thereby preserve her right to bring suit any time within 2 years. It was entirely optional with her, however, whether she would serve the notice or bring suit within 90 days.

Section 3528 of the Code provides that no action shall be brought against the county upon an unliquidated demand until same has been presented to the board of supervisors and payment demanded and refused or neglected. It was held, in *Perry v. Clarke County*, 120 Iowa 96, that a claim filed within 60 days, containing all the requirements of the notice referred to in Paragraph 1 of Section 3447, was sufficient, and that it was not necessary thereafter to serve a notice repeating the same matters. The claim filed by appellant recited that same was filed to comply with Sections 3447 and 3528 of the Code. No separate notice was served or filed. It is claimed that the board of supervisors investigated the merits of plaintiff's claims, and became fully advised of all facts in relation thereto.

Under Section 3528, above cited, it was the duty of the board of supervisors to allow or reject an unliquidated demand made against the county. Naturally, before taking action, the board would make all the investigation necessary to enable it to proceed intelligently in the matter of allowing or rejecting the claim. The statute provides only that an unliquidated demand shall be presented to the board, leaving the form thereof entirely to the claimant.

The paper filed was a sufficient statement of a claim for damages, but did not contain the matters required to be stated in the notice referred to in Section 3447. It will hardly do to say that, notwithstanding the fact that it was the duty of the officers of defendant county to act under the provisions of one section of the Code with which the statement complied, it thereby waived its right to object to the sufficiency of the statement to comply with an independent section of the statute enacted for a different purpose.

It appears from the pleading that the board of supervisors tried to settle with plaintiff, but there is nothing to show that its members intended their action in this regard to be treated otherwise than as a good-faith effort to comply with the statute relating to the claim for damages, and to allow or reject the same. Plaintiff was in no wise misled by anything that was done by the officers of defendant. She caused the notice to be served before any action was taken by the board of supervisors. She was not induced to forego the service of notice or the bringing of her action within 90 days by reason of the investigation made by the officers of the county or the negotiations had for a settlement of the claim.

A large number of Michigan cases are cited by appellant to sustain her contention that the officers of defendant waived the defects in the notice. This contention does not properly take into account the distinction that must be made between the statute under consideration and the statute of Michigan. Under the Michigan statute, a notice is a condition precedent to the maintenance of an action against a municipal corporation. It has no relation whatever to the statute of limitations, whereas, in this state, the only purpose, so far as a claimant is concerned in causing a notice to be served, is that such claimant may thereby preserve the right to bring suit after 90 days and within

2 years. In all the cases cited from the Michigan Reports, the defect waived was some informality in the notice, such as failure to properly itemize or verify the claim. The officers of the defendant in each case owed claimant the duty of objecting to the sufficiency of the claim, failing to do which, it was held that the right to thereafter take advantage of the defect appearing in the notice was waived. One related to the statute of limitations; the other, to the merits of the claim filed. It was held in some of the Michigan cases that the proper officers having to do with the allowance and payment of the claim filed could, under the law of Michigan, waive the defect in the notice, whereas this court, in a case in which the notice given the city was oral, held that the requirements of the statute that the notice be in writing could not be waived by the city council. *Starling v. Incorporated Town of Bedford*, 94 Iowa 194. The holding of this case has been approved by the appellate court of Illinois. *Lucas v. City of Pontiac*, 142 Ill. App. 470.

It must, therefore, be held that the facts pleaded by plaintiff do not constitute a waiver on the part of appellee of the right to plead the statute of limitations.

III. Nor were the facts pleaded sufficient to create an estoppel against appellee to plead the statute of limitations. As appears from the above cited cases, estoppel depends upon whether the person sought to be estopped caused his adversary to do or refrain from doing something to his injury or prejudice. The only matters pleaded as estoppel are those contained in plaintiff's second amendment to her petition. It is there alleged that the officers of defendant treated the notice as a full and sufficient notice, and made a full investigation into the matter of the injuries, and at the same time led plaintiff to believe, by entering into negotiations for settlement, that the claim

3. **ESTOPPEL:**
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would be adjusted and settled by them; that plaintiff was misled into believing that a suit would not be necessary; and that, by reason thereof, the defendant is estopped from setting up the statute of limitations or objecting to the sufficiency of the notice. This court is committed to the doctrine that a litigant may estop himself from the right to plead the statute of limitations. *Holman v. Omaha & C. B. R. & B. Co.*, 117 Iowa 268; *McKay v. McCarthy*, 146 Iowa 546; *Gamet v. Haas*, 165 Iowa 565.

The basis on which the doctrine of estoppel to plead the statute of limitations was held in the foregoing cases was fraud that induced the plaintiff to refrain from bringing suit within the statutory period, or because of an agreement, express or implied, to pay. Applying the holding of the above cases to the case at bar, it is readily seen that no fact is pleaded by appellant which could have had the effect to estop defendant to plead the statute of limitations. It is not claimed that any promise, express or implied, was made by the officers of defendant to plaintiff to pay or settle her claim, but upon this point, at most, that an offer of settlement was made and rejected by her, and that an offer made by her was rejected by the board of supervisors. There are no allegations of fraud in either amendment to plaintiff's petition, nor is it claimed that the officers of defendant were guilty of any bad faith or deceit which could operate as an estoppel to prevent the plea of the statute. It may be that appellant believed that she would be able to make some settlement with defendant, but there is no allegation in either amendment to her petition charging a promise upon the part of the officers of defendant to make settlement, nor of fraudulent conduct inducing in her the belief that her claim would be settled. It is not sufficient that she may have misled herself into believing or hoping that settlement would be made, but the conduct or promise, express or implied, of the officers of defendant must have

been such as to lead her reasonably to rely thereon, and refrain from bringing suit within the statutory period. The matters pleaded in no wise estopped the defendant from interposing the plea of the statute of limitations.

Further, it does not appear from the record that plaintiff objected to the withdrawal by defendant of its answer and amendment thereto, and to the filing of a demurrer to plaintiff's petition; but, so far as appears from the record, plaintiff may have voluntarily consented thereto. It is not improbable that counsel for plaintiff may have, at the time, believed that a favorable ruling upon the demurrer would be of value in inducing the defendant to settle and adjust her claim without further litigation. Plaintiff could not sit by and, without protest, permit defendant to withdraw its answer and file a demurrer and thereafter be heard to say that defendant was estopped from interposing a demurrer to the petition on the ground that the cause of action was barred by the statute of limitations, or from pleading the same as a defense. While it is unfortunate that appellant was prevented from having her cause tried to a jury upon the merits, the defendant is not at fault, and the finding and judgment of the trial court were right.—*Affirmed.*

GAYNOR, C. J., WEAVER and PRESTON, J.J., concur.

E. O. KABRICK, Appellee, v. J. I. CASE THRESHING MACHINE COMPANY, Appellant.

VENUE: Office or Agency—Traveling Salesman. An action growing out of a sale of machinery may be brought in the county where it was consummated by defendant's duly authorized traveling agent, especially when the agent resided in said county and the notes were made payable in said county. Section 3506, Code, 1897.

SALES: Delivery—Intent—Conduct of Parties, etc. Evidence, consisting of writings and course of conduct of the parties, reviewed, and held not to show delivery of property to the purchaser.

SALES: Rescission—Acceptance—Acts of Ownership—Effect. Acts of ownership, exercised by the purchaser in ignorance that the property would not be delivered to him, are no obstacle in the way of rescission, and recovery of the price paid.

Appeal from Clay District Court.—N. J. LEE, Judge.

MONDAY, JUNE 25, 1917.

ACTION at law to recover the purchase price of a secondhand threshing outfit. Judgment for plaintiff. Defendant appeals.—*Affirmed.*

Parsons & Mills and J. W. Cory & Son, for appellant.

Heald & Cook and Faville & Whitney, for appellee.

STEVENS, J.—On June 11, 1914, appellant, through its agent F. E. Kabrick, sold a threshing separator, engine and other machinery, to William Rohde, who resided near Rock Rapids, Clay County, Iowa. William Rohde was, at the time, the owner of an old separator and engine, which appellant agreed to take as part payment on the purchase price of the new machine. On June 20th, E. O. Kabrick signed an order, in which he agreed to purchase of appellant the secondhand separator, engine and other machinery above referred to, and to execute two notes therefor, one for \$220, due October 1, 1914, and one for \$216, due October 1, 1915, at 7 per cent interest. The order was given subject to the approval of appellant. The company accepted the order on June 30, 1914. The new machinery was delivered to Rohde about July 29, 1914. The machinery, at the time of all the transactions above referred to, was situated upon the farm of Mr. Rohde, about 3 miles from Rock Rapids. Appellee did not go to see the machinery

before purchasing the same. On August 1, 1914, appellee executed the notes referred to in his written order for the purchase price of the old machinery, together with a chattel mortgage on the old machinery to secure the payment thereof, and, on October 1, 1914, to obtain a discount, paid both notes in full.

Some time later, the brother, who had conducted the negotiations for the sale of the new machinery to Rohde and the old machinery to appellee, also undertook to sell the secondhand machinery for appellee; but, upon taking a purchaser to the premises occupied by Mr. Rohde, he was informed by him that he would not part with the possession of the old machinery until the company adjusted some difference between them arising out of the purchase of the new machinery. The controversy between Rohde and appellant continued for some time, and, on January 11, 1915, appellee had his attorneys notify appellant that, because he was unable to get possession of the machinery which he had purchased, he elected to, and did, rescind the contract, and demanded the repayment to him of the money which he had paid appellant therefor. The bill of sale executed by Rohde, conveying the secondhand machinery to appellant, provided for the delivery of the machinery to it, loaded, without charge, on the cars at Rock Rapids, Iowa.

Upon receipt of the letter of January 11th, rescinding the contract for the purchase of the secondhand machinery, the manager of defendant at Des Moines wrote a letter to appellee's attorneys, declining to return the purchase price received from appellee therefor. On January 11, 1915, a representative of appellant called upon Mr. Rohde and adjusted the difficulties between appellant and him, and received an agreement signed by Rohde, agreeing to deliver the secondhand machinery according to his bill of sale. On June 5, 1915, appellant, through the manager of its

branch house at Des Moines, Iowa, wrote a letter to Rohde, demanding the sum of \$1,142, representing the value of the old outfit taken in trade. This demand was based upon the alleged refusal of Rohde to deliver the machinery on board the cars at Rock Rapids free of charge.

This action was brought in Clay County to recover the money paid for the old machinery. The cause was tried to a jury, but, at the conclusion of the testimony, both parties having moved for a verdict, by agreement the jury was discharged, and the cause submitted to the court, which found in favor of the plaintiff, and rendered judgment against the defendant for the amount claimed by plaintiff.

I. Appellant asked a change of venue, on the ground that it had no office or agency in Clay County, supporting the same by the affidavit of the manager of its branch house at Des Moines, Iowa, from which point distribution of sales made by its traveling representatives was made throughout the state. The motion was overruled, and this ruling is assigned as error.

F. E. Kabrick was the agent of appellant, and traveled from place to place in the state selling its machinery. The sale of the new outfit to Rohde, and of the secondhand machinery to appellee, was made in Clay County. F. E. Kabrick resided in Clay County, and the notes given by appellee were made payable at a bank in Spencer, Iowa. It is not claimed that appellant had an office in Clay County or other agency than that of F. E. Kabrick. Section 3500 of the Code provides that suits may be brought in any county in which the defendant has an office or agency for the transaction of business, where the suit grows out of, or was connected with, the business of that office or agency. The evidence showed that F. E. Kabrick was the agent for appellant, having authority to solicit orders for new, and to sell the old, machinery, and that he conducted the nego-

1. VERUM: office
or agency:
traveling
salesman.

tations in Clay County for appellant in both transactions, and, under the holding of the following cases, the action was properly brought in that county. *Milligan v. Davis*, 49 Iowa 126; *Locke v. Chicago Chronicle Co.*, 107 Iowa 390; *Goodrich v. Fogarty*, 130 Iowa 223; *Thistle Coal Co. v. Rex Coal & Mining Co.*, 132 Iowa 592; *Gilbert v. McCullough*, 140 Iowa 362.

II. The theory and claim of appellant are that appellee agreed to accept the outfit where it was at the time the order was given, and that no further act of appellant was necessary to complete the delivery. On the other hand, appellee sought to rescind the contract of sale, on the ground that appellant had wholly failed to deliver the outfit, or place the same at his disposal, and that Rohde refused to deliver it or permit appellee to remove the same from his premises. This is the only remaining question presented upon this appeal, and is one of fact rather than of law, and depends for its answer largely upon the intention of the parties, which is to be ascertained from the written instrument and other facts and circumstances appearing in evidence.

"When and where the sale was complete and title to the property passed to the purchaser is largely a question of intent, to be drawn not alone, necessarily, from the writings made or the formal words employed, but also from the conduct of the parties and their methods of dealing. The answer to the question is nearly always a conclusion or inference to be drawn from a consideration of all the circumstances developed by the evidence, and is therefore a question of fact for the jury and not of law for the court." *Hamill v. Joseph Schlitz Brewing Co.*, 165 Iowa 266.

The bill of sale executed by Rohde, referring to the matter of delivery, stated: "Above machinery to be loaded

2. **SALES:** delivery; intent; conduct of parties, etc.

on cars free of charge subject to order of J. I. Case T. M. Co., Rock Rapids, Iowa."

The order given by appellee for the secondhand outfit, which was subject to acceptance by appellant, recited:

"You will please deliver on or before the 'at once' or as soon thereafter as you can furnish for transportation or deliver to 'These goods will be accepted where they stand.'"

It appears from the evidence that the secondhand outfit was in possession of Rohde at the time he entered into the contract for the purchase of the new outfit, and also at the time of the execution of the bill of sale, and when the written order was signed by appellee and accepted by appellant. The new outfit was delivered to Rohde in the latter part of July, and, some time thereafter, a controversy arose between him and appellant respecting the new machinery, and thereafter, Rohde refused to permit a prospective purchaser of the secondhand outfit to remove the same from his premises. Rohde, however, testified that, after the execution of the bill of sale, and prior to the time the controversy arose between himself and appellant, he would have permitted appellee to take possession of the old outfit, had he sought permission to do so. It is not quite clear from the record when the controversy arose between Rohde and appellant regarding the new machinery, but the court may well have found from the testimony that it was near the first of August. He testified that he would not have permitted the machinery to be removed from his premises after the controversy arose. In compliance with the terms of the written order signed by appellee, he executed the two notes and mortgage to secure the payment thereof, and, on or about October 1st, when one of the notes fell due, paid both of them. Up to this time, he had not been to see the machinery, nor had he at any time requested possession thereof.

Appellee testified that he understood that the machinery was to be delivered to him at Rock Rapids, and introduced in evidence a letter written by appellant's manager at Des Moines, dated June 30, 1914, in which he was advised of the acceptance of his order for the secondhand outfit, and that "Same is to be delivered to you by your brother, rig being on hand at Rock Rapids." The conduct of the parties after the attempted rescission of the contract throws some light upon their apparent intention as to the matter of delivery at the time the contract was entered into. E. O. Kabrick testified that, after the final refusal of Rohde to permit the machinery to be taken from his premises by one of appellee's prospective purchasers, he thereafter, on December 19, 1914, talked over the telephone with appellant's manager at Des Moines, who agreed to write a letter to Rohde demanding that he comply with his contract, and directing the witness to go to Rock Rapids and demand that Rohde deliver the outfit at Rock Rapids according to his bill of sale. He further testified that he did go to Rock Rapids, and that Rohde refused to deliver the outfit as requested.

On June 5, 1915, a letter was written from appellant's Des Moines office to Rohde, calling his attention to the fact that he had agreed, by his bill of sale, to deliver the old machinery at Rock Rapids, loaded on the cars, subject to the order of appellants, and, as he had failed to do so, demanding the payment of \$1,142, which he claimed to be the value of the old outfit. On January 11, 1915, Rohde signed a statement in which he agreed to make delivery of the secondhand machinery in accordance with the terms of the bill of sale. At the bottom of the signed statement appears the following notation, made by the representative of appellant: "I recommend the delivery to be made where it now stands."

The above is substantially a full statement of the evi-

dence bearing upon the question involved. It was evidently contemplated by the representative of appellant, at the time the bill of sale was executed by Rohde, that it might be necessary to ship the secondhand outfit to some other point than Rock Rapids, and the provision in the contract was made requiring Rohde to deliver the same loaded on the cars at Rock Rapids. This provision in the bill of sale is not, however, necessarily inconsistent with the claim now made by appellant that appellee agreed to receive delivery of the outfit at the Rohde premises. It was a provision for the benefit of the company, which it could, of course, waive.

Counsel for appellant in argument place much stress upon the following provision of the order signed by appellee: "These goods will be accepted where they stand." The contention is that this provision of the contract bound appellee to receive the goods on the premises, and that, under the terms of the bill of sale executed by Rohde, he had a right to take possession of the outfit in question. The language, however, is apparently susceptible of another construction; that is, that it was intended to designate the place of delivery only. This is apparently the construction appellant placed upon this language, as is evidenced by its letter of June 30, as follows: "Same to be delivered to you by your brother, rig being on hand at Rock Rapids." Evidently the writer of this letter understood that delivery of the machinery had not been completed, and that some further act was necessary to complete the same. It is quite clear that the words were not intended at the time as an agreement on the part of appellee to treat the outfit as delivered, because the order was subject to the approval of appellant, and no delivery could have been contemplated until after the appellant had signified its acceptance of the order.

3. SALES: rescission: acceptance: acts of ownership: effect.

Appellant emphasizes the fact that appellee executed the notes and mortgage and paid the same; that he sought to exercise acts of ownership over the property by offering and attempting to sell it; that he thereby treated the outfit as having been delivered to him, and that, by reason thereof, he is estopped from rescinding the contract. However, it is quite evident that, at the time of the execution of the note and mortgage and the payment thereof, appellee did not know or have reason to anticipate that Rohde would refuse delivery or interfere with his taking possession of the machinery. Rohde had possession of the outfit for appellant at the time the order was given and accepted by it, and appellee was prevented from obtaining possession, after the notes were executed and paid, because of some alleged failure of appellant's to carry out the terms of the contract with Rohde. We do not think, under the facts disclosed, that there was a delivery of the outfit, or that appellee was estopped, by reason of any of the matters shown, from maintaining this suit.

The questions of fact were for the court, and its finding thereon has the force and effect of the verdict of a jury. The court, having the witnesses before it and having heard all the testimony, found the facts in favor of appellee, and, as the inferences necessary to such finding are justified by the evidence, the court's finding should not be disturbed.—*Affirmed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

M. H. LYNCH, Appellant, v. BARNEY KATHMANN et al., Appellees.

CONTRACTS: Legality of Object and Consideration—Unlawful Practice of Profession—Recovery for Services—Physicians and Surgeons. *Recovery may not be had for services which constitute a crime.* More concretely, when the practice of a vocation or profession is punishable by fine or imprisonment unless certain specified statutory conditions are first complied with, one who assumes to practice without strictly complying with all such conditions may not recover for his services, even though he possessed high qualifications, acted in good faith, and was even misled by a public officer, in attempting to comply with said conditions.

PRINCIPLE APPLIED: Plaintiff brought action to recover for medical services admittedly rendered to defendant. When the services were rendered, the practice of medicine, etc., was an indictable misdemeanor unless the one practicing had first secured from the state board of medical examiners a certificate of authorization and filed the same in the office of the county recorder of the county where he resided. Section 2576 *et. seq.*, Code, 1897. Prior to the rendition of the services, plaintiff had secured the required certificate, but, by mistake, had filed it in the office of the clerk of the district court of the county where he resided, the clerk having informed him that such filing was in full compliance with the law.

Held, plaintiff may not recover, even though he possessed high qualifications, personally acted in good faith, and was misled by the said clerk.

Appeal from Carroll District Court.—E. G. ALBERT, Judge.

MONDAY, JUNE 25, 1917.

Action to recover on account for medical services. Defendants plead that plaintiff had failed to record his certificate in the office of the county recorder. Judgment for defendants for costs. Plaintiff appeals.—*Affirmed.*

Reynolds & Meyers and Douglas Rogers, for appellant.

L. H. Salinger, for appellees.

CONTRACTS:
legality of ob-
ject and con-
sideration: un-
lawful practice
of profession:
recovery for
services:
physicians and
surgeons.

STEVENS, J.—Plaintiff alleges in his petition that he is a regularly qualified, licensed and practicing physician and surgeon in Carroll County, Iowa; that, during the time between September 7, 1913, and December 29, 1914, he rendered professional services to the defendants of the reasonable value of \$361, and asks judgment therefor. The defendants answered in two counts, admitting that plaintiff rendered services, and, in Count 2 of their answer, pleaded as a special defense that, notwithstanding the fact that plaintiff was a regularly licensed physician and surgeon, he had not caused his certificate to be recorded in the office of the county recorder of Carroll County, as required by Section 2577 of the Code, and that he cannot maintain the action.

Plaintiff demurred to Count 2 of defendants' answer, upon the ground that the facts stated did not constitute a defense to plaintiff's petition. The demurrer was overruled, and plaintiff filed a reply, in substance alleging that the state board of medical examiners of the state of Iowa, after due examination, issued to plaintiff a certificate authorizing him to practice as a physician and surgeon in the state of Iowa, which, on the second day of August, 1911, he caused to be recorded in the office of the clerk of the district court of Carroll County, Iowa, in a book in said office entitled "Register of Physicians and Midwives," and that said registration was in full compliance with the laws of the state of Iowa with reference to the recording and registering of said certificate; that he was informed by the clerk that said registration was in full compliance with the laws of the state of Iowa with reference to the recording and registering of said certificate; and that he believed and relied on said information.

The defendant demurred to plaintiff's reply upon substantially the same grounds as to his petition. The demurrer was sustained, to which ruling of the court the plaintiff duly excepted. Plaintiff thereupon elected to stand on his pleadings, and refused to plead further, whereupon his petition was dismissed, and judgment entered in favor of the defendants, as above stated.

I. Section 2576 of the Code authorizes the physicians of the state board of health, acting as a board of examiners, to examine candidates for certificates to practice medicine in the state of Iowa, and also to prescribe what examination shall be required of such candidate, and authorizes five members of the board to issue a certificate to such candidates as shall have passed the required examination.

Section 2577 of the Code provides that the holder of a certificate issued by the board of examiners "shall, before engaging in the practice of medicine, file the same for record in the office of the recorder of the county in which he resides, * * *

Section 2580 of the Code, so far as material to this case, is as follows:

"Any person who * * * shall practice medicine, surgery or obstetrics in the state without first having obtained and *filed for record the certificate* herein required, and who is not embraced in any of the exceptions contained in this chapter * * * is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than \$300, nor more than \$500, and costs of prosecution, and shall stand committed to the county jail until such fine is paid."

All of the states have enacted laws prescribing the qualifications of applicants and the conditions upon which certificates to practice medicine shall be issued to such applicants, and regulating the practice of medicine. The constitutionality of such statutes has been tested in various states, but, so far as we are able to find, all reasonable con-

ditions and regulations have been uniformly sustained by the courts. That the state may determine what acts constitute practice as a physician, and may impose conditions on the exercise of that privilege, was held in *State v. Mosher*, 78 Iowa 321, *State v. Bair*, 112 Iowa 466, *State v. Corwin*, 151 Iowa 420.

No statutes of this state are assailed upon this appeal, but it is argued on behalf of appellant that a certificate was issued to him by the state board of medical examiners, and that he attempted in good faith to comply with the laws requiring the recording thereof, by filing the same for record in the office of the clerk of the district court, and that he believed he had fully complied therewith and was entitled to practice medicine. The foregoing statutes require the holder of a certificate to practice medicine, before engaging in the practice thereof, to cause such certificate to be filed for record in the office of the county recorder, and that same be recorded by the county recorder in a book kept for that purpose. The same section requires that the record thereof shall be open for public inspection. Section 2580 makes it an indictable misdemeanor for anyone to engage in the practice of medicine in this state without first having obtained and filed a certificate for record in the office of the county recorder, as required by Section 2577. The language of the statute is: "Without having first obtained and filed for record the certificate herein required."

The obtaining and recording of the certificate are conditions precedent to his right to engage in the practice of medicine. He cannot lawfully do so until he has complied with the laws and regulations enacted by the legislature of the state for the regulation of the practice of medicine. The requirements of the statute that, before engaging in the practice of medicine, a certificate must first be obtained and filed by every person attempting to practice medicine

in the state of Iowa, are mandatory, and no right exists in favor of anyone to so engage in the practice of medicine until he has complied with all the requirements of the statute. Not only are these statutes mandatory in character, but they are founded upon principles of sound public policy. They are not intended to interfere with the right of any person to adopt and follow any lawful vocation which he may choose, but only to require that, before engaging to deal with the public in matters of such grave importance as the practice of medicine, he shall first satisfy the proper authorities of his qualifications, and comply with the conditions required by law to be performed by him before engaging in the practice of this profession. Statutes prescribing the qualifications for the practice of medicine and regulating the practice thereof are not alone for the protection of the public, but as well for the protection of the members of the medical profession. It affords them protection against the fraudulent schemes and practices of incompetent, dishonest and designing quacks, who seek to impose upon the credulity of the people and thereby tend to destroy the high character and aim of the profession and bring it into disrepute. It was said by Justice Field, in *Dent v. State of West Virginia*, 129 U. S. 114.

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. * * * Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions upon

compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected."

The purpose of causing the certificate to be recorded is, evidently, to give full publicity to the fact that the holder has passed the required examination and possesses the requisite qualifications and is deemed worthy by the board of medical examiners to practice medicine in the state of Iowa, and to provide a convenient method of apprising the public thereof. This would seem to be a reasonable regulation. The record of such certificate is, by special provision of statute, open to public inspection. No restrictions shall be placed by the custodian of such record upon the right of the public to examine and inspect the same. The question is not one of good faith on the part of the holder of the certificate, but of conformity to conditions imposed by the legislature upon the holder thereof, which must be complied with by him before he is authorized by law to practice medicine.

Appellant was required to file his certificate in the office of the county recorder before engaging in the practice of medicine. He failed to do this, not because he sought to evade the law, but on account of a misapprehension as to the proper office in which to file the same. It also appears that the misunderstanding of the clerk of the district court misled him; but these matters in no sense tend to legally excuse him from complying fully with the statute, before commencing the practice of medicine.

II. Having failed to comply with the law requiring him to file his certificate for record in the office of the county recorder, can he maintain this action for the value

of the services rendered? It will be observed that the statute makes it an indictable misdemeanor to engage in the practice of medicine "*without having first obtained and filed a certificate.*" The certificate must be obtained from the state board of medical examiners and filed in the office of the county recorder. The purpose and object of requiring the recording of the certificate can only be met by having the same recorded in the office designated by law. As before stated, the statute is mandatory, and a severe penalty is imposed upon its violation. It was said, in *Fox v. Dixon*, 12 N. Y. Supp. 267, wherein a physician sought to recover compensation for services rendered, without having first obtained the certificate required by statute:

"It is a settled principle that one cannot recover compensation for doing an act to do which is forbidden by law, and is a misdemeanor. The contrary rule would make an absurdity. It would permit one to hire another to commit a misdemeanor, and would compel the payment of the contract price for doing what the law forbids. Whether this statute is wise or not, we cannot examine. It is enacted in the interest of the health of the public, to prevent incompetent persons from practicing as physicians. We must give effect to it. And we cannot permit a recovery of compensation for doing an act which this statute declares to be a misdemeanor."

Deciding a case similar to the one at bar, the Supreme Court of Tennessee, in *Haworth v. Montgomery*, 18 S. W. 399, said:

"This section requires that 'every person holding a certificate from the state board of medical examiners or the county court clerk shall have it recorded in the office of the county court clerk in which he resides, and the date of record shall be indorsed thereon. Until such record is made, the holder of such certificate shall not exercise any of the rights or privileges therein conferred to practice

medicine.' In view, therefore, of the plain provision of this section, it cannot matter what the character of her 'temporary license' was, inasmuch as it was not recorded. The contract sued upon was one expressly prohibited by the statute. Where a statute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade, or business, except in compliance with the statute, a contract made in violation of such statute cannot be enforced. This is familiar law, and the judgment must be affirmed."

The statute in the above case differs somewhat from the statute of this state. The former provides that, until the record is made of the certificate, the holder thereof "shall not exercise any of the rights or privileges therein conferred to practice medicine;" whereas our statute provides that "he shall, before engaging in the practice of medicine, file the same for record in the office of the recorder of the county in which he resides." Perhaps the restrictions of the Tennessee statute are more forcibly expressed, but the meaning and purport of the two statutes is not essentially different.

The Supreme Court of Texas, in *Wickers-Nease v. Watts*, 70 S. W. 1001, applying the following statute, "If any person shall hereafter engage in the practice of medicine in any of its branches or departments for pay, or as a regular practitioner, without having first filed for record with the clerk of the district court in the county in which such person may reside or sojourn, a certificate from some authorized board of medical examiners, or a diploma from some accredited medical college, he shall be punished as prescribed in Article 438," to a case in which the plaintiff held a certificate to practice, but which he had failed to record, held that plaintiff could not recover, saying:

"However great the hardship following the law applicable to the facts in this case may be to a man who is

an honor to and is honored by his profession, this court is without power to relieve him from it, but must, in obedience to the law, which governs courts as well as litigants, reverse the judgment of the county court."

The decision of the Nebraska case cited by appellant is based upon a statute which provides specifically that a physician is not entitled to recover compensation for services rendered before complying with the requirements of the statute, and is, therefore, not helpful in this case.

The only case which we have found holding contrary to the doctrine of the foregoing cases is *Riley v. Collins*, (Colo.) 64 Pac. 1052. In the latter case, the court construed a statute of the state of Colorado. The language of the Colorado statute is as follows:

"Every person holding a certificate from the state board of medical examiners should have it recorded in the office of the clerk of the county in which he resides, * * * but no penalty was provided for the failure to record the certificate. The court did not hold the provision of the statute to be mandatory, and gave effect to another section of the general statutes of Colorado, which provided that the issuance of the certificate by the state board "shall be conclusive as to the rights of the lawful holder of the same to practice medicine in this state."

Stewart on Legal Medicine, Section 27, says:

"It is necessary that a physician should be qualified to practice in accordance with the statutes of the state where he resides in order to successfully maintain an action for his fees." See also 30 Cyc. 1593.

The holding of some of the authorities cited by appellant is quite persuasive, but none bear a very close analogy to the one at bar, and, if the doctrine therein laid down tends to support the claim of appellee, it is contrary to the holding of all of the courts which we have been able to find

upon the question at issue. It may be that appellees are morally bound to pay for the services rendered by appellant, and the rule which deprives appellant of the right to maintain an action therefor may be a harsh one, but, as was said by the Supreme Court of Indiana, in *Hedderich v. State*, 1 N. E. 47:

"Whether a statute is or is not a reasonable one is a legislative and not a judicial question. Whether a statute does or does not unjustly deprive the citizen of natural rights, is a question for the legislature, and not the courts. There is no certain standard for determining what are or are not the natural rights of the citizen. The legislature is just as capable of determining the question as the courts. Men's opinions as to what constitute natural rights greatly differ, and if courts should assume the function of revising the acts of the legislature on the ground that they invaded natural rights, a conflict would arise which could never end, for there is no standard by which the question could be finally determined."

As has been well said by Judge Cooley:

"The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power."

But this court is not disposed to find fault with the statute. It is in line with the statutes of most, if not all, of the states of the Union. It therefore necessarily follows that the judgment of the lower court must be, and is,—*Affirmed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

JESSIE E. MAIN, Appellant, v. J. W. MAIN, Appellee.

DIVORCE: Jurisdiction—Good-Faith Residence—Evidence. Evidence reviewed, and held sufficient to establish the good-faith

residence of plaintiff in the county where the action was brought, notwithstanding that the removal to such county followed litigation of the same nature in another county, where the other spouse had always resided.

DIVORCE: Jurisdiction—Pleading—Nonessential Allegations. No
2 allegation "that the action is brought in good faith and for the purpose of obtaining a divorce only" is necessary when plaintiff and defendant are both residents of this state. Sec. 3172, Code, 1897.

DIVORCE: Jurisdiction—Residence—Pendency of Proceeding in
3 **Another County—Effect.** The existence of an order of court in the county of the husband's residence (entered on the husband's unsuccessful application for a divorce), requiring the husband to pay certain monthly support money to the wife, is no obstacle to the wife's taking up a bona fide residence in another county and there instituting divorce proceedings on her own
hand.

DIVORCE: Judgment or Decree—Adjudication. A wife's plea for
4 divorce on the grounds of desertion for two years, wholly accruing after the termination of a prior action by the husband for divorce, is not adjudicated by the decree in such prior action wherein the wife asked and received separate maintenance on the grounds of desertion and cruel and inhuman treatment.

DIVORCE: Abatement—Pendency of Another Action. An action
5 for annulment of marriage on stated grounds by the husband in the county of his residence may not be pleaded in abatement of an action for divorce on different grounds by the wife in another county which is the county of her residence.

Appeal from Webster District Court.—R. M. WRIGHT,
Judge.

MONDAY, JUNE 25, 1917.

PLAINTIFF brought this action in the district court of Webster County, Iowa, originally as an action for separate maintenance, and later amended the petition, asking a divorce, temporary alimony, attorney's fees, suit money and permanent alimony in the sum of \$50,000. Defendant appeared and filed objections to the jurisdiction and a motion to dismiss for want of jurisdiction, also for change of

place of trial; objections and resistance to plaintiff's application for temporary alimony, suit money and attorney's fees. The court held that it had no jurisdiction, and sustained the motion to dismiss, and denied suit money, alimony and attorney's fees. The plaintiff appeals.—*Reversed.*

Thomas A. Cheshire and Robert Healy, for appellant.

Kenyon, Kelleher & Price, and Tripp & Tripp, for appellee.

PRESTON, J.—The parties were married in November, 1911, and lived together about six months, when they separated, defendant going to a hotel in Colfax to live, and plaintiff continuing to live in the house formerly occupied by them. Both parties continued to reside in Colfax, Iowa, until about the last of November, 1915, when plaintiff removed from Colfax to Fort Dodge, and, as plaintiff contends, took up her permanent residence in Fort Dodge, and has been living there ever since. The petition, as originally filed, asking separate maintenance, was filed December 23, 1915, and her amendment, asking a divorce, was filed January 12, 1916. This was the next day after defendant had filed his objections to the jurisdiction and motions. The original petition charged cruel and inhuman treatment and desertion.

One of the main points relied upon, and, as we view it, the turning point in the case, is whether, under the record, plaintiff was a resident in good faith of Webster County, Iowa, and entitled to bring her action there. We may as well discuss and determine that point now, and then take up the other questions presented. The statute, Section 3171, Code, 1897, provides, in substance, that the district court in the county where either party resides has jurisdiction of the subject matter in divorce cases. The defendant, appellee, concedes that, where an action for divorce

1. Divorce: jurisdiction: good-faith residence: evidence.

is originally brought by a bona fide resident of one county against a bona fide resident of another county, the district court of the county in which either of the parties resides has jurisdiction of the subject matter and of the parties. He concedes, also, on the question as to whether plaintiff, appellant, was a good-faith resident of Webster County, that the intention of the party is controlling. He says, however, that this intention is to be determined not only by what the party says, but it must be determined from all the facts and circumstances, as disclosed by the record.

Plaintiff, appellant, cites *Todhunter v. De Graff*, 164 Iowa 567, as holding that, in divorce proceedings, no particular length of time is required to enable a residence to be acquired by the plaintiff in such a suit. Defendant concedes this proposition, provided such residence is in good faith. Defendant's contention is that the evidence does not show a good-faith residence, but that it is more in harmony with the theory that plaintiff came to Fort Dodge for the purpose of attempting to confer jurisdiction upon the Webster district court, in order that defendant should be compelled to litigate the question away from his home county. The defendant does not dispute plaintiff's proposition that, under the authority of *Sylvester v. Sylvester*, 109 Iowa 401, and other cases, the general rule that the domicile of the husband is the domicile of the wife does not apply in divorce cases.

The only evidence introduced on the question as to plaintiff's good-faith residence in Webster County is that of the plaintiff herself, although the defendant claims that other matters in regard to prior litigation in Jasper County, the prior residence of plaintiff, should be considered on this point. Counsel for plaintiff contend that plaintiff was called as a witness for the defendant on his objections and motion to dismiss, and the defendant is bound thereby; while defendant contends that she was called by him only

for the purpose of cross-examination of her affidavit filed with her petition, in which she gave testimony in support of her application for temporary alimony. The so-called cross-examination of plaintiff as a witness goes beyond the scope of her affidavit, we think. The substance of her affidavit is that she is without means, and has not paid her attorneys, and is without means to support herself pending the trial or procure witnesses, and is unable to borrow money, and that defendant is worth about \$125,000. Nothing is said about her residence. In some cases, under such circumstances, it has been held that the party becomes the witness of the party exceeding the cross-examination. But this point is not made, and it may not be very material, in view of the fact that her testimony is the only direct evidence on the subject. She testifies, as a witness in court, substantially:

"I have been living in Fort Dodge about two months. I occupy five rooms. I went into those rooms about two months ago. I moved to Fort Dodge from Colfax; have been living in the latter place five years. I moved nearly all my personal effects to Fort Dodge from Colfax; left a few things in Colfax, part of them in the house that belongs to Mr. Main, and in which I had been living, and part of them in storage in Colfax. I brought the greater part of my goods to Fort Dodge. Am holding the key to the Colfax house until I get the remainder of my goods away from the house. My goods were shipped to Fort Dodge from Colfax about two months ago; I had them coming just as I could see fit to get them out. I don't remember when the last shipment was made; I have shipped them as I have had money to ship them with. I rent the house by the month, just a month at a time. I do not expect to ever go back to Colfax if I can help it. I brought two beds, two dressers, a sofa, bookcases, china closet, table, chairs, rocking chairs, mirrors, dishes, everything that was

contained in a small house. I have no relatives living in Fort Dodge. I am the same Jessie E. Main who was defendant in the suit of John W. Main in the Jasper district court at the October, 1912, term of that court, and I brought action for separate maintenance in Jasper County for the April, 1913, term of court, and I filed an application in April, 1915, for modification of the decree in the divorce suit, and I dismissed the suit for separate maintenance and the application for modification of the decree in the divorce suit. I did not tell Mr. Main I was going away nor give the key to the Colfax house to Mr. Main because I did not think I had to. Q. Mrs. Main, what purpose or object did you have when you came to Fort Dodge in reference to living here? A. Why, stay here, living here, making it my home here. Q. How long? To live here and make it your home how long? A. As long as I felt satisfied to live here and as long as I could live here in peace."

The defendant testified in regard to his property. It appears that, in October, 1912, the defendant herein brought an action for divorce in Jasper County, in which the plaintiff in this case claimed and was granted temporary alimony, and, in her answer in that case, she alleged that the plaintiff therein, the defendant herein, had wilfully deserted her, and was guilty of cruel and inhuman treatment, and asked for support and alimony so long as her husband continued to reside separate and apart from her. That case was tried in October, 1912, and the petition of plaintiff therein was dismissed. Later, and at the April, 1913, term of the Jasper district court, this plaintiff's application for attorney's fees and support was tried, and attorney's fees allowed to her, and support in the sum of \$50 a month, commencing December 1, 1912. The defendant herein appealed that cause to the Supreme Court, and it was affirmed in January, 1915. 168 Iowa 353. April 26, 1915, the plaintiff herein filed in that cause an application for a

modification of that decree, and an amendment thereto in May, 1915. That proceeding was dismissed by the plaintiff herein November 2, 1915. Pending the appeal to the Supreme Court before referred to, the plaintiff herein, at the April, 1913, term of the Jasper district court, brought an action for separate maintenance on the ground of desertion and cruelty. In that action, the defendant filed a cross-petition, in which he alleged that the marriage between the parties was brought about by the fraud and deceit of this plaintiff, and that plaintiff had been divorced from her prior husband in Minnesota and had married within a year without permission, and that her marriage with defendant was therefore void; that plaintiff was estopped from maintaining that action because he had paid the amounts adjudicated against him in the prior suit; alleged that he had no knowledge of these matters until after the prior divorce action instituted by him; prayed that plaintiff's petition be dismissed, and that the alleged marriage between the plaintiff and defendant be adjudged illegal and void. For reply to defendant's said cross-petition, plaintiff denied all allegations therein, and pleaded the former divorce proceeding as an adjudication of all matters set up by the defendant in his said cross-petition. December 8, 1915, the plaintiff dismissed her said action last referred to without prejudice, and, on December 23, 1915, brought the present action in Webster County.

These matters have been somewhat fully set out here because defendant contends that they have some bearing upon the question being now considered as to whether plaintiff is a good-faith resident of Webster County, and some of these matters will be referred to later in the opinion, on other points raised. Of course, the plaintiff could have gone on with her action brought at the April, 1913, term in the Jasper district court, but there is no reason why she should not, if she so chose, dismiss that action,

which she did. We are of opinion that, under the record before set out, and the undisputed evidence of plaintiff, she had a right to change her residence from Jasper County to Webster County, and the mere fact that there was prior litigation between the parties in Jasper County does not show that her removal to Webster County was in bad faith. She had a right to take up her residence in Webster County, and we think she has done so, and that the court should have found, under this record, that she was a resident in good faith of Webster County, and had a right to bring this action there. We have said that plaintiff's evidence is undisputed. We should have said that the defendant filed his affidavit in support of his application for a change of place of trial, in which he states that he is, and has been for 40 years, a resident of Jasper County, and that, during the time plaintiff and affiant lived together as husband and wife, they resided in Jasper County, and never had any residence in any other county in the state, and then states the distances, expenses, etc., in attending at Webster district court; but no other facts are stated by him in his affidavit bearing on plaintiff's intention in her removal from Jasper County to Webster County.

As stated, the pivotal point in the case is as to whether plaintiff is a resident in good faith of Webster County. It may be, as contended by defendant, that the two years required for divorce on the ground of desertion and her cause of action for divorce on that ground ripened after she filed her petition in the Webster district court for separate maintenance. Under some circumstances, it is not necessary that the two years should have elapsed when plaintiff filed her original petition in Webster County to authorize separate maintenance. *Hirschl v. Hirschl*, 161 Iowa 647, and cases.

2. Appellee contends that plaintiff's petition in this case does not allege that the action is brought in good faith for the purpose of obtaining a divorce only, as required by Section 3172 of the Code; but that section requires such allegations in cases where the defendant is a nonresident. The provisions of the statute in this regard where the parties are both residents of the state are that the district court in the county where either party resides has jurisdiction of the subject matter of the chapter on divorce, annulling marriages and alimony. Code Section 3171.

3. The defendant contends that, because the order or judgment in the Jasper district court requiring the defendant to pay \$50 a month is still in force, plaintiff should have filed her petition in this case in Jasper County, and that this is another reason why the Webster district court had no jurisdiction. But we see no reason why this matter may not be taken care of and the defendant protected in the trial of the instant case in Webster County, if defendant shall present the matter there, and if the plaintiff's case in Webster County is first tried.

4. If defendant has for two years asserted plaintiff, and a cause of action has accrued to her since the trial of the first case, such issue was not adjudicated in the first trial, as contended by defendant.

5. We have this situation, then: that defendant's cross-petition against plaintiff is still pending in Jasper district court, which, since plaintiff has dismissed her action brought there, is the same as though defendant had brought his action there against her. This action is, in

effect, for an annulment of the marriage, and, for the purposes of this case, we regard the same as an action for divorce, since such a proceeding comes under the chapter of the Code in regard to divorce, annulment of marriages, and alimony; and plaintiff has an action for divorce against defendant pending in Webster County. The issues are not the same, and we are unable to see how one could be pleaded in abatement of the other; that is, defendant could not plead his action in abatement of plaintiff's action, any more than plaintiff could plead her action in abatement of defendant's. In fact, no abatement was pleaded by either party. Of course, it may depend somewhat upon which case is tried first. It seems that there are cases where the rights of children are at stake, or an order has been made affecting children, where the court has a discretion in this matter; but no such question is presented in this case. Of course, if the defendant's cross-petition in Jasper County should be first tried, and it should be determined that the marriage was void, as he alleges, this would end plaintiff's claim for a divorce. If, however, the defendant should be defeated in his cross-petition on the issues tendered by him therein, we see no reason why plaintiff may not proceed with her case on the issues presented by her. We may suggest, in passing, that, in plaintiff's case, if it should be tried first, defendant can raise the issue as to whether there has been any marriage at all. So, too, if plaintiff's case is tried first, the defendant may or may not try his in Jasper County, depending upon the result of the trial in Webster County. It has been held that the pendency of an action against a wife for absolute divorce in one county did not preclude her from instituting an action in another county in the same state for a divorce from bed and board, where she had sought no affirmative relief in the other suit. *Cook v. Cook*, 159 N. C. 46 (40 L. R. A. [N. S.] 83); 9 R. C. L. 413.

The statutes of North Carolina are not as favorable to the plaintiff's contention here as are the statutes of Iowa. As the record now stands, the plaintiff was asking no affirmative relief in any proceeding pending in Jasper County after her dismissal of the last petition filed by her in that county, and this was before she commenced the instant suit.

It is our conclusion that the trial court erred in dismissing plaintiff's petition, and the order and judgment appealed from is therefore reversed, and the cause remanded for further proceedings in harmony with this opinion.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

MARY MURRAY, Appellee, v. BROTHERHOOD OF AMERICAN YEOMEN, Appellant.

TRIAL: Taking Case from Jury—Hostile Motions for Directed Ver-

1 **dict—Effect.** A disputed question of fact need not be submitted to the jury, when counsel, even impliedly, consents to a full and final disposition of the cause by the court. So held where, in a case presenting disputed questions of fact, both plaintiff and defendant moved for directed verdict, where the court then openly assumed the matter to be before him for full decision, and where complainant did not ask that any issue be submitted to the jury.

INSURANCE: Mutual Benefit—Action—Prior Existence of Dis-

2 **ease—Evidence.** The confidential report of an insurer's expert medical examiner, preliminary to the issuance of a policy of insurance, in which he recommended applicant as a fit subject for insurance and made no mention of any disease affecting the applicant, is quite persuasive proof that no disease existed.

INSURANCE: Mutual Benefit—Warranties and Representations—

3 **Rule of Construction.** Statements and answers in an application for insurance will not be treated as technical warranties, even though repeatedly stated to be such, (a) when, from their very nature, they are necessarily expressions of opinions, and (b) when, elsewhere in the contract, there can be found reason

to suppose that such was not the clear understanding of the parties. In such case, the warranty is simply of the applicant's good-faith opinion. So held as to statements as to the physical condition of the insured, and as to the nonexistence of tubercular disease.

INSURANCE: Mutual Benefit—Representations and Warranties—

4 Good Faith—Evidence. On the issue of applicant's good faith in making representations in an application for insurance, evidence of what applicant had been told concerning the subject matter of the representation may be admissible. *Held*, evidence competent that applicant, who had represented that her brother had died of lead poisoning, had been informed, prior to the making of the representation, that the doctors had so diagnosed the brother's malady.

Appeal from Polk District Court.—CHAS. A. DUDLEY, Judge.

MONDAY, JUNE 25, 1917.

ACTION by plaintiff as beneficiary on a benefit certificate issued by defendant to Jessie B. Murray, deceased. It was stipulated that, if plaintiff was entitled to recover at all, she was entitled to recover \$726.64, with interest. There was a trial to a jury, and at the close of all the evidence, defendant moved for a directed verdict in its favor, and plaintiff moved for a verdict in her favor. The defendant's motion was overruled and the plaintiff's sustained, and judgment rendered for the amount stipulated. Defendant appeals.—*Affirmed*.

John D. Denison, Jr., for appellant.

Clark, Byers & Hutchinson, for appellee.

PRESTON, J.—Defendant is a fraternal beneficiary association organized under the statute. On April 15, 1914, deceased made and executed her application for a benefit certificate in defendant association. On the 20th of the same month, a benefit certificate was issued to her, and on May 5 thereafter, she was duly initiated or adopted as a member, and received the certificate as issued. A copy of

the application appears on the back of the certificate. She died of tuberculosis of the lungs March 29, 1915, in good standing in the association. No question is now made as to the cause of death. No controversy is made but that notice and proper claim was made for the amount due under the certificate. Defendant association rejected the claim and refused payment. The contentions of the defendant, as its counsel state them, are: First, that the answers of Jessie B. Murray to the questions propounded to her in her application were false and untrue, and constitute, each of them, a breach of warranty, which avoided the contract; second, that her death resulted from a disease or disability existing prior to the date of her benefit certificate; third, that the warranties contained in the certificate were breached by the insured, and the contract thereby rendered void. The errors assigned are that the court erred in admitting evidence regarding the ailment of her brother, which was communicated to deceased; that the court erred in holding that defendant was required to prove that deceased had knowledge of the falsity of the answers in her application, and erred in sustaining the motion of plaintiff, and overruling defendant's motion for a directed verdict.

The application contains, among other things, the following:

"I hereby warrant all my answers herein to be full, complete and true, without suppression, evasion or concealment, and I agree that this application with questions and answers thereto shall be copied on the certificate to be issued hereon, and that such certificate and application, together with the constitution and by-laws now or hereafter in force, shall form the contract between me and the Brotherhood of American Yeomen, and that such contract shall bind me and all my beneficiaries. * * * And I agree that any untrue answer to any question in Parts one

and two of this application shall immediately, without process, render the certificate issued thereon null and void."

The certificate provides:

"This certificate is issued and accepted upon the following warranties and conditions and agreements. That the statements in the application of said member, including answers in the medical examination, a copy of which appears upon the back hereof and which is hereby made a part of this agreement, are true in every particular, and shall be held to be strict warranties. That, if the application or any part thereof shall be found to be untrue, then this certificate shall be null and void; no claim resulting from disease or disability existing prior to the date hereof shall be valid against this association; I hereby warrant that I am in good health and that no change has occurred in my condition as set forth in my application, and I accept this benefit certificate, and agree to all the conditions therein contained at date of my adoption."

The list of questions in the application was headed by the words: "Warranties of applicant for membership, etc., in the Brotherhood of American Yeomen." The application contained questions upon family history, and her answer that her brother, aged 25 years, had died of lead poisoning, after one year's sickness.

Defendant pleaded affirmatively breach of warranty on the part of the insured because of the alleged falsity of her answers to certain of the questions. These are, in substance, that her statement that she was in good health was false and untrue, and so as to her consulting a physician within 10 years, and her answer that she had last been attended by a physician two years ago for two fractured ribs, and that there was a prompt recovery, for that she had been treated by physicians less than two years prior to the date of her application, and for an ailment other

than fractured ribs, and that she concealed the fact of such consultation, treatment, and ailment from the defendant; that she had consulted several physicians other than the one mentioned, and for ailments other than stated, within 10 years; that her answer to the question as to whether she had any disease of the throat, heart or lungs was false and untrue, for that, at said time, she was afflicted with disease of the lungs; that her statement that no blood relative, including brothers, had had consumption was false and untrue, for that a brother had had consumption; that her statement that she had never had any ailment, disease, injury or operation other than stated was false and untrue, in that, about one year prior to the date of her application, she was afflicted with symptoms of disease the same as those with which she was afflicted in her last illness. Defendant also alleged that the insured was not in good health at the time the certificate was signed by her and as warranted in the certificate, and that the certificate provided that no claim resulting from disease or disability existing prior to its date should be valid against the association, as to which last, defendant alleges that the insured died as the result of a disease, to wit, tuberculosis of the lungs (consumption), existing prior to the date of the certificate, May 5, 1914. The certificate provided that it should "not be valid unless delivered to applicant during applicant's good health." Defendant alleges that she was not in good health when the certificate was delivered. Because of certain matters appearing in the record, and particularly in regard to the question of the court's sustaining plaintiff's motion to direct a verdict, and whether deceased had knowledge of the alleged falsity of her answers, and whether her disease, tuberculosis of the lungs, developed before or after the beneficiary certificate became effective, which will be referred to later in the opinion, we think it advisable to refer to the

evidence somewhat in detail, but without attempting to give all of it.

A witness testifies that he was the medical attendant of deceased for about nine months, during which time she was confined to the house and prevented from attending to business for about seven and one-half months; that he treated her for pulmonary tuberculosis, which was the remote cause of her death; that the history and symptoms of the disease during its progress were typical.

Another medical witness testified that he had known deceased two years; had not treated her for any ailment prior to her last illness; attended her during her last illness for tuberculosis of the lungs; that the remote cause of death was tuberculosis. Another medical witness testified that he had met deceased at the sanatorium at Oakdale, where he was superintendent, and that this was June 25, 1914. Witness identified an exhibit as the record of deceased, and answers, to questions put to her by an attendant, that Dr. Peck was the sanatorium examiner in June, 1914; identified another exhibit as Dr. Peck's report on deceased to the sanatorium.

Dr. Peck testified that he examined deceased June 17, 1914, for admission to the sanatorium; that she was referred to him by Dr. Page, who brought her; that the exhibit identified by the prior witness was the record made by him; that witness examined her June 8, 1914; he found that she then had pulmonary tuberculosis; that she complained of tiring easily, was nervous, poor appetite and digestion, restless sleep, weak, afternoon fever, loss of weight, dry cough, shortness of breath, and so forth; that he diagnosed her case, basing his judgment on her symptoms and the history given by her, as pulmonary tuberculosis, and expressed his opinion that she had had it for years; says that she told him she had a similar attack the previous year, and had gone to Nebraska for a vacation; that de-

ceased then told him she had a brother who died from tuberculosis, three years previous.

As before shown, deceased stated in her application that her brother had died of lead poisoning; and it should be said here that she had been informed, prior to her giving such answer, that a doctor had pronounced his disease lead poisoning, but that thereafter, and before she told Dr. Peck that her brother had died of tuberculosis, she had been so informed.

Continuing the testimony of Dr. Peck, he says further that deceased told him in the conversation before mentioned that she had had a long-drawn-out attack of typhoid fever five years previous; witness says he found definite physical signs of tuberculosis in the lungs, and diagnosed her case as tuberculosis on June 8th; that she had been tubercular for years. He says, however, that the condition mentioned was not necessarily present all the time in the lungs; that if Dr. Mountain (whose testimony will be referred to later) found her normal on April 15, 1914, then there was no tuberculosis there. Witness gives other symptoms and tests made by him, and says she did not have the acute, rapidly developing type, but that she had chronic tuberculosis. He says, however, that a careful physical examination might be made in April and no symptoms discovered, and later, the symptoms might be found in June; that chronic tuberculosis has a usual run of several years before producing death. He says that, in his judgment, deceased was afflicted with tuberculosis or consumption on May 5, 1914, and immediately preceding that day.

At this point, we may as well refer to the rebuttal testimony of Dr. Peck in regard to a conversation between him and the plaintiff, who testified to the conversation. The plaintiff testified that, the day before deceased went to Oakdale, witness went with her to see Dr. Peck, and says:

"I asked him what was the matter. He said it was

lung trouble. I said, 'Doctor, how did that come? She was examined just in April for the Yeoman Lodge, and she passed an examination of good health then.' 'Well,' he says, 'her lungs—she was not far enough advanced, not even two weeks ago, that you could tell,' he says, 'that there was anything wrong with her,' and he says, 'it is hard to tell now * * * for it is just the very starting of it.' "

In rebuttal, Dr. Peck was asked if he so stated to Mrs. Murray, and answered:

"A. I had some conversation with her; yes, sir. Q. Will you tell the jury whether or not you make those statements to Mrs. Murray? A. I cannot recall the words used in talking to her. Q. Did you tell her the substance of that? A. Yes, sir."

We have been compelled to go to the transcript as to this testimony, because of a dispute between counsel, but find that appellee's additional abstract is substantially correct.

Dr. Wertz, testifying for defendant, states that he treated deceased about April 24, 1914, for catarrhal inflammation of the membranes of the nose and pharynx; that she consulted him at that time for headache, recurrent nose-bleed, for two months following a cold; said she had been afflicted in this way for two months.

Dr. Page says that he made a physical examination of deceased in December, 1911, and recalls that she was run down and took a vacation; saw her again in June, 1914, and diagnosed her trouble as being tubercular, and referred her to Dr. Peck; she had a cough, and an examination of the lungs caused him to decide she had tuberculosis; saw her again June 16, 1914; her case was further advanced; saw her again in July, 1914; case progressing more rapidly than in June; told her in June what her trouble was. Dr. Leir says he treated the brother of deceased in the fall of

1911, and that the patient died in September; the cause of his death was tuberculosis of the lungs; lead poisoning runs a different course from tuberculosis; and witness describes the difference. Certificate of death recites that the brother died of tuberculosis of the lungs.

The stenographer in the office of the superintendent of the sanatorium says that, on June 24, 1914, she made the official record for each patient; produces Exhibit 6, and says her recollection is that she obtained the information appearing therein from deceased, and it recites, among other things, that a brother died of tuberculosis, and gives her age, weight, height, etc. Witness also identified Exhibit 7 as the paper brought by deceased from Dr. Peck. The first part of this, signed by deceased, contains nothing material to the issue; it simply agrees, in substance, to abide by the rules of the institution, and gives the time of her residence in Iowa. Attached to this, or as a part of it, is what purports to be the applicant's history, made out by Dr. Peck. Among other things in this report are the following questions and answers:

"Unable to do usual work since when? Just quit her office; past two months has gone home at night 'all in.' Similar attack a year ago; cough first began two months ago; expectoration began, Slight. amount. Sputum not examined; amount. 24 hrs. Slight. Tubercle bacilli present? None Examined. Applicant ever spit blood? No. Ever have chills, and when last? Yesterday. Highest and lowest afternoon temperature during last seven days, 99.3-99.8; Applicant has not had night sweats. Any enlarged lymphatic glands, and where? Yes, Cervical. Applicant has never had persistent hoarseness or huskiness; urinalysis presents nothing abnormal; previous illnesses, typhoid July, 1909, sick two months; three broken ribs and pleurisy; brother died three years ago with tuberculosis."

Another page of Exhibit 7 is filled out by the sanatorium examiner and shows, in part:

"Temperature 101 at 5:30 P. M. that date; pulse 104; respiration 24; normal weight 120; present weight 102 $\frac{1}{4}$ lbs.; appetite, none; voice, Sl. husky; cough not troublesome; no pain; fair strength; no tenderness or disease of bowels; menses more scanty past two months; no other disease present or other organs involved; constitutional conditions and general appearance, fair; applicant in moderately advanced condition of disease."

The printed application states that the sanatorium is in no sense to be considered a consumptive's home, and that it is an institution where patients in the first stage of pulmonary tuberculosis can be sent with the hope of cure, and so forth.

Dr. Mountain, the examining physician for the local lodge of defendant of which deceased was a member, testified that he signed the confidential report of medical examiner April 15, 1914; that he was acquainted with deceased and first learned she was sick several months after signing her benefit certificate; learned she had tuberculosis about the time of her death; that the statements above his signature in the confidential report are true. From this confidential report of the medical examiner, Dr. Mountain, it appears that, on the "15th day of April, 1914, deceased was 5 feet 4 inches in height, and she weighed 115 pounds, and her chest measure, forced inspiration, 28 inches; forced expiration 31 inches, and a waist measure of 24 inches and a temperature of 98, and her heart action was clear, regular and normal; there was no murmur or enlargement of the heart, and her pulse rate sitting was 72 and standing 80. Under No. 4, 'Examination of lungs,' he stated that her respiration was full and uniform throughout the lungs, and there was a freedom from unusual sounds throughout the lungs; that the percussion was normal throughout each

lung; and that there was no disease of the throat or lung, and there was no evidence of any disease of the brain or nervous system, and that the applicant had not had any disease or disorders affecting her present health."

Attached to this report is the following certificate of Dr. Mountain:

"Remarks.....I hereby certify that I have carefully examined Jessie B. Murray in private, this 15th day of 4, 1914; and that I have carefully reviewed this application for \$1,000 on applicant's life; that all answers to questions in Part 2 are in my handwriting and are exactly as made by applicant, and all answers contained in Part 3 are in my handwriting; and that applicant signed the said Part 2 in my presence. I recommend this applicant be accepted. Are you a commissioned examiner for this society?.....Dated at D. M. 4—15—1914. Dr. E. B. Mountain."

The witness also testified that he first learned that deceased was sick several months after signing her benefit certificate; learned, at about the time of her death, that she had tuberculosis.

The secretary of the local lodge testifies that deceased attended a Yeoman dance about December, 1914.

Dr. Foulk, testifying for plaintiff, says that he was the medical adviser of deceased in the latter part of her lifetime; that, between December, 1911, and June, 1914, she called at his office 10 or 12 times; that he treated her for grippe, cold, constipation, headache,—different things like that; that he saw her about April or May, 1914. He was suspicious of her lungs and told her to go and see Dr. Peck; that she should get out into the open air; that, prior to the last named date, her health was reasonably good; that when he sent her to Dr. Peck was the first time he suspected tuberculosis, and that it was about a month previous to June 8, 1914, when he saw her and told her to go

and see Dr. Peck; and at that time, he examined her lungs and found a dull area, and she had a little temperature, and she gave a history of having lost weight; that the cold or grippe which he mentioned had nothing to do with the consumption that caused her death; that she came to his office about a month before she went to Oakdale, and had a little fever and a little cold; that he sent her home and told her to come back in a few days; that she did so, and had not got rid of her cold, and that this cold he thought developed acute consumption; he testified that he would say tuberculosis could develop in an interval of 48 hours; does not remember anything in respect to fractured ribs; never knew she had any ribs broken.

Dr. Watts, dentist, testified that deceased worked in his office from 2 to 4 years; put in lots of time; was there early in the morning; worked frequently from 8:00 to 6:00, sometimes later; always ready to attend to business; was well; did not recall that she was out of the office for six weeks or two months at any time that he was at home, and while he was away in the summer, she worked just the same; heard no complaints of any headaches prior to April, 1914.

Dr. Cornell, a dentist, in Dr. Watts' office two years, beginning May 1, 1913; saw deceased every day; she was usually the first one of the girls to reach the office in the morning; describes her duties, and says she was on her feet practically all the time, and was there from about 8:00 in the morning to 6:00 or later in the evening; did not remember that she lost any time aside from the vacation she took; he took no vacation and was there every day; knew of her consulting Dr. Peck in June, 1914; noticed a change in her physical condition about a month before that time; never knew of her being ill at all up to the time of her leaving the office; about a month prior to June 8, 1914.

she began to gradually lose strength; appeared weary. needed a vacation.

Plaintiff, the mother of deceased, testified that deceased worked every day, long hours; that she did not complain in the two weeks preceding June 8, 1914, of being tired and nervous, nor of having any fever, nor of being restless at night, nor that she was losing weight or had any headache; that she never noticed that her daughter had any cough—she never complained of any cough; that deceased lived at home; was in good health when she joined the Yeomen; worked right up to the time she went to Oakdale, except a week; first noticed her health failing along towards June; wanted her to take a vacation; never knew her to be sick except for little complaints; several years before she joined the Yeomen she had an accident and complained of a pain in her side; thought her ribs were broken; when she had the trouble with her ribs, she treated herself; she made a very prompt recovery, and did not have Dr. Foulk during this sickness; knew of no one treating her in July of 1909; she was living at home at that time; never knew deceased had pleurisy; deceased never had anything like typhoid fever; went with deceased to see Dr. Peck the day before she went to Oakdale; did not know deceased was coming home tired for two months prior to June 17, 1914, nor that she had had a similar attack the year before; she was away 6 or 7 days on her vacation in 1913; deceased did not complain in the few weeks preceding June 8, 1914; did not know she had lost weight; she didn't complain of headaches; never noticed her having any cough; deceased went to Nebraska after she came home from Oakdale, the same place to which she had gone the year before, where some relatives live; she went August 1st, came back Thanksgiving time, stayed two weeks and returned to Nebraska; witness went out and brought her home in February, 1915; deceased was greatly improved at Thanksgiving time

(1914); had increased in weight; gained 24 pounds while in Nebraska on a ranch; felt better; she went to Oakdale June 24, 1914, and stayed nearly three weeks; she went to Yeoman dance in December, 1914; was feeling fine.

The father gave similar testimony, but not so much in detail. Another witness testified that he was acquainted with deceased; never knew of her being sick until her last sickness; when he saw her, she did not look or act sick.

Such, in brief and in a general way, is the testimony. There may be some other circumstances to be referred to in the discussion of the different points.

1. Appellant contends that the statements by deceased in the application should be construed as strict warranties, while appellee says that they should be construed as representations. Counsel for appellant have been very industrious in the citation of authorities on this proposition, and have very carefully presented their theory on that point, as has counsel for appellee. This is the point most strongly relied upon by appellant for a reversal. He urges strenuously that, if her statements are warranties, then defendant's motion for a directed verdict should have been sustained, and that the case should be reversed because it was overruled. Some other questions, such as the admission of testimony, depend upon the determination of this point. There is a question of practice that should be first noticed. We have stated that both plaintiff and defendant filed motions for a directed verdict, the defendant's being overruled and plaintiff's sustained. Appellant has assigned error that there was a conflict in the testimony at some points, and that, after the court had determined that defendant's motion for a directed verdict was not well taken, the case should have been submitted to the jury, and that the court erred in sustaining plaintiff's motion for a verdict. There is but little argument by ap-

1. TRIAL: taking case from jury; hostile motions for directed verdicts: effect.

pellant on this point except in the reply argument. We are inclined to the view that there was some conflict in the testimony and perhaps enough to require submission of the case to the jury as to some questions, were it not for the state of the record. In some jurisdictions, it is the rule that, where both parties make a motion for a directed verdict, all questions become mixed questions of law and fact for the court, and that there is no question for the jury. The general rule in Iowa seems to be the other way, but with some exceptions, as where both sides of the case either expressly or impliedly consent to a disposition of the case by the court. We think the instant case comes within the Iowa cases holding that the court may properly dispose of the case without submitting it to the jury. The trial court was of opinion that the statements of deceased were not strict warranties. It appears that, in ruling on these motions, the trial court said, substantially, that the two motions presented a serious legal question as to the knowledge of deceased in regard to the representations and their alleged falsity, and that there was some doubt in his mind whether, if the defendant had not made its motion, he would have submitted the question to the jury, to the end that the question which he thought was about the only serious question of fact in the case might have been determined by the jury, and said: .

“But if I am wrong about this matter, in view of the motion which has been made, and the question is submitted to the Supreme Court, the appellate court can make final disposition of it.”

The court then went on to say that he did not believe that deceased, to her knowledge, was affected with tuberculosis at the time she signed her application, or at the time of the delivery of her certificate, and that, if her brother died of tuberculosis of the lungs, she did not know

it at the time of taking out her insurance with the defendant association. The court then said:

"I think these questions are all squarely presented, so that either party now can have these reviewed by the Supreme Court just as well as if I should submit it to the jury upon instructions."

Thereupon, the court overruled the motion of the defendant, and sustained the motion of the plaintiff for a directed verdict for the sum of \$755. After the court had made the statement that, if he was wrong about the matter and the question is submitted to the Supreme Court, the appellate court can make final disposition of it, and that the questions could be reviewed by the Supreme Court just as well as if the case was submitted to the jury upon instructions, the defendant made no objection to the disposition of the case in this manner, and made no request that the case should be submitted to the jury. Furthermore, in this court, counsel for appellant argues strenuously, and, as said, makes it his principal ground for reversal, that a proper construction of the certificate and the application and the statements of deceased is that they are warranties, and that under the evidence there should have been a directed verdict for the defendant. At one place in the argument, appellant says:

"The sole question, as I conceive it, is, did the defendant establish any or all of its defenses by such evidence as required the court under the Iowa decisions to direct verdict in its behalf. In considering that question, the trial court was manifestly in error when he injected the element of knowledge and bad faith and laid the proof of these upon the defendant as a condition required before its defense could be established, and his opinion in directing verdict shows that the failure of the defendant to establish bad faith, knowledge, etc., on the part of Jessie Murray was the reason underlying his action in that respect."

In the latter part of the above statement, counsel for appellant seems to concede that there was a failure of defendant to establish bad faith, knowledge, etc. Counsel concedes, however, in the reply argument, that the burden of establishing the various defenses alleged by the defendant clearly rests upon it. Again, counsel says that defendant's motion for a directed verdict is based upon the proposition that one or more of its defenses are established as a matter of law, and in such case, nothing was left for the court to do but direct a verdict for the defendant; and they cite here *Sanderson v. Chicago, M. & St. P. R. Co.*, 167 Iowa 90, holding that the facts about which there is controversy must be submitted to and determined by the jury, when the evidence of the existence or non-existence of the facts is such that honest minds, searching for the truth, fairly and dispassionately weighing the evidence, might differ as to the existence or non-existence of the ultimate fact sought to be established by the evidence. This, of course, is the ordinary rule, but the question here is whether, under this record, the defendant did not consent to a disposition of the case by the court, or waive the question of submitting it to the jury; and as to this proposition, appellant cites *German Savings Bank v. Bates Addition Imp. Co.*, 111 Iowa 432. But in that case it appears, and the court so says, that the parties never agreed to waive a jury and to submit the issue of fact to the court, and that neither was willing, as against the motion of the other, to waive a jury and to submit this difference to the court; but each was impliedly asking, as against the other, that this difference, which it was the province of the jury to determine, should be submitted to the jury, so that there was nothing in that case except the two motions, one against the other, and this did not of itself show that the parties consented that the trial court should pass upon all questions. But there is more than that in the instant case, and we think.

under this record, that this case is ruled at this point by *Gray v. Central Minn. Immigration Co.*, 127 Iowa 560, 562; *Wells v. Western Union Tel. Co.*, 144 Iowa 605, 624, and cases; *Battis v. McCord*, 70 Iowa 46.

It is very clear to us from the evidence before set out that there was abundant evidence to sustain a verdict for plaintiff, had the case been submitted to the jury, and it had so found. Appellee does not claim that, if there is not sufficient evidence to support a verdict of the jury in her favor, the case should not be reversed on appeal. Appellee contends that this and nothing more was the holding in *First National Bank v. Mount Pleasant Milling Co.*, 103 Iowa 518-524, cited by appellant. It is our conclusion that there was no error at this point.

2. The next question is whether the statements of deceased should be considered as strict warranties, as contended by appellant, or representations, as appellee contends. The principal contention by appellant, as to her statements, at this point, is as to whether deceased had tuberculosis, or consumption, at the time of her statements, or when her certificate became effective; and there is some argument on the point whether, considering her statements as representations, she had knowledge thereof and acted in bad faith. Some other alleged false statements are said to have been made which constitute a breach. But as to these last, plaintiff's evidence was such, some of it direct and some of it circumstantial, that the trial court was justified in finding that they were of minor complaints, such as cold and the like, and that she had not had typhoid fever and some of the other things relied on.

The evidence has already been set out at considerable length, and, without repeating it here, there was ample evidence to sustain the finding of the trial court that, although deceased died of tuberculosis of the

2. INSURANCE:
mutual benefit;
action: prior
existence of
disease: evi-
dence.

lungs, she did not have that disease on April 15, or May 5, 1914. And the evidence is abundantly sufficient to show that, even though she had the disease prior to these days, she did not know it, and did not act in bad faith in making her statements as to her physical condition in that regard. In this connection, it may be remarked that the confidential report of defendant's medical examiner, Dr. Mountain, before set out, is significant. It will be noted that, just before the certificate, under the title "Remarks," a space for answers is left blank, indicating, it would seem, that the examiner found nothing to indicate that the applicant was not in good physical condition. From this, and from the fact of his examination and the making of the certificate, as said in *New York Life Ins. Co. v. Moats*, 207 Fed. 481, 485 (C. C. A. 1913):

"It may be inferred that the medical examiner, after having made a careful examination of the applicant, as a representative of the company skilled in the detection of disorder, found no sign or evidence of derangement of the brain or nervous system: that nothing in the appearance, speech or manner of the applicant gave to the medical examiner any impression not before expressed in his report, or which might influence the home office in its estimate of the risk. In other words, he had, as an expert representative of the company, and as required by his instructions, given in his report a pen picture of the applicant as he presented himself to the examiner, and this pen picture was favorable to the applicant as an insurable risk. It was plainly upon the examination and report of this skilled expert of the company that the character of the risk was finally and mainly determined by the company, and not wholly upon the answers and representations of the applicant himself; and particularly must this be so where the inquiry relates to the brain or nervous system of the applicant, wherein a physician and skilled examiner and ob-

server is often a better judge of the physical and mental condition of the applicant than the applicant himself."

This language is applicable to the instant case, and, as said, the defendant relied, in part at least, upon the judgment of Dr. Mountain. Though not cited by either party, see, also, Code Section 1812; *Weimer v. Economic Life Assn.*, 108 Iowa 451; *Brown v. Modern Woodmen*, 115 Iowa 450, as bearing on this point. It has been held, in some of our prior cases, that the section cited does not apply to mutual benefit fraternal orders such as this. Some members of the court think otherwise, but the point is not raised in this case or determined.

Dr. Peck, testifying for defendant, stated that, if Dr. Mountain found deceased in the condition as stated in the confidential report, then, on that date, there was no tuberculosis there, but that it developed thereafter and before June 8th. If Dr. Mountain, from the character of the examination made by him, was unable to discover any symptoms of tuberculosis or any other disease, surely deceased, inexperienced in such matters, could not be expected to know of its presence, and much less would a court or jury be justified in finding that she did not act in good faith in stating her condition. We do not overlook the fact that there is other evidence on behalf of defendant that the deceased had the disease prior to the dates mentioned; but, under the entire record, the finding of the trial court is sustained.

3. Appellant contends, and cites a large number of authorities to the proposition, that, where a party to a contract binds himself to the strict truth of his statements, or answers, in such contract, and warrants the truth of his said statements and answers, the only question, where breach of warranty is alleged as a defense, in an action on such contract, is as to the truth

3. INSURANCE:
mutual benefit;
warranties and
representations:
rule of con-
struction.

of the answers and statements so made and warranted. And appellant says that the element of knowledge is excluded where a contract of warranty is under consideration. Much of appellant's argument at this point is based upon the assumption that the statements and answers of deceased in the instant case were and are warranties. We do not understand appellee to dispute many of these propositions, but, as said, she contends that they should be treated as representations, and that, this being so, the question as to the knowledge of deceased is material.

In view of the length of the opinion, caused by setting out the evidence at some length, we shall not attempt to review all, or any considerable number, of the cases. It would be an endless task to do so. Furthermore, we think the rule is well settled in this jurisdiction, so that we shall refer to a few of the cases and content ourselves with the citation of others.

In *Owen v. Metropolitan Life Ins. Co.*, (N. J.) 67 Atl. 25, the court said:

"The declaration in Paragraph 2 of the application, to the effect that the applicant had never had disease of the heart, an obscure disease, concerning which the insurer should know that the applicant could not have certain knowledge saving as he might be told by a physician or other expert, is properly to be construed as a warranty only of the bona fide belief and opinion of the applicant. *Henn v. Metropolitan Life Ins. Co.*, 67 N. J. Law 310 (51 Atl. 689); *Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. Law 393 (55 Atl. 291, 62 L. R. A. 774). Since the case is devoid of evidence to show that Owen was apprised that he was suffering from heart disease, beyond the mere fact that he was so suffering, it certainly was not conclusively proved that his bona fide belief and opinion upon the subject were otherwise than as warranted, and so a verdict

could not properly be directed in favor of the defendant on this ground."

Murphy v. National Trav. Ben. Assn., 179 Iowa 213, and *Teeple v. Fraternal Society*, 179 Iowa 65, published at about the time, or since the submission, of the present case, are in point. In the *Teeple* case, we said that it is now well settled that the use of the word "warrant" or "warranty" in the application or policy is of itself not conclusive upon the question whether, in view of the entire record, any given answer or statement of the insured is to be given technical effect as a warranty, rather than as a representation, and that the rule is universal that such statements will not be construed as warranties, if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding of the parties; and that, where there is any doubt as to the construction, the court will lean against the one which imposes upon the assured the obligations of a warranty. And further, that, if the answer alleged to be a warranty is one which, from the very nature of the subject of inquiry, must necessarily be an expression of opinion, the warranty will not be held to extend further than to the good faith of the answer. Numerous cases are cited in the opinion in that case which sustain the propositions stated, among them some of our own recent cases. See, also, *Lakka v. Modern Brotherhood of Am.*, 163 Iowa 159; *Sargent v. Modern Brotherhood of Am.*, 148 Iowa 607, and *Daniel v. Modern Woodmen of Am.*, (Tex.) 118 S. W. 211.

Enough has been said to indicate that in this case the statements of deceased as to her physical condition, and particularly as to tubercular disease, were necessarily a matter of opinion. There is also some language in the application indicating that the defendant, in wording the form of its application, may not have intended the language to mean a strict warranty. At least the language

is such as to make it at least doubtful in meaning, and, under the authorities in such a case, a construction will be given favoring a representation rather than a warranty. Among these provisions, we notice the following: "I hereby warrant all answers herein to be full, complete, and true, without suppression, evasion, or concealment," etc. Had the language stopped with the word "true," appellant would have had a stronger case; although, under the authorities, even though the word "warrant" is used, it does not necessarily follow that a strict warranty is intended. But the words following the word "true" limit the preceding statement, and would naturally have referred more to representation than to warranty. Definitions for these words are found in Cyc.: "suppression," 37 Cyc. 611; "evasion," 16 Cyc. 817; and "concealment," 8 Cyc. 544. They mean, in a general way, to avoid by some device or strategy, or the concealment or intentional withholding of some fact which ought in good faith to be communicated.

There may be other reasons which might be given why the matters now in question should be considered as representations, but enough has been given to show that, under the authorities, they are not strict warranties. See further, at this point, *Murphy v. Aasen*, supra; *Reppond v. National Life Ins. Co.*, (Texas) 101 S. W. 786 (11 L. R. A. [N. S.] 981); *Lakka v. Brotherhood*, supra; 19 Cyc. 684, 812.

4. Treating, then, the statements of deceased as representations, we think the evidence admitted, to the effect that, prior to the making of the application by deceased, she had been informed that the doctors had pronounced her brother's illness lead poisoning, was competent as bearing upon her good faith and knowledge as to the cause of her brother's death. Had the case gone to the jury, the court doubtless would, on its own mo-

4. INSURANCE:
mutual benefit:
representations
and warranties:
good faith:
evidence.

tion, have limited it, to that purpose, or given such an instruction, if asked by defendant. The court, in determining the case, seems to have so limited this evidence. Furthermore, appellee contends that, under the rule announced in *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa 529, at 534, defendant has waived its exception to the admissibility of this evidence, by its motion to direct a verdict.

There may be some other matters argued, but those we have noticed cover all such, and are controlling. It follows, then, that the judgment of the district court ought to be, and it is,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

JOHN H. PARNHAM, Appellee, v. F. R. WEEKS, Administrator, et al., Appellants.

EXECUTORS AND ADMINISTRATORS: Allowance of Claims—

- 1 **Care of Parent—Mutual Expectation to Pay and Receive Compensation.** Evidence reviewed, and held to sustain a finding by the jury that services by a son in caring for an aged parent were performed with the mutual expectation on the part of the parent of paying for such services, and on the part of the son of receiving such payment.

EVIDENCE: Relevancy, Materiality and Competency—Excluding,

- 2 **Immaterial Part of Exhibit.** Principle recognized that it is proper for the court to exclude an offered exhibit in so far as it does not bear on the matters in issue.

EVIDENCE: Opinion Evidence—Nonexpert Opinion as to Mental

- 3 **Competency—Improper Basis.** Nonexpert opinions as to the mental competency of a person not based on the matters detailed by the witness, are inadmissible.

TRIAL: Deliberations of Jury—Possession of Exhibits. Exhibits

- 4 **need not be sent to the jury room, in the absence of a request for such action, especially where the court, upon admitting them in evidence, stated that they would not be sent out with the jury, and counsel, by silence, acquiesced.** Sec. 8717, Code, 1897.

COSTS: Taxation—Voluntary Defendant. Heirs voluntarily ap-

- 5 **pearing on the trial of a claim in probate, and asking and being**

granted the right to defend in place of the administrator (who had formerly allowed the claim), must suffer a judgment for costs in case of allowance of the claim.

Appeal from Audubon District Court.—E. B. WOODRUFF, Judge.

MONDAY, JUNE 25, 1917.

APPEAL from judgment in favor of a claimant against an estate. Defense by permission of court in name of administrator by the heirs. The facts are stated in the opinion.—*Affirmed in part; reversed in part.*

Mantz & White, for appellants.

J. M. Graham, S. C. Kerberg and T. M. Rasmussen, for appellee.

STEVENS, J.—In July, 1909, Millicent Parnham died testate, seized in fee of 220 acres of land, a house and lot in the town of Audubon, and some money. Her husband, George Parnham, survived her. To him she bequeathed, in lieu of dower, the life use of the 220 acres of land. Her will further provided that, in the event he should refuse to consent to this provision of her will, then her real estate was bequeathed, one half to John Parnham, appellee herein, and the rest to Charles Robert Parnham for life, remainder to his children. Shortly after the death of Millicent Parnham, John Parnham qualified as executor of her estate. On July 4, 1911, George Parnham died intestate, without property. Shortly thereafter, upon the application of John Parnham, F. R. Weeks was appointed administrator of his estate. In March, 1909, George and Millicent Parnham went to live with John Parnham upon the 220-acre tract, which was situated in Audubon County. They continued to reside at his home until their death. John

1. EXECUTORS AND ADMINISTRATORS: allowance of claims: care of parent: mutual expectation to pay and receive compensation.

Parnham filed a claim against the estate of George Parnham, deceased, in the sum of \$2,550, claiming that said amount was due him for care, nursing, board and support of his father during the time he resided with him after March, 1909. The administrator allowed the claim as a claim of the third class. On December 30, 1913, upon application of appellants, except F. R. Weeks, the allowance of said claim by the administrator was set aside by the court, and the same set down for hearing on its merits. The court, at the same time, granted to the heirs of George Parnham permission to defend against said claim in the name of the administrator. Appellee stated his cause of action in two counts: (a) Upon a contract, by the terms of which deceased promised and agreed to pay appellee for his board, care and nursing, while he lived in the home of appellee; (b) for the reasonable value of the board, care, nursing and other services rendered to the said George Parnham. Shortly after George and Millicent Parnham went to live at the home of claimant, there appears to have been a conversation one morning at the breakfast table between John Parnham and his mother, in which the matter of compensation for their board and care was discussed. The record is not clear as to exactly what was said, but enough is given so that the inference may be drawn that all of the parties understood that John Parnham would be paid for the services to be rendered to both the father and the mother. The father, apparently, took little, if any, part in the conversation, but was present, and, so far as the record discloses, heard all that was said between the parties. George Parnham was past 80 years of age, very feeble and infirm, and, the evidence tended to show, required much care and attention upon the part of claimant and his family. No testimony was offered on behalf of appellants for the purpose of disputing either the extent or value of the services rendered by John Parnham and family,

but appellants base their defense upon the following grounds: (a) That George Parnham was mentally incompetent to make the contract alleged by claimant for board, care, nursing and other services; (b) that the services were rendered gratuitously, and without the intention of charging therefor, and without the expectation that any compensation would be made to him; (c) that appellee had been fully paid for all services rendered prior to the time claim in suit was filed. The jury returned a verdict in favor of claimant for the full amount of his claim. Judgment was rendered in accordance with the verdict. Both parties appeal, the appeal of the administrator being from the judgment against him for costs. The defendants will be treated as appellants herein.

1. Appellants offered in evidence the first and second annual reports of John Parnham as executor of his mother's estate, but only a portion of said reports was admitted by the court. In the first annual report, which was filed prior to the death of his father, appellee, among other matters, stated that:

2. EVIDENCE: relevancy, materiality and competency: excluding immaterial part of exhibit.

"In addition to said personal property, said decedent owned certain real estate in said county, a life estate in which was devised by the will in said estate to the husband of said decedent, George Parnham; * * * that said George Parnham requires constant care, and it has been necessary for this executor to provide a home for him and otherwise care for him; that he is entitled to pay for said services; that he believes the same to be reasonably worth the sum of \$.50 per day."

In the second annual report, he said:

"He (John Parnham) shows to the court that George Parnham, holder of a life estate in the real estate belonging to said estate, died on or about July 4, 1911; that he

has paid all the bills for care and maintenance of said George Parnham up to the time of his death."

The above extracts from the two reports, together with Exhibit C attached to the first annual report, which purported to be a "statement of moneys paid out for care of George Parnham, and for expense in keeping up and repairing property of the estate," together with other portions of the second annual report, were admitted by the court.

The record is not quite clear as to exactly what part of the second annual report was received. The court, upon objection by appellee, excluded all that part of each of said reports that did not in some way refer to the expenditure of funds by appellee in payment of the care, nursing and board of George Parnham, or of repairs upon the farm. Appellant insists that the court committed error in refusing to permit the whole of said reports to be received in evidence. Appellee, called as a witness in his own behalf, was permitted to detail at some length the services claimed to have been rendered by himself and family to George Parnham, and, upon cross-examination, was interrogated fully in regard to all of the matters gone over in chief. He testified to the income derived from the real estate belonging to the estate of his mother, and to the payment of certain items therein referred to for the use and benefit of his father. He denied that he had been paid for his services, or that the same were rendered gratuitously and without the intention to charge therefor, and stated that he fully expected to be compensated for the services rendered.

The only purpose for which these reports were offered in evidence was to show that appellee had made statements, admissions and declarations inconsistent with the claim he was then making against the estate of his father, and that the same tended to show that whatever services

were rendered by himself and family to George Parnham were rendered without the intention to either charge or receive compensation therefor. Every statement and item contained in said reports tending, even remotely, to establish the claims asserted by appellants, were admitted in evidence. In fact, it is practically conceded by appellants that the court admitted all that was contained in said reports tending in any way to directly discredit the claim of appellee that he intended to charge for the services rendered, or that he had not previously been paid therefor; but contend that the said reports, taken as a whole, would have justified the jury in inferring that appellee had at no time prior to the death of his father intended to claim anything for the services rendered to him; that is, notwithstanding that the portions of the two reports excluded by the court contained no reference to the matter of compensation or services rendered, yet, when taken in connection with the parts admitted, they were more persuasive and convincing than the extracts admitted, standing alone.

As before stated, George Parnham died without having elected to consent to the provisions of his wife's will, and therefore the claim is made that he died seized of an undivided one third of the real estate belonging to her at the time of her death. Except the interest which he had in her estate, he possessed no property of any kind.

In the absence of evidence to the contrary, it must be presumed that George Parnham knew and understood the interest which he had as her surviving spouse in the real estate of his deceased wife. The evidence is undisputed that, in a conversation had at the breakfast table in the home of John Parnham, Millicent Parnham, in the presence of her husband, instructed appellee to keep an account of what he did for them, as he was to be paid therefor. One witness, who was present at the time this conversation was had, testified that George Parnham took part

in it. Nothing that was said by him, however, appears in the record. The evidence relied upon by appellee to establish his claim that the services rendered were in obedience to a contract made upon the occasion of the conversation at the breakfast table may not be wholly convincing, but whether convincing or not upon this question, it does lend aid and support to appellee's claim that the services were rendered on his part and on the part of both Millicent and George Parnham with the intention that same were to be paid for.

The court very carefully guarded the interests of appellants in its instructions to the jury, and placed the burden upon appellee to overcome all of the presumptions of law that arose from the fact that the services were rendered by the son to his parents, and required him to show that the services were rendered with the understanding, both on his part and that of his father, that same were to be paid for.

The evidence, taken as a whole, may justify the inference that appellee believed that the interest of his father in the estate of his deceased mother was that of the life use only of the 220-acre farm, but this inference does not necessarily lead to the conclusion that he intended to render the services in question without compensation therefor. Appellants offered no evidence in contradiction of the claim of appellee that valuable services were rendered by him and his family to George Parnham. So far as the record is concerned, appellants, in effect, concede that both the rendition of services and the value thereof fixed by claimant were just and reasonable.

After the death of George Parnham, apparently, appellee learned for the first time that his father died seized in fee of an undivided one-third interest in the real estate of his mother. He then caused an administrator to be appointed and the claim in controversy to be filed. The

inference may be drawn from this fact that, at the time the services were being rendered, appellee believed that the only source from which he could be paid for his services was the income and profits derived from the 220-acre farm, which was not substantial; but this inference does not justify the conclusion that the services were being rendered gratuitously. The mere fact, if assumed, that he believed that the source of income was insufficient to substantially compensate him for the services rendered, would not outweigh other testimony to the effect that he had not only expected to be paid, but that payment had, in fact, been promised him.

The evidence is clear that George Parnham, before his death, became very feeble and required constant care, nursing and attention; that appellee and his family were faithful and constant in their attentions to the old gentleman; and that the services rendered were of a character that justified the jury in finding that appellee was entitled to substantial compensation therefor.

The court gave due prominence in its instructions to the consideration to be given by the jury to the extracts from the first and second annual reports of appellee, as executor of his mother's estate. The purpose for which the same were admitted and the weight to be given to them by the jury were clearly and fully stated. While the portions of the reports admitted tended to some extent to justify the claim of appellants that appellee had charged and received pay for his services, yet the same were not conclusive. The question was for the jury. The evidence failed to satisfactorily show that appellee had been paid for the services rendered. An item of \$101.50 referred to in the first report, the evidence showed was not received by appellee or a member of his family, but the same was paid to a servant hired to do the housework, while appellee and his family devoted their time and attention to the care

and nursing of George Parnham. The question as to whether the services were rendered gratuitously or with the intention and expectation that same would be paid for, and whether appellee had in fact been paid therefor, was for the jury. The court, under proper instructions, submitted the same to the jury. The court admitted in evidence all that was contained in the two annual reports that bore upon the questions at issue, and properly excluded the rest.

II. The court sustained a motion made by counsel for appellee to strike the opinion of a nonexpert witness, called by appellants to give testimony regarding the mental incompetency of George Parnham at the time of the conversation at the breakfast table, when it is claimed that the contract alleged in Count 1 of plaintiff's claim was made. The court sustained the motion, upon the ground that the witness did not base his opinion wholly upon matters testified to by him. We do not deem it necessary to set out the record on this point, but we think it apparent that the witness based his opinion upon matters not covered by his testimony. The rules governing the admission of the evidence of nonexpert witnesses are too familiar to require statement or the citation of authority. The motion to strike was properly sustained.

III. The court withdrew from the jury the question of the mental unsoundness of George Parnham. The evidence introduced did not justify the submission of this question to the jury. The opinion of one witness was properly stricken by the court, and the other witness, upon cross-examination, made it apparent that he had no knowledge of the mental condition of George Parnham at or about the time the alleged contract was entered into.

What is said on this point disposes of appellants claim that the court committed error in refusing to submit

to the jury the special interrogatory requested by their counsel as to the mental condition of George Parnham at the time it is claimed the alleged contract was made.

IV. It is also claimed by appellant
4. TRIAL: deliber- that the court committed error in refusing
ations of jury: to permit the reports offered in evidence,
possession of exhibits. only portions of which were admitted, to be
taken by the jury while deliberating upon its verdict.

Our statute (Code Section 3717) provides:

"Upon retiring for deliberation, the jury may take with them all books of accounts and all papers which may have been received as evidence in the cause, except depositions, which shall not be taken unless all the testimony is in writing and none of the same has been ordered to be struck out."

The court, in *State v. Young*, 134 Iowa 505, held that the language of this statute is not mandatory, and therefore the court, in the absence of a request, does not err in omitting to send the papers out with the jury; but that, when requested by either party, the papers and books received in evidence should be sent out with the jury, and refusal to do so is error.

The record as to what occurred with reference to these exhibits is that, when the same were offered in evidence, the court announced that only a portion of each would be received, and that the jury would not be permitted to take the same upon retiring to deliberate upon the case, but that counsel might use the same in argument to the jury. Counsel for appellant at the time made no objection to the observation of the court, nor did counsel request the court to permit the exhibits to be sent to the jury room. The record, therefore, presents no question for the consideration of this court. Had counsel requested that the exhibits be taken by the jury, and, upon the refusal of the court to permit the same to be taken, proper exceptions

had been preserved, the question might have been considered upon this appeal. It may be proper, however, to state that, while counsel claims that Exhibit C, attached to the first annual report of the executor of the estate of Millicent Parnham, was written upon a different kind of paper than the rest of the report, and that same bore evidence upon its face of alteration or mutilation, there is no apparent reason why the attention of the jury was not called to the matters referred to, and each member of the panel permitted to inspect the same. Furthermore, Exhibit C comprised but a single sheet of the report, and all of the entries thereon were admitted in evidence. It could have been readily detached from the rest of the report, and doubtless, upon request, the court would have permitted same to be done, and the paper taken by the jury upon retiring to its room for deliberation.

V. The heirs at law of George Parnham were permitted to appear and defend in the name of the administrator. They in fact entered their appearance and filed answer as parties to the suit. The claim in controversy had previously been allowed by the administrator. The jury found in favor of the claimant for the full amount of his claim. There would seem to be no reason why the parties who voluntarily entered their appearance for the purpose of making defense should not be liable to the payment of the costs of the proceedings. The court below taxed the costs against the administrator. Plaintiff filed a motion to retax the costs, and prayed that same be taxed to the defendants, except the administrator. The motion was overruled; plaintiff appeals.

The result of the trial justified the allowance of the claim by the administrator, and we see no reason why the estate should be taxed with any part of the costs herein. The motion to retax the costs should have been sustained

5. Costs: taxation: voluntary defendant.

and judgment entered therefor against the defendants, except the administrator.

The cause is, therefore, affirmed upon defendants' appeal and reversed upon plaintiff's appeal, with directions that the costs be taxed to the defendants, except the administrator.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

C. A. PAYETTE et al., Appellees, v. MARSHALL COUNTY et al., Appellants.

JUDGMENT: Lien—Loss of Lien—Subsequently Acquired Real

1 Property. Judgments are, by statute, liens on the real estate of the judgment defendant only during the ten years following the date of the judgment. It necessarily follows that real estate owned by the defendant at the expiration of said ten years, or subsequently acquired and later passed to heirs under the laws of inheritance, is wholly beyond the reach of said judgment. (See Sec. 3801, Code, 1897.)

LIMITATION OF ACTIONS: Application to State and Municipalities—Nominal Appearance—Strictly County Matters.

2 The State, when appearing in a purely nominal capacity, and a municipal corporation, when appearing simply as the representative of the people of such corporation, are not exempt from the operation of the statute of limitation. So held as to a county (with intervention by the State) seeking to collect an obligation due the temporary school fund of the county.

INTOXICATING LIQUORS: Judgments—Life of Lien on Real Estate.

3 A judgment for fine and costs in an intoxicating liquor prosecution necessarily ceases to be a lien on the defendant's real estate *at the expiration of the life of the judgment*, to wit, 20 years from the date thereof, irrespective of the declaration in Section 2422, Code, 1897, that such a judgment shall act as such lien "until paid." The latter section creates no perpetual lien.

Appeal from Marshall District Court.—JAMES W. WILLET, Judge.

MONDAY, JUNE 25, 1917.

Action in equity to quiet title to land and for an

injunction. Decree for plaintiffs, and defendants appeal. The material facts are stated in the opinion.—*Affirmed.*

George Cosson, Attorney General, *C. A. Robbins*, *Ross R. Mowry*, Assistant Attorneys General, *M. M. O'Bryan* and *E. N. Farber*, for appellants.

Carney & Carney, and *B. L. Burritt*, for appellees.

WEAVER, J.—There is no dispute as to the facts. On April 30, 1879, in an action then pending in the district court of Marshall County, one John Payette was convicted of maintaining a liquor nuisance, and judgment was then and there entered, imposing upon him a fine of \$100 and costs. Thereafter, on November 8, 1879, in a similar proceeding in the same court, he was again convicted, and adjudged to pay a fine of \$50 and costs. These judgments, so far as the record shows, have never been paid. On June 29, 1899, Bridget Payette, wife of the said John Payette, died intestate, leaving certain land, which is described as Lot 6 of the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Section 35, Township 84, Range 18, and an undivided half of Lot 4, Block 3, in Glick & Willigrod's Addition to Marshalltown, the other undivided half of said lot being then owned by her husband, John Payette, who survived her about 15 years, dying intestate, May 17, 1914. After the death of John Payette, the board of supervisors of Marshall County procured the issuance of executions upon the above-mentioned judgments, and levied upon said land as being subject to the payment thereof, and also caused the administrator of said estate to be garnished to enforce payment of the said claims. The plaintiffs, who are the children and heirs at law of both Bridget Payette and John Payette, bring this action in equity, setting up the facts as here related, and allege that they are the owners of said lands and that no part thereof is liable or subject to the

1. JUDGMENT:
lien: loss of
lien: subse-
quently acquir-
ed real prop-
erty.

payment of said judgments, action upon which, they aver, is barred by the statute of limitations, and that right to have an execution thereon has long since expired. They therefore ask to have the title quieted in them, and that further attempt to enforce said executions by levy upon or sale of the property be enjoined.

By their answer, the board of supervisors and the sheriff holding the executions admit the devolution of the title upon plaintiffs as pleaded in the petition, but aver that the share therein which John Payette had and acquired in his lifetime became subject to the lien of said judgments, and that said liens are still valid and enforceable by execution for the benefit of Marshall County and its temporary school fund, and they ask a decree confirming their right to proceed with the sheriff's sale.

The State of Iowa also appeared and intervened, stating in its petition that it had an interest in the controversy in common with Marshall County and adverse to the plaintiffs. It alleges no facts on which such claim is asserted, but asks that the judgments be decreed to be a lien upon the property.

Plaintiffs demurred generally to the answer of the defendants and the petition of intervention. Both demurrers were sustained, as was also a demurrer to the defendants' cross-petition.

2. LIMITATION OF ACTIONS: application to state and municipalities: nominal appearance: strictly county matters.

I. In their argument to this court, the defendants first rely upon the proposition that the right to enforce the judgment against the lands is protected and preserved by virtue of the general rule that statutes of limitations do not operate against the sovereign or the government, whether state or Federal. The general soundness of this rule will not be questioned, but the propriety of its application to the case at bar is not so clear. Though the State for some reason made it-

self a party to the case by intervention, it fails to allege or suggest a single fact, except to say it is interested in the matter in controversy with the defendants and against the plaintiffs. Nor is any attempt made in argument to enlighten the court on that subject, and we think the case is to be treated and disposed of precisely as it would have been had the intervention not been made. It is true that the judgments were entered in actions prosecuted in the name of the State of Iowa, but a judgment in a case of that nature and the money collected thereon do not belong to the state, but to the county, for the use of its temporary school fund. The state's interest, if any, is merely nominal, and it is settled in this jurisdiction that, where the state stands in a merely representative capacity and not in the exercise of its sovereignty, its exemption from the statute of limitations is not effectual. *State v. Henderson*, 40 Iowa 242.

This brings us to the next and more pertinent inquiry, whether, under the circumstances of this case, the county is to be regarded as a mere arm or instrument of the state's sovereignty, and therefore entitled to an exemption from the effect of the statute of limitations. Reference to the precedents seems to indicate that, where the claim made by the county is in its own right or interest, and not in the interest of the state or general public, the limitation is applicable to the same extent as if the action were brought by an individual. *Brown v. Painter*, 44 Iowa 368; *Hartman v. Hunter*, 56 Ohio St. 175; *County of St. Charles v. Powell*, 22 Mo. 525; *H. & T. C. R. Co. v. Travis County*, 62 Tex. 16; *San Francisco v. Jones*, 20 Fed. 188; *Perry County v. Selma M. & M. R. Co.*, 58 Ala. 546; *Ouachita v. Tufts*, 43 Ark. 136; *Chamberlain v. Board Supervisors Lawrence Co.*, 71 Miss. 949. The same principle has been recognized by this court in *City of Pella v. Scholte*, 24 Iowa 283, 298, and *County of Des Moines v. Harker*, 34 Iowa 84. The

county in this instance is seeking the enforcement of the Payette judgments, not for the use or benefit of the state nor for the use or benefit of the general public of the state, but solely in its own interest and in the interest of that particular part or fraction of the public within its local jurisdiction. The county is not the state (*Perry County v. Selma M. & M. R. Co.*, 58 Ala. 559), and the reasons upon which the rule *Nullum tempus occurrit regi* is supposed to rest, have little or very restricted application to the minor municipalities of the state.

II. But irrespective of the effect of the general statute of limitations, there is another insuperable objection to the claim or right asserted by the appellants. Even if the judgments could be held not subject to the statute of limitations, neither the county nor the state could now enforce collections thereof against the property, title to which has passed to the plaintiffs, unless the court could further find or say that the judgments are and at all times have been a lien upon said property. In the absence of statute therefore, a mere personal judgment at law is never a lien upon the defendant's property without levy of execution, and when such statute exists, the lien so provided is measured and controlled by its terms. Our statute upon this subject is as follows:

"Judgments in the Supreme or district court of this state, or in the circuit or district court of the United States within the state, are liens upon the real estate * * * for the period of ten years from the date of the judgment." Section 3801, Code, 1897.

Thus it will be seen that the very enactment which creates the lien provides in express terms for the period of its existence. This is not a statute of limitation upon a right of action which may be of no avail as against the sovereign authority of the state. It does no more than to fix a period of time within which a party, having obtained

a judgment, may follow the defendant's real estate into the hands of grantees. If he fails to avail himself of such privilege within the time fixed, the right expires, and he must enforce his judgment, if at all, by the usual method of levy and sale upon such property as he can find belonging to the judgment debtor, unaided by a statutory lien. The court has no power to extend its life, nor can the officers of the state prolong it by neglecting to make use of its benefits. See *Albee v. Curtis*, 77 Iowa 644. If Payette owned any non-exempt real estate in Marshall County when these judgments were entered, or if he acquired any within the succeeding 10-year period, the statutory lien attached thereto at once, and might have been enforced at any time within 10 years from the date of the judgment. They were not so enforced. Indeed, except as to the undivided half of Lot 4, the judgment could not have been a lien on the property at any time; for he did not acquire any title thereto until the death of his wife, in the year 1899, 20 years after the date of the judgments, and 10 years after the time when the judgments could constitute or become a lien under the statute. It follows of necessity that plaintiffs hold the title to the property in controversy unincumbered by any lien thereon in favor of either state or county, and that the trial court was right in so holding.

3. INTOXICATING
LIQUORS: judgments: life of
lien on real
estate.

III. Appellants further assert claim to a lien under the terms of Code Section 2422, which provides that judgments for fines and costs for violating the liquor laws may be collected as a charge against the property, both personal and real, used or occupied for such unlawful purpose, and that such charge shall be a lien on the property until paid. We shall not attempt to consider the extent or effect of the lien thus provided for by statute, except to say that we think it ought not to, and cannot, be con-

strued to provide a perpetual lien on the property. There is nothing in the statute which excepts such a judgment from the general statute which limits the effective life of a judgment of a court of record to the period of 20 years, and, in our opinion, the lien mentioned must be held to expire with it.

The issue joined as between defendants and appellee Hoes relates to a subsidiary matter which an affirmance upon the other issues renders of no importance at this time.

The decree below is right, and it is therefore—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

JENNIE C. SEMMONS, Appellant, v. NATIONAL TRAVELERS' BENEFIT ASSOCIATION, Appellee.

INSURANCE: Accident Insurance—Accidental Injury and Sole Cause of Death—Degree of Proof. Harmonious, consistent and related facts and circumstances may be such as to establish, *prima facie*, (a) that an injury was accidental, and (b) that such injury was the sole cause of death, even though there is no expert medical testimony in support of the latter.

PRINCIPLE APPLIED: Ice from melting snow had, during an afternoon, accumulated on five steps leading to a porch, and particularly on the top step. The insured came home after dark, and was heard to come up the walk and steps at his usual walk. When the top step was reached, the wife heard a "thud" as though a person had fallen, and a scraping sound as though the person had slid down the steps. This was followed by low, continuous, monotonous talking, but no cry for help. A sound followed as though someone was crawling up the steps on his knees. The wife opened the door, and discovered the insured aimlessly walking around on the porch in a dazed condition. He was taken inside the house. He was very pale. His talk was, at first, incoherent. Later, he said he slipped on the steps and fell to the walk. No marks of injury appeared on the body. He remained conscious for two hours, then became unconscious and so remained to the time of his death, seven hours later. In the meantime, a doctor was called. There was evidence pos-

sibly tending to show that insured was then partly paralyzed, but there was no showing of any predisposition to apoplexy or paralysis. After he was taken into the house, he vomited a bloody, watery substance. He had not been well for two years prior to his death, and had quite largely given up business, but was, at all times, up and around the city. The nature or extent of his ailment did not appear. Prior to his injury on the night in question, he was in his usual health. In an action on the policy, there was no medical testimony that the fall (if he did fall) did or might have caused his death.

Held, the record would justify the jury in finding (a) that the injured person was "accidentally" injured, and (b) that such injury was the sole cause of death.

EVIDENCE: *Presumption—Withholding Evidence.* No unfavorable
2 presumption is raised against one who fails to call physicians on the issue as to the cause of death of a party in question when such physicians are equally accessible to both parties.

Appeal from Story District Court.—E. M. McCall, Judge.

MONDAY, JUNE 25, 1917.

ACTION at law, brought by plaintiff as beneficiary in a certificate of membership issued by defendant to W. J. Semmons. Plaintiff claimed that deceased met his death as a result of bodily injuries effected by accidentally falling upon an icy step. Trial to a jury. At the close of plaintiff's evidence, defendant moved for a directed verdict in its favor, which was sustained. The plaintiff appeals.—*Reversed and remanded.*

C. G. Lee, and I. R. Meltzer, for appellant.

Carr, Carr & Evans, J. Y. Luke, and E. H. Addison, for appellee.

PRESTON, J.—Plaintiff sought to re-
cover \$5,000 upon a certificate, claiming
that assured accidentally slipped and fell
violently upon an icy step on the night of
February 6, 1915, which effected bodily in-
1. **INSURANCE:**
accident insur-
ance: acci-
dental injury
and sole cause
of death: de-
gree of proof.

juries that resulted in his death within a few hours thereafter.

That assured was in good standing, that he died on the date alleged, and that notice and proof of death were given, was admitted. The only question in dispute was whether the death of deceased resulted from injuries effected by accidental means. The main question is whether it was necessary, under the circumstances shown, to call medical witnesses to show that the death of deceased resulted from the injuries which he received on the evening in question. Appellee states the proposition this way: The decisive question is whether the evidence was sufficient to establish the allegation that assured's death resulted from bodily injuries "effected directly and independently of all other causes, through external, violent and accidental means." Appellee's contention is that there is no direct evidence to establish that fact, and that the circumstantial evidence is insufficient to show that the death of the assured resulted from accident. They say there may be direct evidence that deceased fell on the porch, but that the direct evidence does not show that such fall produced fatal injuries. Several separate reasons were stated in the motion to direct a verdict, but it is conceded that the real ground of the motion was that the evidence was insufficient to justify a verdict in plaintiff's favor, for the reason that the evidence fails to show that the death of the assured resulted from a bodily injury accidentally received.

The trial court adopted defendant's theory, and, in ruling upon the motion, said, in substance:

"The record is silent as to whether or not the injury which the assured received, if he received one, could have caused his death. No witness, physician or layman, has testified that his death might have resulted or could have resulted from the injury which he received, if he did re-

ceive one, that evening on the porch. It strikes me that, under the circumstances, the court could not permit a verdict to stand if one were rendered, in the absence of any showing that the cause of the death of Mr. Semmons was the injury which he received on the porch the night before his death."

The defendant also contends, and cites authority to the effect, that a theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and that it is not sufficient that they may be consistent with that theory, for that may be true and yet have no tendency to prove the theory; and many authorities are cited to the further proposition that, if other conclusions than that contended for may reasonably be drawn as to the cause of the injury, from the facts in evidence, the evidence does not support the conclusion sought to be drawn from it, etc. These legal propositions are not disputed by appellant.

The certificate provides that the association "does hereby accept W. J. Semmons * * * and does hereby insure said member * * * against loss of life, limb, sight and time resulting from bodily injuries (hereinafter called 'such injuries') effected directly and independently of all other causes through external, violent and accidental means."

It will be necessary to refer to the testimony bearing upon the point in controversy, and this we will now proceed to do as briefly as may be. There was evidence from which the jury could have found that, prior to the date in question, a heavy snow had fallen; the snow had melted to some extent on the afternoon of February 6th and that evening it turned cold, and the melted snow was turned to ice. Upon the south side of the Semmons residence was

a porch with five steps from the walk to the porch, and there were two steps from the street to the walk. There were no eaves upon the porch to which this walk and steps led. The afternoon of the 6th, the snow had been melting upon the roof of the porch and the water had been running down upon the steps; ice had formed, particularly upon the top step. On the date in question, deceased was in his usual health; he had been to a funeral that afternoon, and after the funeral he had remained down town until dinner time. After dinner he had gone down town for the mail at about 8:10 P. M. While down town, he was observed by witnesses who testify that he was then apparently in his usual health. Just before 9 o'clock that evening, he was heard by his wife coming along the street returning home. An ell of the house is located about 14 or 15 feet from the sidewalk on the street; this ell is octagon shaped, and in it were three windows. Mrs. Semmons was sitting in the octagon reading. The frozen snow and ice gave a crunching noise to footsteps. Mrs. Semmons recognized the footsteps of her husband, and that he was walking at his usual gait; she heard him come into the yard up the steps from the sidewalk to the yard walk, and up the steps to the porch until he reached the top step, when she heard a noise like a thud upon the step. A part of the testimony of plaintiff follows:

"I did not observe anything unusual about his condition when he left the house to go down town that evening. I think he left about 10 minutes past eight, and was gone more than a half hour, but I don't think quite three quarters. I think he returned 10 or 15 minutes before 9. It is $3\frac{1}{2}$ blocks from our home to the post office. I know his walk and heard him coming, and he was walking about as usual, about his usual gait. The next day I observed the condition of the steps, and they were very icy. After hearing Mr. Semmons coming along Eighth Street by the

window where I was sitting, I heard him turn in and walk up the 2 steps and walk the length of the walk to the porch steps and walk up the 5 steps—up, I think, to the top step. Then there was a thud of some kind. I did not know exactly what had happened. I imagine that he came to the top step. I next heard a rattling down the steps; then I heard talking at the foot of the steps. About a week or two before this, some children had been playing upon the steps—I suppose it was children—who had left a box of little condensed milk cans sitting on the steps—there was a place at the end of the steps for the children to play. I didn't go to the door immediately, and I heard a noise on the steps as though someone—it didn't sound like footsteps; it sounded more like someone on their knees—but I could hear the weight on the ice as they were moving around, and they continued up the steps in that way, moving back and forth, a noise as someone on the ice; it didn't sound like a man's footsteps, but sounded more like a man crawling up steps. There was talking all the time in just a conversational tone, but no one was calling for help or anything of that kind. It came along up to the top of the steps. The talk continued right along, and the same noise, as though someone was going back and forth on the steps, or crawling up the steps; and when they got to the top step, I went to the door and was going to open it, and then thought I wouldn't. The talk ceased for just a moment and they were quiet, so I went to open the door, and then it seems as if someone got up to their feet, and then I heard footsteps going round and round on the porch, and then I knew something was wrong and I threw the door open. When I opened the door, Mr. Semmons stopped and put his hand out, but he wasn't reaching towards the door. I took him by the arm and led him into the house. He walked in and took off his gloves and laid them on the stand, and I believe he took his hat off himself, and then I

helped him to take off his overcoat. I asked him what was the matter, if he got hurt, and at first I couldn't understand what he said; each time he would say something that ended up with 'walk;' I couldn't understand whether he said he had walked too much or what, and I said, 'I can't understand what you say,' and then he took both hands and took hold of his leg and pushed his leg along the floor. Q. What did you say after he did that? A. I said, 'Oh, you slipped on the steps and fell to the walk?' and he said, 'Yes.' Q. Did you hear what was said by Mr. Semmons to Dr. Proctor about what happened to him? A. Yes, sir. Q. What did Mr. Semmons say? A. Dr. Proctor said, 'How did this happen—what were you doing when this came on?' Q. What did Mr. Semmons say? A. He said, 'I fell on the steps.' * * * When I opened the door and found my husband on the porch, I heard him walking, but he stopped and stood still and reached out; he did not speak outside, and I could not understand at first what he said when he first came in. He looked very pale, and looked quite dazed. I should think you would express it that way; he vomited, and it looked quite bloody, watery and bloody—not thick blood, but red like blood and water. Mr. Semmons remained conscious after he came in until after 11 o'clock. He died about 6 o'clock Sunday morning, without regaining consciousness. After he came in, he sat up long enough for me to prepare the couch."

On cross-examination, she said, among other things:

"There is a kind of a noise you would term a thud, a falling body. Q. Was that such a one as the weight of a man would make—is that what you mean? A. Yes. After I laid my paper down, I sat and listened and wondered what was going on outside. After the thud came, I heard something rattling down the steps—some noise on the steps; then I heard talking at the foot of the steps leading into

the house. Q. What did you do then? A. I still wondered; I was more surprised than ever, and couldn't understand who was talking, because I knew no one came with Mr. Semmons, and I couldn't understand who he could be talking to. The talking was in a conversational tone and just a monotone; there was no calling for help, and I thought it was strange. I knew no one came with him, and the only thing that I could think of was that these children had come down again, and it passed through my mind that he must have caught the children, and when I heard the noise which must have been him crawling up the steps, I thought it the children. Undoubtedly it was Mr. Semmons getting to his feet, because it sounded like it; the noise sounded like he was feeling his way up and crawling up the steps."

She also testified:

"I put him in the chair first and rubbed his head, and then went to the kitchen and got water and bathed his head and face, and he seemed to get better. When he came in, he was quite pale looking, and then he got so he looked more natural after I bathed him and rubbed his face. Q. Did you call a doctor? A. No. I told him to sit still in the chair and I would go upstairs and get clothes and quilts, and I did, and he took hold of the chair and moved the chair back and forth this way and brought himself to the couch, and then he got off and took hold of my arm and got on the couch. Then I called Dr. Proctor. He did not come immediately, and Mr. Semmons asked me if I had called the doctor, and I said 'Yes,' and he said, 'You better call again,' and I called again. Dr. Proctor gave him two treatments. A little bit the first time, and then went back and treated him again. This was the same evening. The doctor came within 10 or 15 minutes after we called for him, and got there very soon. The doctor came within 20 minutes after I got Mr. Semmons in the house."

It is appellant's contention that the statements by deceased and the conversation between him and others are a part of the *res gestae*, and we do not understand appellee to question this. From the evidence before set out, it is contended by appellant that the evidence was sufficient to take the case to the jury on her theory that the fall by deceased was accidental, and that the death of deceased resulted from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means. The theory is that it is the bodily injuries and not the loss of life that must be effected directly and independently of all other causes, etc.

The evidence opposed to this, which defendant contends presents the question whether or not it was not as likely that the death of deceased was from ill health as from the injuries in the fall, is substantially this: Dr. Maxwell testified:

"I am a physician and surgeon and reside at Ames, and knew Mr. Semmons during his lifetime. * * * I knew about Mr. Semmons being ill, but I don't know how long I knew it. I knew he had been ill and had given up his business and did that on account of his health; I also knew that he had gone abroad on account of his health. I don't know how long he had been about Ames after his return from Europe and prior to his death, but I knew he had gone to Europe and come back. I saw him on the streets of Ames every few days. I would see him once or twice a week. Q. When you say you noticed nothing unusual about him (the evening before he died), you mean that he looked the same that evening as he did when you saw him other times, after his return from Europe? A. As far as I observed him. Q. Was there anything that evening that called your attention especially to him? A. No, sir. Q. Anything about his appearance that was dif-

ferent from what it had been for the past few months? A. No, sir."

Plaintiff testified further:

"Q. You knew your husband was in bad health, didn't you? A. His health was not very good, but he was able to go around all the time, never was sick a day. He had not been perfectly well for two years, and was as well that night as usual. Q. You answered, in answering Judge Lee, that he was not any different from usual that night; now I will ask you what you understand his usual condition was? A. He was not any worse—that is, he was not sick, or was not any better; he was about as he had been. Q. How had he been? A. He had been able to go about his work all the time. He got up in the morning and went down town at eight o'clock, as he always did when he was in business. He had been doing some insurance, and came home to dinner at twelve o'clock, and went down town in the afternoon again * * *. About eleven o'clock, Dr. Proctor called Dr. Bush, who came inside of ten minutes and stayed until about half past one. I heard Dr. Proctor tell Dr. Bush that Mr. Semmons was paralyzed—that he was paralyzed partly—and he thought perhaps bleeding him would help some, or something to that effect."

We understand appellee to make some claim also as to the answers to questions before set out, which are:

"Q. What did Mr. Semmons say? A. Dr. Proctor said: 'How did this happen—what were you doing when this came on?' Q. What did Mr. Semmons say? A. He said, 'I fell on the steps.'"

The thought is, as we understand it, that from this question there is an inference that some trouble came on. But it will be observed that the question is a compound one, and the answer that deceased said he fell on the steps could apply to the first part of the question as well as the

latter part, and we think is directly responsive to the first part of the question as to how it happened.

1. As to the first proposition: Was the evidence sufficient in connection with the declarations of deceased, to take the case to the jury on plaintiff's theory that deceased was injured accidentally, and that his death was the result of such injuries, without testimony of medical witnesses to show that fact? We think this question must be answered in the affirmative. There are cases where malpractice is charged, as in *Ewing v. Goode*, 78 Fed. 442, and *Wade*, *Malpractice Cases*, pages 503, 505, holding that, when a case concerns the highly specialized art of treating an eye for cataract, etc., with respect to which a layman can have no knowledge at all, the court and jury must depend on expert evidence. It was said also in the same case that in many cases expert testimony, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, etc. But we think the instant case is not like a malpractice case, and we are of opinion that, from the evidence in this case, the plaintiff made out at least a prima-facie case, and that the jury would have been justified in finding from the evidence that deceased was injured in a fall, and that his death was caused from such injuries. If a man is struck a severe blow on the head with a sledge hammer and the skull completely crushed in, or if a man's body is found at one side of a railroad track and his head on the other, clearly it would not be necessary to call medical witnesses to prove that such injuries would cause death. To be sure, these are extreme illustrations. We do not hold that a case could not arise where the circumstances might be such as to dispense with med-

ical testimony on the question as to whether the injuries would cause death. It has been held that, where death results within a short time after an accident, the inference may be drawn that the accident was the cause of death. *Wiese v. Remme*, 140 Mo. 289, 297, 298 (41 S. W. 797); *Railway Officials & Employees' Accident Assn. v. Coady*, 80 Ill. App. 563, 565, 566, 567, 571; *Hooper v. Standard Life & Accident Ins. Co.*, 148 S. W. 116 (166 Mo. App. 209); *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340, 343 (53 Pac. 345); *Indianapolis, Peru & Chi. R. Co. v. Collingwood*, 71 Ind. 476, 477; *Same v. Thomas*, 84 Ind. 194, 197; *Pittsburgh, C., C. & St. L. R. Co. v. Hoffman*, (Ind.) 107 N. E. 315, 321; *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63, 72; *Clark v. Employers' Liability Assur. Co.*, 72 Vt. 458, 461, 462, 464; *Carpenter v. Town of Rolling*, 107 Wis. 559 (83 N. W. 953); *Foster v. North American Accident Ins. Co.*, 176 Iowa 399.

We held, in *Bonjour v. Iowa Telephone Co.*, 176 Iowa 63, that, where a cause is shown which might produce an accident, and it further appears that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about such result. See also *Lunde v. Cudahy Packing Co.*, 139 Iowa 688.

In *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 56, it was said that, where two or more causes contribute to an injury, where there is doubt, or the facts are of a character such that equally prudent persons would draw different conclusions therefrom, in such cases the question as to which of the contributing causes is the efficient, dominant, proximate cause is a question to be submitted to the jury. See also *Lunde v. Cudahy Packing Co.*, supra.

The following cases may be cited also to the point to sustain the proposition that appellant is not required to

offer the testimony of a physician that death could have resulted from the fall: *Wiese v. Remme*, 140 Mo. 289, 297 (41 S. W. 797); *Anderson v. Northern Pac. R. Co.*, 53 Pac. 345; *Carpenter v. Town of Rolling*, (Wis.) 83 N. W. 955; *Clark v. Ins. Co.*, 72 Vt. 458

There is some evidence, it is true, that deceased had not been in good health for some time prior to his death, but the character of his indisposition is not disclosed by the record. Certainly it is not shown that there was any predisposition to apoplexy or paralysis. We think it is a matter of such common knowledge that a jury could properly so say, that a person receiving a fall might be dazed or possibly paralyzed. We think it cannot be said as a matter of law that the ill health of deceased is equally reasonable, or equally consistent with the theory that deceased was injured by a fall and that his death resulted therefrom. At most, under the circumstances shown, if it be thought that the ill health of deceased was the cause of his death, still, under the authorities before cited, it was a question for the jury as to which of the two alleged causes was the cause of death. It should have been stated that the evidence does not disclose that there were any marks on the deceased's person, but, among other circumstances, it is shown that deceased turned pale; that he was dazed; that he vomited a watery, bloody substance; and the like.

It is contended by appellee, and authorities are cited in support of the proposition, that, because appellant did not produce the testimony of the physicians and inquire of them as to the cause of death, there is a presumption against appellant that such testimony, if produced, would be adverse to her. But we think the rule does not apply under the circumstances here shown. Under the facts of this case, we see no reason why plaintiff should be required to use all the testimony she may have, since

2. EVIDENCE:
presumption:
withholding
evidence.

we hold she made a prima-facie case without the introduction of such testimony. The testimony of the doctors here was not peculiarly within the control of appellant, neither did she prevent the use of such testimony.

For the reasons stated, it is our conclusion that the trial court erred in directing a verdict for the defendant. The cause is therefore reversed and remanded for trial.—*Reversed.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

F. E. SNYDER, Appellant, v. CITY OF BELLE PLAINE, Appellee
(and two other cases).

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
1 ments—Distribution of Excess Costs.** An assessment of benefits for a public street improvement is not necessarily limited to the cost of the improvement in front of the lot assessed. It follows that, if the cost of an improvement in front of a specified lot or lots is in excess of the special benefits, or is in excess of 25 per cent of the value of the lot, such excess need not be paid out of the general fund of the city if such excess can, by an equitably apportioned assessment, be so distributed among other lots within the improvement that no lot will bear an assessment in excess of the special benefits received, or in excess of 25 per cent of the value thereof, even though, by such assessment, some lots may be compelled to bear a burden exceeding the cost of the improvement fronting thereon. Sections 792-a, 792-b, Code Supplement, 1913.

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
2 ments—Front-Foot Rule Levy.** The presumption that an assessment of benefits for a public street improvement is according to benefits received is not overcome by evidence that consideration of the so-called front-foot rule was not wholly disregarded.

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
3 ments—"Frontage" as an Element.** "Frontage" may very properly be taken into consideration as one of the elements bearing on benefits.

**MUNICIPAL CORPORATIONS: Public Improvements—Assess-
4 ments—Identical Amounts on Small and Large Tracts—Effect.** It may not be presumed, from the mere fact that two separate

tracts of materially different areas are assessed in the same amount, that such assessment is inequitable, and not according to benefits.

Appeal from Benton District Court.—B. F. CUMMINGS,
Judge.

MONDAY, JUNE 25, 1917.

APPELLANTS appealed to the district court from the assessment of benefits by the city council on account of the cost of paving certain streets in the city of Belle Plaine. In the district court, upon hearing, the assessment of the city council was sustained. The same parties appeal from the finding and judgment of the district court.—*Affirmed.*

C. W. E. Snyder and Clarence Nichols, for appellants.

W. C. Scrimgeour and Tobin & Tobin, for appellee.

STEVENS, J.—I. F. E. Snyder, C. W. E.

1. MUNICIPAL CORPORATIONS: Snyder and Angeline Snyder are each own-
public im-
provements: ers of lots, or tracts of land, in the city of
assessments: Belle Plaine, Iowa, abutting upon certain
distribution of streets recently improved by paving and
excess costs. guttering. Each of said parties filed written objections in the office of the city clerk to the assessments proposed by the schedule of the engineer then on file against said property, upon the ground that a portion of the cost of paving certain corner lots was illegally included in the amount proposed to be assessed against their lots, and that their lots should not be assessed for any part of the cost of the improvement.

The regularity of the proceedings of the city council, except in the matter of assessing the cost of the improvement, is not questioned by appellant. The improvement included a portion of Eighth Avenue, Twelfth and other streets in said city. For the purpose of a more equitable apportionment and assessment of the cost of the improve-

ment upon the abutting property, the total improvement was divided into three assessment divisions, or districts, known as A, B and C. A portion of the cost of paving the corner lots at the intersection of Eighth Avenue and Twelfth Street and Ninth Avenue and Twelfth Street was apportioned and levied upon other property in the respective assessment districts. The assessments in Division B averaged \$6.19 per foot for the 40-foot pavement, except the four corner properties at the intersection of Eighth Avenue and Twelfth Street, which, on the side, averaged \$3.09 per foot. The corner lots at the intersection of Ninth Avenue and Twelfth Street were assessed, on the side, at an average cost of \$2.92 per foot, whereas all other property on said street was assessed at an average cost of \$5.85 per front foot. The total cost of paving the streets abutting upon the sides of said lots exceeded the amount assessed against the same approximately \$2,200. This sum was apparently apportioned in the proper amount, and levied upon the remaining property in the respective assessment districts.

Appellants complain of the assessment of a portion of the said \$2,200 against their respective tracts, and contend that the same should have been paid by the city. This contention is based upon Section 792-b, Supplement to the Code, which provides that:

"If the special assessment which may be levied against any lot or tract of land shall be insufficient to pay the cost of the improvement, the deficiency shall be paid out of the general fund, * * *"

Section 792-a of the Supplement to the Code is as follows:

"When any city or town council or board of public works levies any special assessment for any public improvement against any lot or tract of land, such special assessment shall be in proportion to the special benefits conferred

upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of levy, * * *

The city council, therefore, in the matter of levying special assessments for public improvements upon abutting property, must not levy an amount in excess of the special benefits conferred, nor, in any event, to exceed 25 per centum of the value of the property. Another limitation upon the power of the city council in levying special assessments for the cost of paving and other public improvements is that the same shall be equitably apportioned and the levy made in accordance therewith.

In an apparent effort to reach a just and proper apportionment and assessment of the costs of the improvement in question, the city council divided the whole improvement into three districts, as above stated, for assessment purposes, thereby treating the whole improvement, for assessment purposes, the same as though it were three separate improvements. By this means, a safer and more equitable basis for comparison and apportionment was provided. Evidently, the city council found that the deficit in question could be properly levied against other property benefited by the improvement without transgressing any of the limitations created by statute. This plan of assessing the cost of street improvements was approved by this court in a case decided at the present term (*Carpenter v. City of Hamburg*, 179 Iowa 1168), wherein it is held that, in making assessments, the total cost of the assessment district or improvement should be taken into consideration, and the assessments levied ratably and equitably according to the benefits conferred upon each tract or parcel abutting upon the improvement. The special benefits conferred upon a given tract or parcel may be less or greater than the total cost of the improvement immediately in front or on the

side thereof. If the special benefits conferred upon a given tract exceed the cost of the improvement immediately in front thereof, there would seem to be no reason why the city council should not so apportion and levy the excess upon such other property benefited as to equitably distribute the burden of the whole cost of the improvement among the property owners in a given district. Such is the holding of the cited case, which is sustained by prior decisions of this court. See *Des Moines Union Railway Company v. City of Des Moines*, 140 Iowa 218; *Early v. City of Fort Dodge*, 136 Iowa 187.

II. Several members of the city council, and also the engineer having charge of the improvement, were called and examined as witnesses by appellants upon the trial in the court below. The apparent purpose of the testimony elicited from these witnesses was to show that the assessments were not levied according to the special benefits conferred upon the respective tracts or parcels of property abutting upon the improvement, but rather in accordance with the so-called front-foot rule. Each of the witnesses testified to the conclusion that the assessments were levied strictly in accordance with the special benefits conferred, and that the front-foot rule was not followed. The evidence, however, fails to show that, in making the apportionment and levying the assessment, the front-foot rule was entirely disregarded by the council. No other evidence was offered on behalf of appellants, and the testimony of the several witnesses taken together tends to show that the cost assessed against the respective tracts was fairly in accordance with the special benefits conferred by the whole improvement. At any rate, the evidence fails to show that the amount levied against each of the respective parcels or tracts owned by appellants was greater than the special benefits conferred

2. MUNICIPAL
CORPORATIONS:
public im-
provements: as-
sessments:
front-foot rule:
levy.

thereon. The engineer having charge of the matter testified that he examined each separate parcel or tract, and then prepared a schedule showing the special benefits conferred thereon, which, in his judgment, was just and fair. The schedule and classification prepared by the engineer were adopted and made the basis of the assessments levied by the city council.

The frontage may be properly taken in-

3. MUNICIPAL CORPORATIONS: public improvements: assessments: "frontage" as an element. to account as the basis for determining benefits, and the mere fact that the assessment may have been substantially in accordance with the cost of the improvement in front

of each tract is not conclusive that the assessment was not according to the special benefits conferred, and does not overcome the presumption that the city council proceeded according to law. *Des Moines Union Railway Company v. City of Des Moines*, supra; *Stutsman v. City of Burlington*, 127 Iowa 563; *Minneapolis & St. L. R. Co. v. Lindquist*, 119 Iowa 144.

4. MUNICIPAL CORPORATIONS: public improvements: assessments: identical amounts on small and large tracts: effect. It was also the duty of the city council to equitably apportion the cost of the improvement, so that the burden of the total cost should be shared equitably and justly by each tract or parcel in the improvement district. The evidence offered on behalf of

the appellants was to the effect that certain improved lots of much larger area were assessed at the same rate as other property, apparently similarly situated, of much less area. There may have been some inequality in the assessment of these respective parcels, but the evidence fails to show this fact, except in so far as same may be inferred from the difference in the area and apparent value of the respective tracts. It was the duty of the city council to assess the cost against each of the respective tracts or parcels in accordance with the special benefits conferred, and

in such a way as to make the apportionment of the whole costs just and equitable. This court cannot presume, from the mere fact that two separate tracts of materially different area are assessed the same amount, that such assessment is inequitable and unjust, and not according to the special benefits conferred. We are unable to say, notwithstanding the apparent inequality in the assessment, in the absence of evidence showing that fact, that said assessment is unequal and not according to benefits conferred. No evidence was introduced by appellants upon this question, and the trial court found that the assessment made by the city council should be upheld.

The judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. A. W. CHAMBERLIN, Appellant.

INDICTMENT AND INFORMATION: Motion to Quash or Dismiss

1 —**Noncitizenship of Grand Juror.** He who moves to quash an indictment on the ground of the noncitizenship of a grand juror has the burden to establish such grounds. Evidence reviewed, and held insufficient.

GRAND JURY: Qualifications—Citizenship—Presumptions. Princi-

2 ple recognized that a strong presumption of citizenship arises from the fact that the party has voted, held office, or otherwise performed the functions and exercised the rights of citizenship. Evidence reviewed, and held insufficient to overcome the presumption.

CRIMINAL LAW: Appeal and Error—Review—Harmless Error—

3 **Waiver.** An accused may not, on appeal, complain that the court denied him the right to examine a witness at a certain period and on a certain point when such right was later accorded to him and he failed to avail himself of it.

Appeal from Hamilton District Court.—H. E. Fry, Judge.

MONDAY, JUNE 25, 1917.

DEFENDANT was convicted of the offense of maintain-

upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of levy, * * *

The city council, therefore, in the matter of levying special assessments for public improvements upon abutting property, must not levy an amount in excess of the special benefits conferred, nor, in any event, to exceed 25 per centum of the value of the property. Another limitation upon the power of the city council in levying special assessments for the cost of paving and other public improvements is that the same shall be equitably apportioned and the levy made in accordance therewith.

In an apparent effort to reach a just and proper apportionment and assessment of the costs of the improvement in question, the city council divided the whole improvement into three districts, as above stated, for assessment purposes, thereby treating the whole improvement, for assessment purposes, the same as though it were three separate improvements. By this means, a safer and more equitable basis for comparison and apportionment was provided. Evidently, the city council found that the deficit in question could be properly levied against other property benefited by the improvement without transgressing any of the limitations created by statute. This plan of assessing the cost of street improvements was approved by this court in a case decided at the present term (*Carpenter v. City of Hamburg*, 179 Iowa 1168), wherein it is held that, in making assessments, the total cost of the assessment district or improvement should be taken into consideration, and the assessments levied ratably and equitably according to the benefits conferred upon each tract or parcel abutting upon the improvement. The special benefits conferred upon a given tract or parcel may be less or greater than the total cost of the improvement immediately in front or on the

side thereof. If the special benefits conferred upon a given tract exceed the cost of the improvement immediately in front thereof, there would seem to be no reason why the city council should not so apportion and levy the excess upon such other property benefited as to equitably distribute the burden of the whole cost of the improvement among the property owners in a given district. Such is the holding of the cited case, which is sustained by prior decisions of this court. See *Des Moines Union Railway Company v. City of Des Moines*, 140 Iowa 218; *Early v. City of Fort Dodge*, 136 Iowa 187.

2. MUNICIPAL CORPORATIONS: public improvements: assessments: front-foot rule: levy.

II. Several members of the city council, and also the engineer having charge of the improvement, were called and examined as witnesses by appellants upon the trial in the court below. The apparent purpose of the testimony elicited from these witnesses was to show that the assessments were not levied according to the special benefits conferred upon the respective tracts or parcels of property abutting upon the improvement, but rather in accordance with the so-called front-foot rule. Each of the witnesses testified to the conclusion that the assessments were levied strictly in accordance with the special benefits conferred, and that the front-foot rule was not followed. The evidence, however, fails to show that, in making the apportionment and levying the assessment, the front-foot rule was entirely disregarded by the council. No other evidence was offered on behalf of appellants, and the testimony of the several witnesses taken together tends to show that the cost assessed against the respective tracts was fairly in accordance with the special benefits conferred by the whole improvement. At any rate, the evidence fails to show that the amount levied against each of the respective parcels or tracts owned by appellants was greater than the special benefits conferred

thereon. The engineer having charge of the matter testified that he examined each separate parcel or tract, and then prepared a schedule showing the special benefits conferred thereon, which, in his judgment, was just and fair. The schedule and classification prepared by the engineer were adopted and made the basis of the assessments levied by the city council.

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of each tract is not conclusive that the assessment was not according to the special benefits conferred, and does not overcome the presumption that the city council proceeded according to law. *Des Moines Union Railway Company v. City of Des Moines*, supra; *Stutsman v. City of Burlington*, 127 Iowa 563; *Minneapolis & St. L. R. Co. v. Lindquist*, 119 Iowa 144.

It was also the duty of the city council

4. MUNICIPAL CORPORATIONS: public improvements: assessments: identical amounts on small and large tracts: effect.

to equitably apportion the cost of the improvement, so that the burden of the total cost should be shared equitably and justly by each tract or parcel in the improvement district. The evidence offered on behalf of

the appellants was to the effect that certain improved lots of much larger area were assessed at the same rate as other property, apparently similarly situated, of much less area. There may have been some inequality in the assessment of these respective parcels, but the evidence fails to show this fact, except in so far as same may be inferred from the difference in the area and apparent value of the respective tracts. It was the duty of the city council to assess the cost against each of the respective tracts or parcels in accordance with the special benefits conferred, and

in such a way as to make the apportionment of the whole costs just and equitable. This court cannot presume, from the mere fact that two separate tracts of materially different area are assessed the same amount, that such assessment is inequitable and unjust, and not according to the special benefits conferred. We are unable to say, notwithstanding the apparent inequality in the assessment, in the absence of evidence showing that fact, that said assessment is unequal and not according to benefits conferred. No evidence was introduced by appellants upon this question, and the trial court found that the assessment made by the city council should be upheld.

The judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. A. W. CHAMBERLIN, Appellant.

INDICTMENT AND INFORMATION: Motion to Quash or Dismiss

1 —**Noncitizenship of Grand Juror.** He who moves to quash an indictment on the ground of the noncitizenship of a grand juror has the burden to establish such grounds. Evidence reviewed, and held insufficient.

GRAND JURY: Qualifications—Citizenship—Presumptions. Princi-

2 ple recognized that a strong presumption of citizenship arises from the fact that the party has voted, held office, or otherwise performed the functions and exercised the rights of citizenship. Evidence reviewed, and held insufficient to overcome the presumption.

CRIMINAL LAW: Appeal and Error—Review—Harmless Error—

3 **Waiver.** An accused may not, on appeal, complain that the court denied him the right to examine a witness at a certain period and on a certain point when such right was later accorded to him and he failed to avail himself of it.

Appeal from Hamilton District Court.—H. E. FRY, Judge.

MONDAY, JUNE 25, 1917.

DEFENDANT was convicted of the offense of maintain-

ing a liquor nuisance. From a judgment assessing a fine of \$700, he appeals.—*Affirmed.*

J. W. Lee and G. D. Thompson, for appellant.

H. M. Havner, Attorney General, H. H. Carter, Assistant Attorney General, and John E. Burnstedt, for appellee.

STEVENS, J.—The defendant was convicted of the crime of maintaining a liquor nuisance. The evidence showed that he was a physician who had been for many years engaged in the practice of his profession in Hamilton County.

It appears from the evidence that, on the 22d day of December, 1915, the sheriff and his deputy went to the defendant's place of business with a search warrant, for the purpose of searching the premises for intoxicating liquor. The defendant made no objection to a search by the officers. A box containing 50 pint bottles, and some other vessels containing liquor, were found back of the prescription case and removed by the officers. The defendant at the time stated that the bottles contained brandy.

Numerous witnesses testified to having on various occasions purchased liquor of the defendant at the place of the seizure of the liquors.

Many objections were urged by appellant to the introduction of the State's testimony, and some exceptions taken to the court's instructions. The defendant was convicted by the jury, and the court assessed a fine against him for \$700, for which amount judgment was entered.

I. Defendant was not held to answer and did not have an opportunity to challenge the grand jury. A motion was filed by him to quash the indictment upon the ground that one of the grand jurors returning the indictment was not a citizen of the United States.

1. INDICTMENT
AND INFORMATION: motion to
quash or dismiss: noncitizenship of
grand juror.

The motion was overruled by the court and proper exceptions taken to this ruling.

It is urged on behalf of appellee that his objection to the competency of the grand juror could not be raised after the indictment was returned, but, in view of our conclusion that the evidence was insufficient to show that the grand juror was not a qualified elector, it is unnecessary to pass upon this question. The motion to quash the indictment was accompanied by an affidavit signed by the defendant, which recited that John McCarley, the member of the grand jury referred to, was born in Ireland and had never been naturalized and was not a citizen of the United States. Upon being cross-examined, defendant stated that he had no personal knowledge of the matter, and the matters set out in the affidavit were all hearsay.

Another witness called on behalf of the defendant testified that he was present in court when the said John McCarley was called as a witness on the hearing of an application for naturalization, and that his testimony was rejected on the ground that it did not satisfactorily appear that he had been naturalized. The defendant also called the said McCarley as a witness, who testified that he was born in Ireland in 1872 and that he came to this country when 10 years of age; that he understood his father took out naturalization papers in 1884 at Joliet, Illinois; that, at the time, his father was working in the roller mills at that place, and that he remembered his father's going down town to take out his second papers; that all of the Scotch and Irish in the neighborhood were anxious to see Blaine elected president, and that his father took out his second papers in order that he might vote for Blaine.

The grand juror had always supposed that he was a citizen and voter. There is no question that, if his father became naturalized in 1884, the grand juror was also naturalized at the time the indictment was returned. The evi-

dence is wholly insufficient to show that his father was not naturalized at the time referred to. So far as the record in this case shows, his naturalization papers were issued in 1884, as claimed by the grand juror, and proper record made thereof. The only testimony relating to the absence of such record was hearsay and incompetent.

The evidence relied upon to overcome the presumption of citizenship that arises from the party's having voted, held office, or otherwise performed the functions and exercised the rights of citizenship, must be clear and satisfactory. *Torre v. Jeannin*, (Miss.) 25 So. 860.

The burden was on defendant to show that the grand juror was not a qualified elector. *State v. Haynes*, 54 Iowa 109; *Keenan v. State*, 8 Wis. 132; *Moore v. Wilson's Administrators*, 10 Yerger (Tenn.) 406.

The best evidence of the naturalization of an alien would have been the original papers or certified copies of the record thereof. It is not shown by competent evidence that no record exists of the naturalization of the father of the grand juror. In the absence of a certified copy of the record, or of competent testimony that no such record exists, secondary evidence would not be admissible. The grand juror could, of course, testify to the place of his birth and that he had never taken out naturalization papers, but he had always supposed he was naturalized by the naturalizing of his father, and the evidence does not show that the father was not naturalized at the time in question.

The motion to quash the indictment was properly overruled.

II. While the county attorney was examining the sheriff in chief, defendant's attorney requested the privilege of cross-examining him, presumably upon the question of the legality of the search warrant under

2. GRAND JURY:
qualifications:
citizenship:
presumptions.

8. CRIMINAL LAW:
appeal and error:
review:
harmless error:
waiver.

which the search of the defendant's place was had. No statement was made by counsel as to why he desired to cross-examine the defendant, except the inference from the language of the objection to the testimony that counsel probably claimed that the search warrant was illegal and wrongfully obtained.

The court, in ruling, stated that it made no difference whether the warrant was illegal or not, and counsel was at that time denied the privilege of cross-examining the witness. After the witness was turned over to defendant's counsel for cross-examination, no questions were asked concerning the writ or the legality or regularity thereof. Neither did defendant offer to prove that there was irregularity or illegality in the procuring of the writ. The warrant was offered in evidence, but the record fails to show any evidence in any way tending to show that the warrant was not in all respects regular and valid.

III. It is claimed on behalf of appellant that the county attorney was guilty of misconduct in the examination of some of the witnesses. In so far as the county attorney sought to offer improper testimony, the same was excluded by the court upon the defendant's objections, and, while the court permitted the county attorney to ask leading questions of some of the witnesses, it does not appear that its discretion was in any way abused.

IV. Appellant also complains of the refusal of the court to give certain requested instructions, and predicates error upon the giving of certain instructions by the court upon its own motion. The instructions requested by appellant were properly refused by the court. The exceptions to the instructions are indefinite, and do not point out the grounds thereof specifically and with reasonable exactness, except as to the fifth and ninth instructions. We have, however, examined the instructions separately

and as a whole. There is no merit in the exceptions taken to the third and fifth instructions.

The court, in Instruction Nine, stated that, if the evidence showed beyond a reasonable doubt that the defendant had made a sale of intoxicating liquors, a presumption would arise that the sale was illegal, but that, if the jury had a reasonable doubt as to the illegality of the sale, then the presumption would be overcome, and it would not be warranted in finding that the sale was illegal. This instruction is evidently based upon Section 2427 of the Code.

While the defendant was a physician, and entitled to keep intoxicating liquors for use in his practice, yet this did not give the right to keep liquors for sale and engage in that kind of traffic.

V. Objections were made by counsel to many rulings of the court upon offers of testimony, and of the overruling of defendant's motion for a new trial, but same are without merit, or, if erroneous, without prejudice to the defendant.

We have examined the record with care, and are convinced that the defendant had a fair trial, and that the judgment of the court should not be interfered with.—*Affirmed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. FRANCISCO GIUDICE, Appellant.

INDICTMENT AND INFORMATION: Requisites and Sufficiency—

- 1 **Nonspecific Allegations—Waiver.** A failure to specifically allege, in an indictment for murder, that the accused, in making the assault, actually used the weapon with which he is alleged to have been armed, is waived by going to trial without objection thereto.

CRIMINAL LAW: Appeal—Law of Case. A holding on appeal and

- 2 reversal that certain testimony is admissible, becomes the law of the case and conclusive on retrial.

TRIAL: Misconduct of Counsel—Argument—Legitimate Inferences.

3 Principle recognized that counsel in argument has the right to draw any legitimate inference from the testimony and base argument thereon.

Appeal from Mills District Court.—THOMAS ARTHUR, Judge.

MONDAY, JUNE 25, 1917.

DEFENDANT was convicted of murder in the first degree and sentenced to the penitentiary for life. For statement of facts, see *State v. Giudice*, 170 Iowa 731.—*Affirmed*.

John J. Hess, for appellant.

C. E. Swanson, H. M. Logan, John P. Organ, Genung & Genung, George Cosson, Attorney General, for appellee.

STEVENS, J.—I. Objection was made, upon the trial below, to the sufficiency of the indictment. The specific objection to the indictment is that, while it is therein stated that defendant was armed with a deadly weapon, the indictment fails to specifically state that defendant, in making the assault and inflicting the fatal wound upon deceased, used the deadly weapon described.

The indictment is not as specific in this respect as it might have been made, but, giving to the language of the indictment its true meaning, it is clear that no other interpretation is possible than that the wound was inflicted by the use of the deadly weapon referred to in the indictment. We therefore think the indictment sufficient. It is not necessary, as contended by appellant, to supply something by intendment. This, of course, cannot be done, but we think the indictment sufficiently charges the manner of the killing, together with the weapon used, to meet the requirements of the statute and pleading in criminal cases. In any event, the objection was not made in time. Section

1. INDICTMENT
AND INFORMATION:
requisites
and sufficiency:
non-specific al-
legations:
waiver.

5289, Supplement to the Code, 1913; *State v. Gulliver*, 163 Iowa 123.

II. It is also claimed, on behalf of defendant, that the court erred in admitting the testimony of the witness Shellinger, relating to certain statements made by deceased immediately after receiving the fatal injuries. This testimony was held upon the former appeal to be admissible, and the same was, therefore, properly admitted.

III. Numerous objections were made to the introduction of testimony which were overruled, and such rulings assigned as error upon this appeal. We have carefully gone over the record as to all of these matters, and, while some of the testimony might have been properly excluded, its admission was without prejudice to the defendant. Some objections urged were passed upon adversely to the contention of appellant upon the former appeal. We find no reversible error on account of the admission or exclusion of testimony.

IV. It is also urged on behalf of defendant that counsel for appellee were guilty of such misconduct in argument to the jury as to require a reversal of this case.

There was no particular impropriety in any of the remarks of counsel. Counsel had the right to draw any legitimate inference from the testimony and base argument thereon. We discover no error in the argument of counsel. *State v. Harmann*, 135 Iowa 167; *State v. Proctor*, 86 Iowa 698; *State v. Hasty*, 121 Iowa 507.

On account of the seriousness of the charge and the sentence imposed upon the defendant, we have gone over the record with great care, and are convinced that no reversible error was committed by the court. The defendant's guilt was clearly established.—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. FRED POWERS, Appellant.

WEAPONS: Carrying Concealed Weapons—Evidence—Sufficiency.

- 1 Evidence reviewed, and held sufficient to sustain a conviction for carrying concealed weapons.

CRIMINAL LAW: Trial—Misconduct. The act of the county at-

- 2 torney, in attempting to offer the testimony which the accused had given in another case, does not constitute reversible misconduct when, by the sustaining of objections, neither the purpose of the county attorney nor the nature of the other case was revealed.

CRIMINAL LAW: Trial—Misconduct in Argument—Curing Error.

- 3 Sustaining objection to improper argument, with prompt direction to the jury to disregard the same, held to render the error harmless, in view of the record.

APPEAL AND ERROR: Reservation of Ground—Naked Objection.

- 4 A naked objection, without specification of any kind, presents no question on appeal.

CRIMINAL LAW: Trial—Instructions—Punishment—Duty of

- 5 Court and Jury. It is not error for the court to instruct that the punishment to be meted out to the accused, in case of conviction, is a matter for the consideration of the court, and not of the jury.

CRIMINAL LAW: Appeal—Modification of Sentence. On appeal

- 6 from conviction for carrying concealed weapons, held, in view of the record and the immature age of the accused, that an indeterminate sentence of two years in the reformatory should be reduced to 30 days in the county jail.

Appeal from Cherokee District Court.—W. D. BOIES, Judge.

MONDAY, JUNE 25, 1917.

DEFENDANT was indicted, tried and convicted of the crime of carrying a concealed weapon, and, being but 18 years of age, was sentenced to the reformatory at Ana-

mosa for a period not to exceed two years. Defendant appeals.—*Modified and affirmed.*

Wm. Mulvaney and Molyneux & Maher, for appellant.

H. M. Havner, Attorney General, and *H. H. Carter*, Assistant Attorney General, for appellee.

PAERSTON, J.—There are 23 assignments of error, some of which are duplications, and as to others, we think the record is not in such condition that the objections now argued can be raised.

1. Some of the assignments may be considered together. It appears that, on the evening of October 28, 1916, defendant came from his home to a hardware store, and brought with him from home an empty revolver; in the store he purchased a box of cartridges; the clerk who sold the cartridges loaded the revolver and handed it to the defendant; the defendant then placed the loaded revolver in the side pocket of his coat; a few minutes thereafter, he left the store; soon after that, he was seen in front of a pool hall with the revolver in his hand, and in a short time, a shot was fired, and the revolver found lying on the sidewalk near where defendant stood. It was defendant's purpose to go out to practice target shooting the next day.

It is the contention of appellant that the evidence is undisputed that the revolver was not carried concealed upon the person of the defendant. A number of the assignments of error are based upon this contention that there was no evidence to justify the court in submitting the case to the jury, and that the court erred in instructing the jury on the subject, and erred in refusing to give an instruction asked by the defendant, based upon the assumption that there was not sufficient evidence to take the case to the jury. Cases are cited to the point that, to const-

tute a concealment, the weapon must be hidden or concealed from the view, etc.

We cannot agree with counsel for appellant in his claim that the evidence is not sufficient. The clerk in the store who sold the cartridges to the defendant and loaded the revolver testifies that, when he loaded the revolver, the defendant put it in his side pocket, and that it was out of view, and that he could not see the revolver after defendant put it in his pocket, and that defendant then went out of the store. He thinks the defendant put the revolver in his left coat pocket, and says that he looked at defendant, and that he could not see the revolver; that defendant turned around, and the pocket he had the revolver in was toward the witness; that defendant was right across the counter from him; and that, as defendant turned around, he turned his left side toward the witness. This evidence as to whether, at that time, the weapon was concealed or not, is not disputed by any other witness, except that the defendant testifies that he put the revolver on top of a box of matches and handkerchief in his pocket, which was a shallow pocket; and says, "The revolver could not help but be exposed to view as I had it in my pocket." This is somewhat in the nature of a conclusion, as the witness does not say that he looked at his pocket or saw the revolver exposed in his pocket. Another witness testifies that afterwards he saw defendant in front of a pool hall, and saw defendant have a revolver in his hand, and that he did not see it before that; that he saw the revolver about five minutes after he came where defendant was, and that defendant did not have the revolver in his hand when witness came; witness did not see where he had it. Another witness says that, on the night in question, he saw defendant on the street, and saw him have a gun in his pocket. The witness says that he is almost positive it was in his right-hand pocket, and that at that time there was about half

an inch of the butt sticking above; that witness was close to defendant—about 3 or 4 feet; that it was either in front of the pool hall or just across the street,—he does not remember which,—but he says he saw the revolver. This witness did not see defendant have the revolver in his hand after he crossed the street. Witness walked across the street with defendant. Another witness testifies that he saw defendant on the street, but did not take any particular notice of him, and did not see defendant have a revolver; that he heard a shot 5 or 6 minutes after he saw defendant; was 5 or 6 feet away; did not see any revolver in defendant's hands; saw a revolver lying on the sidewalk.

This is the substance of the testimony, and we think it is sufficient to take the case to the jury, and that the verdict has sufficient support. The court instructed the jury that the words of the statute, "to have concealed upon his person," as used in the statute, means to have out of sight upon his person. This is in substantial accordance with one of the instructions offered by the defendant. But, as said, his contention was that there was no evidence to show that the revolver was concealed.

2. It is thought by appellant that the county attorney was guilty of misconduct in his closing argument and in attempting to introduce certain evidence. The only part of the closing argument which the defendant objected to was this:

"Now I shall not go into all these fellows said, but I will leave it to you to say whether they are talking sense or nonsense, and whether they are trying to fool the jury and get the jury to commit some ridiculous thing as another jury—"

At this point, counsel for defendant objected, and the court sustained the objection. This will be considered in connection with the other alleged misconduct and in con-

nection with an instruction given by the court. Before the evidence for the State was closed, we find this record:

"Mr. Smith: The State offers in evidence a duly certified transcript of the testimony of Fred Powers when he was sworn as a witness in the case of—(Defendant objects at this time to any reference to any other case as immaterial and improper.) The Court: It is sustained, because Fred Powers has not been sworn as a witness in this case, and the testimony that he may have given in some other case is immaterial and incompetent. Mr. Smith: I want to show by this testimony— The Court: I know what you want to show and the court says you can't show it. (Defendant objects to any further offers as misconduct on the part of counsel.) Mr. Smith: It is no misconduct. The Court: Counsel has the ruling of the court. Mr. Smith: Will the court allow me to make no record of the showing? The Court: No, sir, the court will not allow you to make any further record than you have made. Mr. Smith: The record don't show what I want to do, what I propose to offer. (Defendant objects to the continued remarks of counsel as continued misconduct. Sustained and plaintiff excepts. The State offers in evidence the revolver and the box of cartridges. Here the State rests.)"

It is possible that the State would not be entitled to offer in evidence the certified transcript of the testimony of a witness in another case without some further foundation's being laid that it was the transcript of his testimony, and that the defendant did so testify. But that objection was not made. It does not appear what the prosecutor's purpose was in seeking to introduce the transcript, and it is possible that all the transcript would not be admissible. It may be that there were statements made by defendant on another trial which would be perfectly proper to show as an admission of the defendant's as to some fact that would be relevant and material to some of the issues

in the instant case: that incidentally this would disclose that there had been another case of some kind, would be the defendant's misfortune. The trial court would not permit the prosecutor to show what his purpose was, or to make any further record. The defendant did later testify in this case and testified:

"The revolver you show me is the one Hallabauer (the store clerk) loaded for me. It is my revolver."

To illustrate: Had he so testified on another trial, this would be competent as an admission, in view of the fact that the revolver found on the sidewalk was not definitely shown by the witnesses testifying in this case to have been the defendant's revolver. The contention of appellant is that the prosecutor was improperly attempting to show something in regard to a former trial. He was not permitted to go that far, but he was stopped by counsel for defendant and by the court, and nothing was permitted to reach the jury even in the question which would indicate the character of the other case or the parties thereto.

It should be borne in mind here that the State is not asking a reversal because of the exclusion of its offered testimony, but the question is whether the prosecutor was guilty of misconduct in attempting to show what, so far as we know, may have been perfectly proper as an admission of some matter given by witness on the trial in another case. As to this matter and the part of the closing argument objected to, the court sustained the defendant's objection, and instructed the jury:

"Something has been said by counsel for the State with reference to 'another case,' but you are instructed that the defendant is on trial upon charges preferred in this indictment, and, in considering this case, you will give no thought to any other case, and determine this case solely upon the testimony that has been received upon this trial."

We think there was no misconduct in the county attorney's making the offer, and if there was any in regard to the sentence referred to in the closing argument, it was cured by the court's sustaining the objections, and by the instruction referred to. It is our conclusion that there was no prejudicial error at this point.

There are some other minor matters which we shall refer to briefly. The instructions asked by the defendant are, for the most part, argumentative. What has already been said covers others as to the law of the case and the fact that it is necessary that the weapon should be concealed, and others are covered by instructions given by the court. A clause in Instruction No. 2, given by the court on the question of reasonable doubt, is criticized. This clause is as follows:

"It is your duty to seek the truth and not to hunt for doubts. A fanciful, forced or captious doubt is not a reasonable doubt."

The exception to this instruction taken at the trial gives no reason why the language used was improper, and counsel has not in argument here advised us as to what he claims is objectionable in this language. No other part of this instruction is complained of.

A part of Instruction No. 5, given by the court, is criticized. In this, the court refers to the fact that counsel for defendant in argument had mentioned the punishment that might be pronounced by the court in case of defendant's conviction, and told the jury that the duty and responsibility in that respect were for the court, and that the duty and responsibility of the jury end when they shall have determined from the testimony whether defendant is guilty or not guilty of the offense

3. CRIMINAL LAW:
trial: misconduct in argument: curing error.

4. APPEAL AND ERROR: reservation of ground: naked objection.

5. CRIMINAL LAW:
trial: instructions: punishment: duty of court and jury.

charged. We are cited to no case by appellant to sustain his contention that the instruction is improper. The point seems to have been ruled against appellant's contention in *State v. McGhuey*, 153 Iowa 308, at 312. There may be some other of these minor matters not specifically noticed, but they have all been considered.

3. It is thought by appellant that, in view of defendant's youth, the court should not have imposed the extreme penalty, and

6. CRIMINAL LAW: appeal: modification of sentence. in this we are inclined to agree. We recognize the fact that, in many cases, the trial court may be aware of local conditions which are not known to the appellate court, and ordinarily, we are not disposed to interfere with the discretion of the trial court in the matter of sentences. It is no doubt true that the purpose of the legislature in increasing the penalty for this offense was to discourage the carrying of concealed weapons. Reasons are given in argument why, in some cases, the extreme penalty should be imposed. In pronouncing sentence, the remarks of the trial court were taken down and made of record, and the court stated in part:

"You know better than I do what followed as a result of your carrying a concealed weapon. While you have been acquitted of the charge preferred against you on which you were tried for what did happen on account of your carrying a concealed weapon, the court feels that this statute was passed in order that cases arising as this one did may afford some adequate punishment for carrying concealed weapons, under the statute, in view of the results."

Though it does not appear in the record, it is conceded in argument, substantially, that the revolver was dropped, and in some way discharged and killed a bystander, and that this is the matter referred to by the court in the remarks before quoted. It is likewise conceded that defendant was tried for manslaughter and acquitted. But it does

not appear, and it is not claimed, that the fact that the defendant's revolver was concealed on his person a part of the time had anything to do with the discharge of the weapon and the killing. The inference we draw from the little information we have on this is that it was dropped in some manner when the defendant had it in his hand. However this may be, we are unable to see how the concealment of the weapon—and that is the gist of the offense under the statute—could have anything to do with its discharge. There is no claim, either, that there was any altercation between defendant and the person killed. Neither is it claimed that the extreme penalty was imposed because the offense for which defendant was convicted was not his first offense. As we understand the record, it was on the ground before stated. The statute as it now reads (Section 4775-11a, Code Supp., 1913), is that the punishment shall be a fine of not more than \$500, or imprisonment of not more than two years, or both such fine and imprisonment, provided that, in case of the first offense, the court may, in its discretion, reduce the punishment to imprisonment in the county jail for a term not more than three months, or a fine of not more than \$100.

From anything appearing in the record or in argument, we think we ought not to infer that a young man of the age of defendant has been in the habit of carrying concealed weapons. Under all the circumstances before us, we reach the conclusion that the punishment of the defendant ought not to be more than a jail sentence, and the judgment will be reduced to 30 days in the county jail of Cherokee County, and his sentence is reduced to 30 days in the county jail of Cherokee County, to which he will be committed.

As so modified, the judgment is affirmed.—*Modified and affirmed.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

MARK C. TAYLOR, Appellee, v. MINNEAPOLIS & ST. LOUIS
RAILROAD COMPANY, Appellant.

NEGLIGENCE: Acts or Omissions Constituting—Attractive Agencies—Turntables. Maintaining an unlocked and unguarded railway turntable at a place where it may attract, and for a space of some two years has attracted, the attention of children, and enticed them to play on and about the same, with the express or implied knowledge of the company so maintaining, presents a jury question on the subject of negligence, even though the turntable was located 400 feet outside the platted portion of a city and abutted upon farm lands with no buildings thereon.

Appeal from Palo Alto District Court.—D. F. COYLE,
Judge.

MONDAY, JUNE 25, 1917.

ACTION to recover damages for personal injury. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Burnquist & Joyce, for appellant.

Daniel Kelly, E. A. & W. H. Morling, for appellee.

NEGLIGENCE:
acts or
omissions con-
stituting: at-
tractive agen-
cies: turn-
tables.

WEAVER, J.—The plaintiff, a child of eight years, was injured while playing upon a turntable owned and maintained by the defendant railway company at Ruthven, Iowa. Suing by his next friend, he alleges that the turntable was a dangerous device of such character as to be especially attractive to children, and was negligently maintained by the defendant at a point near the public highways and public places of the town, and that, for a long period, as defendant well knew, the children of the vicinity had been in the habit of resorting to and playing around and upon it. It is further charged that defendant

negligently failed to guard or protect said turntable by any lock or other device to prevent its being operated or made use of as a place or instrument of play, and that plaintiff was thereby attracted and lured into making such use of it, and in so doing received the injury of which he complains. The defendant admits its corporate capacity and its ownership of the turntable, but denies all other allegations of the petition. On trial to a jury, there was a verdict for the plaintiff for \$1,000, and from the judgment entered thereon, this appeal has been taken.

In presenting its appeal to this court, the appellant submits but one proposition, and that is that the plaintiff's evidence is insufficient to sustain the charge of negligence on the part of defendant. The thought of counsel is that the turntable is shown to be upon the defendant's own premises, and at such distance from any public way or other place of public resort where children could be reasonably expected to go or to be exposed to temptation therefrom that it should be held as a matter of law that no lack of reasonable care upon the company's part has been shown. It is true, as counsel suggest, that the owner of a turntable or other lawful device of a kind to naturally and strongly attract the attention of children of tender years is not bound to so guard or protect it as to absolutely insure it against their approach or interference. It is also true that such device may be so far removed from public access and from places to which the public is accustomed to resort as to fully justify the owner in assuming that it may be left unlocked and unguarded, without being chargeable with negligence. In our judgment, however, the showing made in this case on behalf of the defendant is not of such conclusive character as to require the withdrawal of the question of negligence from the jury. While it is shown that the turntable is located some 900 feet from the defendant's depot, and perhaps 400 feet outside of the platted

part of the town, and that the lands immediately adjoining are open fields unimproved by residences, there is also evidence from which the jury could properly find that, for two years or more, the public, including children, had been accustomed to walk or travel along defendant's track and right of way past the turntable; that children were in the habit of playing on and about the turntable; and that the plaintiff was not the first child who had been injured thereon. Whether the turntable was in any manner enclosed or protected by fence is a matter of dispute between the witnesses. It is undisputed that it was unlocked and unfastened, and was capable of being revolved or operated by the efforts of the children using it as a place of play. All these things are of a character such as must have been known to the servants and agents of the defendant in charge of the road at that place, and the danger so created was of such obvious character that we cannot say as a matter of law that no duty was imposed upon defendant to guard against it. Injuries to children upon turntables are so many and so frequent that they have been the subject of consideration by a very large proportion of all the courts of this country. They have given rise to two differing and irreconcilable theories of the law by which they are governed; but the question is thoroughly settled in this jurisdiction that, if the company owning such device locates it or maintains it at a place where it naturally attracts the attention of children and entices them to play upon it, and leaves it unlocked and unguarded, then such company is chargeable with negligence. See *Edgington v. Burlington C. R. & N. R. Co.*, 116 Iowa 410, and later decisions of this court in which that precedent has been applied and followed. There is no question of contributory negligence raised by counsel, and upon the single ground of appeal, the sufficiency of the proof of defendant's negligence, we hold that the trial court did not err.

The case called to our attention by appellant, *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, while quite parallel with the instant case in some of its material facts, is not at all inconsistent with the conclusion here reached, because it was there made to appear that the turntable was located at a place where the public were not in the habit of passing, and there was no showing, as in this instance, that children had long been accustomed to play upon it. That the location of the turntable need not be within the limits of the town before the rule of the *Edgington* case is applicable, see *Kansas Central R. Co. v. Fitzsimmons*, 22 Kan. 686.

For the reasons above stated, the judgment of the trial court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

R. VANDEVENTER, Appellant, v. RUFUS NELSON, Sheriff, Appellee.

EXEMPTIONS: Property Exempt—Jury Question. The issue
1 whether a traction engine is one of the instrumentalities by which a debtor habitually earns a living for himself and family is, on conflicting evidence, necessarily a jury question.

EXEMPTIONS: Property Exempt—Threshing Machine Separator.
2 A threshing machine separator is not exempt from execution.

EXEMPTIONS: Enforcement of Rights—Wrongful Levy—Damages
3 —**Notice to Officer.** Written notice by a judgment defendant to the levying officer of exemption claim is a condition precedent to the right to recover damages of the officer by reason of the wrongful detention by the officer of exempt property under levy. See Sections 3991, 4017, Code, 1897.

APPEAL AND ERROR: Harmless Error—Instructions—Incorrect
4 **Measure of Damages.** Incorrect instruction on the measure of damages becomes quite harmless when the jury finds that plaintiff has no cause of action.

• Vol. 180 1A.—45

Appeal from Hamilton District Court.—R. M. WRIGHT,
Judge.

MONDAY, JUNE 25, 1917.

ACTION at law to recover damages on account of the unlawful levy of an execution. The material facts are stated in the opinion. The jury returned a verdict for the defendant.—*Affirmed.*

F. J. Lund and D. C. Chase, for appellant.

Wesley Martin and W. J. Coril, for appellee.

STEVENS, J.—Defendant, as sheriff, levied under execution upon a threshing machine and traction engine as the property of plaintiff. M. J. Vandeventer caused notice to be served upon the sheriff, claiming to be the holder of a mortgage upon the threshing machine and engine. After some time had elapsed, the sheriff released the machinery from the levy because the judgment creditor refused to give him an indemnifying bond.

Plaintiff averred in his petition that he was a mechanic, earning his living by threshing, hulling grains and seeds, and doing other work in which he used said engine; that they were the necessary tools and instruments by which he earned his living; that he was a resident head of a family, and that said property was exempt from execution; that the sheriff unlawfully retained possession thereof; and he demanded damages for the loss of the use of the property and to the property resulting from the negligence of the sheriff in failing to properly care for and protect the same while held under execution. He further charged that the detention of the property by the sheriff was malicious, and asked judgment for exemplary damages. Defendant in answer admitted the levy, averred that the property was left in the possession of plaintiff; that if same was injured

it was because of his own negligence and without fault of defendant; that the execution was regular upon its face; that he was fully protected in making the levy. The court withdrew from the jury the question of exemplary damages, and the evidence tended to show that, under the levy, the property was permitted to remain on the premises where the levy was made, and that plaintiff used the same to some extent in threshing on the premises; and the sheriff testified that he told plaintiff to go ahead and use the machinery if he wanted to. There was conflict in the evidence as to important and material matters.

I. The court instructed the jury that
1. **EXEMPTIONS** · the separator levied upon was not exempt
property ex-
empt; jury
question. from execution, and submitted to it the
question as to whether or not the traction
engine was one of the instrumentalities by which the plaintiff habitually earned a living for himself and family, and informed the jury that, if they so found, then same was exempt from execution, and the levy was unlawful, and plaintiff would be entitled to recover the fair, reasonable value of the use of the engine during the time plaintiff was deprived thereof by reason of said levy, and such damages, if any, to said engine that resulted proximately from the levy.

It is claimed by appellant that the instruction was erroneous because it stated that the separator was not exempt from execution, and that it permitted plaintiff to recover damages to the engine and for the loss of the use thereof only in case the jury found the same to be exempt. It is true that the court, after giving the jury the correct rule for determining whether the engine was exempt or not, added the clause relating to damages, but evidently did not pretend to fully state the measure of plaintiff's recovery in this instruction, but only sought to advise the jury that plaintiff would be entitled to recover damages

if the execution was wrongfully levied upon the property.

The instruction, in so far as same submitted to the jury the question as to whether the engine was exempt or not, was clearly correct. The court also correctly informed the jury that the separator was not exempt from execution. *Meyer v. Meyer*, 23 Iowa 375.

II. The court in its Instruction No. 4 stated, in substance, that it was the duty of the sheriff, after levying upon the property, to give it such care as a reasonably prudent and careful man would give the same under like circumstances, and that, if he failed to do this, then he would be liable for any damages to the separator resulting from the want of such care during the time plaintiff was deprived thereof by reason of the levy, and that the measure of plaintiff's recovery would be the difference, if any, in the value of the separator at the time of the levy and its value at the time the levy was released. The court, in an instruction numbered 4½, said:

"If you find that the property levied upon by the defendant as sheriff was the property of the plaintiff, and was at the time exempt from execution, then you are instructed that it was the duty of the plaintiff, at the time of the levy or thereafter, to claim such exemption and to request the defendant to release said property because of such exemption, and the defendant would not be liable for the detention of said property until such time as knowledge or notice was in some way brought home to him, if it was brought home, that his levy was unlawful. If, however, you should find from a preponderance of the evidence that the defendant did have knowledge or notice that should have caused him to release the said property, and he did not do so, then, in such case, his detention of the property, after such notice or knowledge, was unlawful,

and he would be responsible for all damages, if any, resulting from his wrongful detention of said property."

Plaintiff excepted to both of said instructions before same were read to the jury. He complains because the court failed to include engine with the separator in the first, and that the latter was erroneous because, under the holdings of this court, defendant was not required to give the sheriff notice as stated in the instruction.

The instructions on the measure of damages were not very satisfactory, but the rule of law as to defendant's liability was correctly stated, and, if the jury had found in favor of the plaintiff, the failure to properly state the measure of damages might have become ground for reversal; but, as the jury found that plaintiff was not entitled to recover, it cannot be said that the failure of the court to correctly state the measure of damages was prejudicial, and this cause should not be reversed on account thereof.

III. Section 3991 of the Code is as follows:
"An officer is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy, unless he has received notice in writing under oath from some other person, his agent or attorney, that such property belongs to him; stating the nature of his interests therein, how and from whom he acquired the same, and consideration paid therefor; or *from the defendant, that the property is exempt from execution*; but failure to give such notice shall not deprive the party of any other remedy. Or, if after levy he receives such notice, such officer may release the property unless a bond is given as provided in the next section; but the officer shall be protected from all liability by reason of such levy until he receives such written notice."

4. APPEAL AND
ERROR: harm-
less error in
instructions: in-
correct meas-
ure of damages.

Plaintiff was present at the time of the levy of the execution, and made no claim that the property, or any part of it, was exempt from execution. It is true that, under the provisions of Code Section 4017, he did not waive his right to bring action for damages on account of a wrongful levy because of such failure. It was the duty of the sheriff to levy upon any property which he found in the possession of the judgment debtor. The court, in *Blair v. Fritz*, 162 Iowa 716, expressed doubt as to the correctness of its holding in *Upp v. Neuhring*, 127 Iowa 713, in which the court apparently held that the notice required by the statute was not applicable to the defendant. The writer of the opinion evidently overlooked changes in the statute. The provision of the statute above quoted is very plain. The instruction given the jury by the court was more favorable than plaintiff was probably entitled to under the statute.

IV. Appellant complains of the refusal of the court to give a certain requested instruction, and of the admission of testimony over his objections. The instruction was not proper, and the court rightly refused to give the same. The objection to the admission of some of the testimony might have been properly sustained, but it is quite apparent that no prejudice resulted from the ruling of the court.

The verdict of the jury finds ample support in the testimony, and no reversible error appears in the record. The judgment of the lower court is therefore—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

ARMSTRONG-McCLENAHAN COMPANY, Appellant, v. THOMAS RHOADS et al., Appellees.

EXEMPTIONS: Persons Entitled—Head of Family—Divorced Person. A debtor who lives alone and apart from his wife and children, who is unmarried and divorced from his wife and

under no obligation to support her, who, by said decree, has no custody of or control over his minor children except to visit them, and who furnishes them no support except occasional voluntary contributions, and who, by an executed transfer of property, has obligated another to care for and support his children, which obligation is being complied with, is not the "head of a family," and therefore not entitled to exemption of his personal earnings. Section 4011, Code, 1897.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

TUESDAY, JUNE 26, 1917.

APPEAL from a judgment of the district court of Linn County, Iowa, releasing attachment and discharging garnishee upon ground that the money due was for earnings due the defendant as the head of a family. Plaintiff appeals.—*Reversed.*

L. M. Kratz, for appellant.

No appearance for appellee.

STEVENS, J.—The Cedar Rapids Oil

EXEMPTIONS:
persons entitled:
head of family:
divorced person.

Company was garnished on execution December 10, 1915, as a supposed debtor of Thomas Rhoads', defendant. Defendant filed a duly verified application, asking that said garnishment be released, upon the ground that he was a resident head of a family; that the amount due from the garnishee was money earned as a laborer within 90 days preceding the date of the garnishment. The court held the funds in the hands of the garnishee exempt from execution, and released the garnishment. The amount involved being less than \$100, the court certified that the cause is one in which an appeal should be allowed.

The abstract does not set out the evidence, but the court made a finding of facts, and certified that defendant was divorced from his wife in 1912, upon the application of his wife, who was granted the full care and custody of all the minor children, which were all the children de-

fendant had; that his wife was awarded judgment for \$1,500 permanent alimony; that privilege was granted defendant to visit his children at suitable times; that, at the time the decree was entered, he turned over to his wife's parents his equity in a home he had been buying on contract, in consideration for which the grandparents agreed to keep and care for said children; that they have lived with their said grandparents since that time; that defendant has not lived with his wife, nor has he lived in the family with his children since that time, nor has he remarried, but has lived by himself all of the time in rooming and boarding houses; has frequently visited the children for a few hours at a time, and has contributed to their support, at irregular intervals, clothing, shoes, etc., whenever he thought they needed such necessities, but has in no way contributed toward their board and lodging or in any other way, except turning over the equity in his former home. He has stood good for medical and hospital services for said children. All the money in the hands of garnishee was the personal earnings of defendant, and was earned within 90 days next preceding the garnishment. Plaintiff appeals.

I. The statute under which the court held the funds in the hands of the garnishee exempt from execution is Code Section 4011, which makes the personal earnings of a debtor who is a resident head of a family, earned at any time within 90 days of the levy, exempt from liability for debt. The sole question presented on this appeal is whether or not the defendant at the time was the head of a family.

The authorities defining "family" and "head of a family" have been several times collected and reviewed by this court, and it is unnecessary to again extensively review the same. In *Linton v. Crosby*, 56 Iowa 386, a family is defined as "the collective body of persons who live in a house under one head or manager." See also *Emerson v.*

Leonard, 96 Iowa 311; *Fullerton v. Sherrill*, 114 Iowa 511; *Fox v. Waterloo National Bank*, 126 Iowa 481; *Sheehy v. Scott*, 128 Iowa 551; *In re Estate of Bishop*, 130 Iowa 250; *Blair v. Fritz*, 162 Iowa 716.

The husband and father who resides with and supports his wife and children is uniformly held to be the head of a family. The wife, however, under some circumstances, may become the head of a family. In *Linton v. Crosby*, supra, the husband and wife had lived separate and apart for seven years, during which time he neither contributed nor was asked to contribute to her support. He lodged in his office and boarded in the family of others. The court said:

"In the absence of a statute so providing, it is difficult to see why a person boarding in the family of others and lodging in his office for seven years can, at the expiration of that time, be regarded as a family, or the head of one. It is true a person may be a boarder and yet the head of a family. But in order to constitute him such, the boarding must be regarded as of a temporary character. * * * The mere fact he was liable for her support should not, we think, make him the head of a family. No family relation, as generally understood, existed between himself and wife. The policy and intent of the statute is to exempt certain property because the support of a family, great or small, is cast upon the head thereof. Such family must have an actual existence, as distinguished from one that exists theoretically only."

In *Emerson v. Leonard*, supra, the court held that a widow who lived alone, supported herself and others, when they were dependent upon her, by dressmaking, was not the head of a family after there ceased to be anyone residing with and dependent upon her. The court said:

"There cannot be a head of a family when there is no

family. It is not material that there was once a family, if it has ceased to exist."

The court, in *Clemans v. Penfield*, 111 Iowa 511, held that a divorced wife did not have a homestead right in the property used by her and her husband as a homestead, and which was conveyed to her by her husband, at the time the divorce was granted, in payment of alimony; that the property lost its homestead character at the time of the divorce, because of the dissolution of the family and the abandonment thereof by the divorced wife.

In *Fullerton v. Sherrill*, supra, where the question involved was the right of a homestead exemption, held that:

"For the benefit of the family, the law exempts the home of the family from the burden that rests upon all other property, of being appropriated to the debts of the owner. The immunity depends on two contingencies: First, occupancy as a home; second, that the owner shall have a family. When either ceases, the exemption is at an end. There can be no more reason for holding that a man who has lost his family shall continue to preserve an exempt homestead because he once had a family, than for saying the house which has once been exempt while occupied as a homestead shall continue to be exempt although totally abandoned as a residence."

The remaining cases cited variously define the head of a family.

"Exemption laws are enacted to prevent the unfortunate citizen from having all the necessities of life swept away, and to preserve for him certain things reasonably necessary to enable him to earn a livelihood for himself and family. The sole purpose of all such laws is to protect the citizens of the state from being reduced by financial misfortune to absolute want, and to encourage industry and thrift and the building up of homes by placing beyond the reach of creditors the homestead and such

tools, implements or appliances as a man may require to prosecute his business, whatever his walk in life or his occupation may be. Every man, even the extravagant and improvident, owes a first duty to those immediately dependent upon him. And so it is that the state has an interest that no citizen shall be reduced to a condition of destitution so as to be prevented from prosecuting useful industrial employments for which he may be fitted, and that families shall not be deprived by extravagance or misfortune of the shelter and comforts necessary to health and activity." Section 3, 11 R. C. L. 491, and cases cited. *Heaton v. Sawyer*, (Vt.) 15 Atl. 166.

In the case last cited, the right of the wife to claim a homestead right in the premises of her husband after her divorce was involved, and the court said:

"By the decree of divorce procured by the defendant, with the custody of the minor children decreed to her, they thereafter ceased to be a part of the family of Norman D. Sawyer. She, without remarriage, could never become his widow. The minor children, without a change in the decree, could never become or constitute a part of his family, over whom he could exercise parental control, or to whom he owed the duty of personal care and support."

To the same effect, see *Holcomb v. Holcomb*, (N. D.) 120 N. W. 547; *Wiggin v. Buzzell*, 58 N. H. 329; *Cooper v. Cooper*, 24 Ohio St. 488. The Supreme Court of Nebraska, in *Roberts v. Moudy*, 30 Neb. 683, held to the contrary.

The Supreme Court of Missouri, in *Caldwell v. Ryan*, 108 S. W. 533, 537, referring to exemption laws, said:

"The statutes of exemption were conceived in mercy for the unfortunate debtor, and are to be construed in that spirit, but they are not to be construed to give him what in common honesty does not belong to him. * * * The statute of exemption was made to cover as with a shield what the unfortunate debtor has in his possession when the

officer comes with a writ to take it from him. It was not made to arm him as with a sword to levy contribution on his neighbor."

The defendant in the case at bar did not reside with his wife or minor children; was separated from them by a decree of divorce. Under the decree, he was deprived of the right to exercise custody or control over them; he had conveyed his equity in his former homestead to the parents of his divorced wife, in consideration of which they agreed to maintain and support defendant's minor children. All that appears in the record is that he occasionally visited the children, and voluntarily contributed clothing and paid for medical services rendered the children. He was in no sense the head of a family. The statute exempting personal earnings was never intended to aid an individual to avoid the payment of his honest debts, but, as above stated, to preserve a certain advantage in favor of the family dependent upon him for support. While exemption statutes are to be given a liberal construction in carrying out their purpose, they should never become a means of enabling an improvident debtor to avoid the payment of obligations arising after he has ceased to properly come within the purview of the statute.

It is our conclusion that the funds in the hands of the garnishee were not exempt to the defendant, and that the judgment of the lower court should be and is—*Reversed*.

GAYNOR, C. J., WEAVER and PRESTON, J.J., concur.

ANNIS CHANEY et al., Appellees, v. W. F. MURPHY, Appellant.

APPEAL AND ERROR: Review—Questions of Fact, Etc.—Law Actions—Trial to Court. Principle recognized that, on appeal in a law action tried to the court, that version of the testimony most favorable to the prevailing party must be accepted.

LIMITATION OF ACTIONS: Computation of Period—Contract

- 2 Without Time for Performance. The statute of limitations, on a contract calling for the performance of a specified act without designation as to time of performance, will commence to run only from the time the one obligated repudiates the contract.

DAMAGES: Breach of Contract—Failure to Furnish Abstract—Ex-

- 3 amination. The obligation to furnish an abstract showing good, merchantable title does not embrace the obligation to defray the cost of examining the abstract after it has been furnished or procured.

Appeal from Johnson District Court.—R. P. HOWELL, Judge.

WEDNESDAY, MARCH 14, 1917.

REHEARING DENIED TUESDAY, JUNE 26, 1917.

ACTION to recover damages for defendant's failure to furnish plaintiffs with an abstract of title to certain property purchased by plaintiffs from defendant. The defense was the statute of limitations, a denial of the material allegations of the petition, and a pleading of full performance by defendant of all of his agreements. Upon the issues joined, the cause was tried to the court, a jury being waived, resulting in a judgment for plaintiffs in the sum of \$56, with interest and costs. Defendant appeals.—*Modified and affirmed.*

C. M. Dutcher and Bailey & Murphy, for appellant.

Edwin B. Wilson, for appellees.

DEEMER, J.—As the case is a law action, and was tried to the court without a jury, we must accept that version of the testimony most favorable to plaintiffs, and, if there be any which substantially supports the judgment, the case must be affirmed.

It seems that, for many years, defendant has been plaintiffs' attorney, and has represented them in all matters

1. APPEAL AND ERROR: review: questions of fact, etc.: law actions: trial to court.

upon which they needed advice or assistance in court or otherwise. Plaintiffs were the owners of some property in the town of Oxford, which defendant wished to secure, and so he proposed to trade them a farm for it. Having agreed upon \$1,000 as the value of plaintiffs' property, a trade was arranged for the farm, plaintiffs to give notes and mortgages aggregating \$4,000 upon the land, in addition to their Oxford property, and also an equity estimated at \$2,000, which Annis Chaney had in a tract of ground belonging to an estate in which she was interested. It was agreed by defendant that he would furnish an abstract showing a good and merchantable title in the farm lands which were to be deeded to the plaintiffs. No time was set for the delivery of this abstract. Deed to the lands was made and delivered to plaintiffs about December 23, 1905, and defendant then said that the abstract of title needed fixing, and that, when he got it fixed, he would turn it over to plaintiffs. Plaintiffs kept calling for the abstract, and defendant kept renewing his promises to fix up and deliver it, until a short time before the bringing of this suit, when defendant, after having brought action to quiet title to the lands, which action, it is said, cured all the defects in the title, refused to deliver the abstract or to have anything more to do with it or the title.

Plaintiffs claim that, having sold the land, or a part of it, they were compelled to secure an abstract to satisfy the purchaser; that they paid \$25 for this; that thereafter, and after defendant had brought his action to quiet title, they had to pay \$6 to have the abstract extended, and that, in view of defendant's failure to furnish an abstract, they had to employ an attorney to look after their interests; and that they paid this attorney \$25 for his services. These several items were allowed by the trial court, and the appeal challenges the allowance thereof.

It is said that plaintiffs' action is barred by the statute of limitations. It is manifestly an action for breach of contract, the contract having been made in December of the year 1905, and this action having been commenced in January of the year 1915. The contract is oral, and the statutory period for bringing suit for breach thereof is five years from the time the cause thereof accrues. The fundamental question is: When did plaintiffs' cause of action accrue? It seems that no time was fixed for the delivery of the abstract. In such a case, a reasonable time is implied by law, and what is this reasonable time depends upon the circumstances of each particular case. Here, plaintiffs say that, during all the time down to within a short while before the bringing of suit, defendant, recognizing his contract, made one excuse after another for not completing the abstract, acknowledged his liability to deliver, and promised each time to do so within a few days. All parties recognized that an action to quiet title was necessary to correct defects in the title, and without this, a good and merchantable title could not be secured, so as to be entered upon the abstract; and plaintiffs state that defendant insisted upon doing this work himself, and delayed doing so, for good reason or for no reason, until about the time of the commencement of this action, thus compelling plaintiffs to procure another abstract and an extension thereof, in order to satisfy a purchaser of the land from them. On plaintiffs' version of the matter, which the trial court had the right to accept, we do not think plaintiffs' cause of action is barred. The action did not accrue, according to plaintiffs' testimony, until defendant repudiated his agreement to furnish an abstract. *Elliott v. Capital City State Bank*, 128 Iowa 275; *City of Muscatine v. Chicago, R. I. & P. R. Co.*, 79 Iowa 645. And the

2. LIMITATION OF
ACTIONS: com-
pensation of
period: contract
without time
for perform-
ance.

trial court was justified in finding that plaintiffs' cause of action was not barred.

II. The court allowed plaintiffs the cost of a new abstract, and also for making the necessary extension thereof, after defendant secured the decree quieting title to plaintiffs' lands, amounting to \$31. In this there was no error. But the court also allowed plaintiffs the sum of \$25 because of defendant's failure to look after plaintiffs' interests, as he agreed to do. We understand that this has reference to an attorney's fee paid by him, necessitated by defendant's failure to furnish abstract or to perfect title to the lands in season.

In the first place, we find no testimony that plaintiffs paid or obligated themselves to pay any amount to an attorney for anything. Moreover, if there be such, there is no showing that this was due to defendant's failure to perform any part of the agreement. Defendant undertook to deliver an abstract showing good and merchantable title to the land, and also to convey such a title. If he had furnished the abstract, he was not bound to pay for the services of an attorney secured by plaintiffs to examine this abstract. Again, after defendant secured a decree quieting title to the land, he was not bound to pay or reimburse plaintiffs for the services of an attorney in examining the title. Defendant performed his agreement when he delivered the abstract and fixed up the title. If he did neither, or failed to do one of the things promised, he is liable for the damages primarily resulting therefrom. He did not furnish the abstract, and plaintiffs are entitled to compensation therefor. He did secure his decree, but plaintiffs are not entitled to recover attorneys' fees from him because they employed someone to see whether or not they then had good title. Neither the law nor the testimony in the case justifies any such allowance. The judgment

must be modified by striking out this allowance for attorneys' fees or for looking after plaintiffs' interests, leaving it stand simply for \$31, with interest. Each party will pay one half of costs of this appeal.—*Modified and affirmed.*

The foregoing opinion was prepared by Justice Deemer, now deceased, and is adopted as the opinion of the court.

GAYNOR, C. J., LADD, EVANS and PRESTON, JJ., concur.

CLARK BROTHERS et al., Appellees, v. MARY E. WATSON et al., Appellants.

SUBROGATION: Sureties—Secret Sureties not Entitled to Subro-
1 **gation.** A secret surety in a note and mortgage securing the same is not entitled to subrogation to the prejudice of subsequent mortgagees without notice of such secret relation. Secs. 3779, 3966, 3967, Code, 1897.

PRINCIPLE APPLIED: In 1885, two sisters, owning a tract of land in equal shares, mortgaged the entire tract, in order to raise money for their brother, and solely as an accommodation to him. The sisters, during the 10 years following, twice secured new loans to take up this accruing obligation, their last mortgage (duly recorded) being given in 1895, and being known as the Robb mortgage. In 1896, one sister died, and by descent the remaining sister acquired an additional one-sixth interest in said land (or a total of two thirds), and said brother, by descent and a conveyance, acquired the remaining one third. Henceforth, the title so remained. During the years 1901 to 1908, said brother repeatedly mortgaged his one-third interest, all of said mortgages being duly recorded. These subsequent mortgagees, in taking their mortgages, had no knowledge or notice that the makers of the Robb mortgage were in fact sureties only, and that the brother was in fact the principal. Held, on foreclosure, that the surviving sister, on payment of any part of the Robb mortgage, was not entitled to be subrogated to the rights of Robb, the mortgagee, to the prejudice of said subsequent mortgagees.

TENANCY IN COMMON: Mortgage Lien—Payment—Contribu-
2 **tion.** The right of one tenant in common to demand contribution on account of mortgage liens on the common property, arises only after payment has actually been made. Held, in Vol. 180 Ia.—46

case at bar, that contribution was, in effect, granted by requiring each undivided fractional part of the land to be sold for its fractional part of the mortgage.

TENANCY IN COMMON: Mortgages—Mortgagees not Cotenant. A
3 mortgagee of the interest of one tenant in common does not become a tenant in common with the others. It follows that such mortgagee is not bound by and not required to take notice of secret equities existing in favor of another cotenant.

PRINCIPLE APPLIED: See No. 1.

MORTGAGES: Priority — Unrecorded Mortgages — Notice—Evi-
4 dence. The number of witnesses is not necessarily controlling on disputed fact questions. Testimony of one witness that he did not have notice of a prior unrecorded mortgage, aided by corroborating facts and circumstances, may overcome the positive testimony of two interested witnesses that they did give such notice to first party, when the conduct of such two witnesses has not been consistent with their assertion.

LADD and PRESTON, JJ., dissent as to the finding of fact.

Appeal from Monroe District Court.—SENECA CORNELL,
Judge.

SATURDAY, OCTOBER 28, 1916.

OPINION ON REHEARING TUESDAY, JUNE 26, 1917.

ACTION in equity to foreclose mortgages and to establish liens and the priority thereof. There was a decree for plaintiffs, foreclosing the mortgages and determining the priority of liens and the rights of the parties. The defendant cross-petitioner People's Savings Bank appeals from the finding of the trial court that the lien of plaintiffs' mortgages was prior to that of said appellant. Mary E. Watson, a defendant and cross-petitioner, appeals from the findings of the trial court, which were against her. A more detailed statement as to the issues and facts appears in the opinion.—*Modified and affirmed.*

J. C. Mitchell, N. E. Kendall, F. D. Everett, and J. C. Mabry, for appellants.

John T. Clarkson and D. W. Bates, for appellees.

EVANS, J.—There are many parties defendant and a large number of different claims and conflicting interests, so that the record is somewhat complicated. However, most of the parties seem satisfied with the finding of the trial court, and, as before indicated, but two appealed.

1. SUBROGATION: sureties: secret sureties not entitled to subrogation.

1. The points in the case most seriously argued, and perhaps the more important ones, are the points raised by the appellant Mary E. Watson in her controversy with plaintiffs and some of the other parties to the action. As to her contention, the pleadings are voluminous. Plaintiffs filed their petition for foreclosure, and later a substituted petition was filed, and by it and amendments thereto, A. C. Watson, People's Savings Bank, George L. Robb, who holds a mortgage on the property, some mechanics' lienholders and judgment creditors of A. C. Watson, including Robb Bros., who hold a judgment against A. C. Watson and appellant Mary E. Watson, were made defendants. Plaintiffs prayed, as against Mary E. Watson, that the money due on the Robb mortgage later referred to should be paid from her undivided two thirds of the 133 $\frac{1}{3}$ acres, which is referred to in the record as the "irregular tract," and sometimes as the "home farm," and the same relief was prayed by the People's Savings Bank as against her by cross-petition. Answering these cross-petitions, Mary E. Watson set out the facts in relation to the Robb mortgage, which will be more fully stated later; and, by way of cross-petition against Clark Bros., the People's Savings Bank, and George L. Robb, she prayed that her cotenants' undivided one third of the irregular tract be first sold in satisfaction of the Robb mortgage, and that her undivided two thirds thereof be sold only to satisfy any deficiency remaining on said mortgage after the application thereon of the proceeds of the sale of her cotenants' undivided one-third interest, and she also prayed for general, equitable

relief. It will be noted here that Mary E. Watson by her pleadings asked that the one-third interest be first exhausted, and did not specifically ask for contribution or subrogation. The questions in regard to contribution and subrogation are argued by her, and it is claimed that she has stated the facts in regard to the matter of her executing the Robb mortgage as an accommodation for her brother, defendant A. C. Watson, and that she is entitled to raise such questions under her plea for general equitable relief. Plaintiff and the People's Savings Bank filed replies to the answer and cross-pleadings of Mary E. Watson, denying the facts she had alleged, and claiming that they were incumbrancers for a valuable consideration without notice. About the year 1882, this appellant and her sister, Rebecca Watson, both maiden ladies, became, by inheritance from their deceased parents, the owners of the irregular tract of land before referred to, and at once entered into the possession and occupancy thereof. Each owned one half. In 1885, the two sisters, who were free from debt and not engaged in any business, negotiated a loan on said real estate. When this loan matured, in 1890, a new loan was obtained for an increased amount, and the first paid off. When the second loan matured, in 1895, they obtained the money to discharge it by executing to the Equitable Life Insurance Company a mortgage for \$2,000. The mortgage was extended from time to time, and, on May 11, 1911, it was assigned to George L. Robb, and is the mortgage involved in this action, and is referred to as the Robb mortgage. Robb was also interested in a judgment against A. C. Watson and appellant Mary E. Watson. This will be referred to later. After the execution of the Robb mortgage before referred to, it is alleged, and defendants A. C. Watson and Mary E. Watson so testified, and the trial court so found, that the money procured from these loans was solely as an accommodation to the

brother, A. C. Watson, upon his promise and agreement to pay the same and have the mortgage canceled and hold his sisters harmless; and that the money was turned over to him and used by him for his own benefit—no part of it was used by the sisters or for their benefit. About a year after the execution of this Robb mortgage, one of the sisters, Rebecca, died, leaving to inherit her property, her sister Mary E. (the appellant), another sister, and her brother, A. C.; so that, on Rebecca's death, Mary E. became the owner of an undivided two thirds of the irregular tract. Soon afterwards, A. C. obtained the other sister's one-sixth interest, and thereby became vested with the undivided one third. The title has so remained ever since, Mary E. owning an undivided two thirds, and her brother, A. C., being the owner of an undivided one third. Robb was also interested in a judgment against Mary E. and A. C. Watson, which was a lien on lands owned by them. The date of this judgment is March 6, 1906.

In addition to the two mortgages before referred to, given by A. C. Watson to plaintiffs, he also executed to them another mortgage covering the irregular tract, which was dated February 13, 1906. Plaintiff also became the owner by assignment of another mortgage executed by A. C. Watson, dated January 8, 1908, covering the irregular tract, and another mortgage covering the same tract, dated February 13, 1906. These mortgages were all foreclosed by the decree in this case.

The real question in the case is whether the Robb mortgage should be satisfied out of the undivided one third of the irregular tract owned by A. C. Watson, or whether it should be satisfied in whole or in part out of the undivided two-thirds interest owned by Mary E. Watson. The theory of appellant Mary E. Watson was, and, as she pleads it, is, that the one-third interest should be first exhausted, because she was only a surety for her brother in the trans-

action in regard to the Robb mortgage; and that her two-thirds interest is liable only for any deficiency; and she claims that the decree should have provided that she be subrogated to the mortgagee's rights for any money she had paid or might be required to pay as such surety; and claims also, in argument, that because, as cotenant, she has now paid off two thirds of the amount decreed herein to be due on the Robb mortgage, she is entitled to contribution. It should have been stated before, in regard to this matter, that it appears that, since the decree was rendered, an execution was issued and her two-thirds interest levied upon, and that thereafter she paid to the sheriff, under protest, the sum of \$1,629.46. The trial court stated, in deciding the case, that appellant Mary E. Watson, because the Robb mortgage was a mere accommodation by appellant Mary E. and her sister for the brother, A. C. Watson, would be entitled to the relief she asks for in some form, but for the fact that other mortgages had been given by A. C. Watson on the undivided one-third interest to plaintiffs and others; but found as a fact that the parties holding such mortgages on the one-third interest had no notice of the secret arrangement between A. C. Watson and the sisters that the Robb mortgage was an accommodation; and that, therefore, appellant Mary E. Watson having a lien of which mortgagees had no notice, and the mortgagees having a lien by reason of their mortgages, it became a question of priority as between these two lienholders. As we understand it, from the arguments of plaintiffs and the appellant bank, they make no serious objection to appellant Mary E. Watson's being subrogated, provided it may be done without prejudice to their claims. Their contention is that, because they had no notice of the private agreement between A. C. Watson and his sisters, their claims are still prior; while appellant Mary E. contends that her claim should be prior, regardless of the question of notice.

Under the record, we hold that Mary E. Watson may be subrogated to the rights of Robb under his mortgage for the amount of money paid by her, but not to the prejudice of plaintiffs or the People's Savings Bank. These matters will be taken up in their order.

The trial court by its decree found and decreed that the Robb mortgage was the prior and paramount lien on the irregular tract; that two of the Clark mortgages, the one dated March 1, 1901, and the other, March 31, 1903, were liens on A. C. Watson's undivided one third of said irregular tract, prior and superior to the liens of any of the defendants except that of the said Robb mortgage; but that two thirds of the amount due on the Robb mortgage, with a like proportion of costs, should be made by a separate sale of Mary E. Watson's undivided two thirds of the said tract, and that whatever should remain of the proceeds of said sale, after the payment therefrom of said two thirds, should be applied to the payment of the balance of the Robb judgment; that the remaining one third due on the Robb mortgage, with a proportionate share of costs, should be paid by a separate sale of A. C. Watson's undivided one third of said tract, and that whatever should remain of the proceeds of such sale, after the payment therefrom of the one third due on the Robb mortgage, should be applied to the payment of the amounts due on the two Clark mortgages before referred to, and the mortgage held by the bank. Other provisions of the decree in regard to other lien holders will not be referred to, because, as we understand it, the finding of the trial court and decree as to other lien holders are not material to the determination of the points now before the court.

Appellant argues the question as to marshaling of assets, and objects to having that done; but the trial court, in an opinion filed, said:

"I am of the opinion that the doctrine of marshaling

securities cannot be invoked against the defendant Mary Watson in this case by the creditors of A. C. Watson, because her property, sought to be appropriated to the payment of this Robb mortgage, does not belong to the common debtor of these different creditors. * * * Mary Watson is not a debtor of any of the creditors of A. C. Watson who are asking that her property be charged with the payment of all of the Robb mortgage; therefore her undivided two-thirds interest in the home farm should not be charged with more than its share of the Robb mortgage. * * * It is the rule in this state that, when mortgaged lands are sold in several tracts, each must contribute ratably to the satisfaction of the mortgage debt. Marshaling securities will not be permitted to the prejudice of third persons."

From this it appears that there was no marshaling of assets, and, this being so, we deem it unnecessary to discuss that question. It has been stated before that the date of the Robb mortgage was in 1895, and the court found that it was a first lien upon all the irregular tract.

2. TENANCY IN
COMMON:
mortgage lien:
payment: con-
tribution.

2. It is undoubtedly true, as contended by this appellant, that a tenant in common, relieving the common property from a mortgage lien for the benefit of all the tenants in common, is entitled to contribution from cotenants out of their interests in the common property. In support of this proposition, this appellant cites 30 Cyc. 47; *Oliver v. Montgomery*, 42 Iowa 36; *Koboliska v. Siechla*, 107 Iowa 124; *Leach v. Hall*, 95 Iowa 611, 619. This appellant claims for the last two cases that the holdings are that it is more a question of contribution than subrogation. They contend that the only substantial difference between the two is that the former, if allowed, could be enforced by foreclosure, while the latter can only be by partition, or perhaps, under peculiar circumstances, by an

equitable action for contribution; and they say that, as a lien, either is as binding and effectual as the other. They also cite on the question of contribution the case of *McNamara v. McNamara*, 167 Iowa 479. And in this case, had appellant Mary E. Watson paid off the Robb mortgage before the final decree was entered in this case, she would have been entitled, at least as between herself and her brother, A. C. Watson, to contribution. We do not understand that, had she paid off incumbrances on the entire common property owned in the first place by her and her sister, and later by her and her brother, A. C. Watson, she would have been entitled to receive from her brother all she paid, but only his proportion. In other words, suppose two persons together own real estate upon which there is an incumbrance of \$1,000, and one of them pays it off, the one so paying would be entitled to receive from the other cotenant, not \$1,000, but \$500, the proportion of each. It seems to us, though we may be mistaken, that counsel for this appellant, to some extent at least, confuses the doctrine of contribution of one's proportion of an incumbrance paid off, with the claim in this case that there was an agreement between A. C. Watson and his sisters that they were procuring the money for him as an accommodation, and that, under the agreement, she might be entitled to receive pay from A. C. Watson for the entire amount. But this appellant, up to the time the decree was rendered, had not paid off any part of the Robb mortgage, and it would seem to us that, until she had paid, she would not be entitled to contribution. Still, again, it seems to us that, by the decree, the trial court did, in effect at least,—though we do not understand that the court put it on that ground,—require A. C. Watson to make contribution; because it required the one-third interest of A. C. Watson to pay one third of the Robb mortgage, and Mary E. Watson, two thirds. These payments were in proportion to

their interest in the property. Counsel for this appellant say, as we understand it, that it makes but little difference to them whether her rights are protected under the doctrine of contribution, or whether, because she was surety for her brother, she is entitled to subrogation, or under the statute to have the property of the principal first exhausted, before resorting to that of the surety. Other suggestions occur to us as a reason why this appellant may not now have contribution as such, but it seems unnecessary to discuss this question in further detail.

3. It is next contended by this appellant that, as between themselves, an accommodated party and the party rendering the accommodation stand in the relation of principal and surety, the former the principal, and the latter the surety; and they cite in support of the proposition, 7 Cyc. 725, 726; *Aetna National Bank v. Hollister*, 55 Conn. 188 (10 Atl. 550); *American National Bank v. Junk Bros.*, 94 Tenn. 624 (30 S. W. 753, 28 L. R. A. 492). Appellees do not dispute this proposition, and their only point is that, even if this be true, the claim of this appellant would not be prior to their regularly executed and recorded mortgage liens, they having no notice of the private arrangement between appellant and her brother. This appellant further contends that, under Sections 3779, 3966 and 3967 of the Code, the surety may demand that his principal's property shall be first sold, and the surety's sold only to make up any remaining deficiency; and such was the theory upon which her counsel seem to have tried their case in the district court, under the pleading filed by them. Their claim was that they were entitled, under these provisions of the statute, to have the judgment rendered show that she was surety for A. C. Watson. They also claim that, having stated the facts and asked for general equitable relief, she is entitled to subrogation for any money that she, as surety, may have paid, or might thereafter be required

to pay. We think there would be force in this appellant's contention at this point, were it not for intervening rights of the plaintiffs under their mortgages. The question is whether the mortgage lien holders, not having any notice of the arrangement between the brother and sisters as to the Robb mortgage, should be prejudiced by allowing Mary E. Watson to be subrogated to Robb's rights.

3. TENANCY IN COMMON: mortgages: mortgagee not cotenant. Counsel for this appellant cite no cases on this question of notice as applied to the doctrine of subrogation. They do claim, however, under the doctrine of contribution, that a tenant in common is seized of each and every part; that he holds a contingent title to all the parts, and cannot be divested of such title until all equities relating to the tenancy have been adjusted; and that a purchaser from a tenant in common, though he purchases for a valuable consideration without notice, can only take subject to the equities of the other tenant or tenants. They cite a number of cases from other jurisdictions, and *McNamara v. McNamara*, 167 Iowa 479. But these cases, with possibly one exception, were where one had purchased the interest of one of the cotenants, and thereby became himself a cotenant. Such was the situation in the *McNamara* case. That case, and perhaps some of the others cited, are cases where the interest of one tenant so purchased was at judicial sale; and under such circumstances, the doctrine of *caveat emptor* applies. And in that case, the contest was between cotenants themselves. The purchaser at judicial sale is held to be a cotenant in place of the one whose interest he had purchased. There was no question in that case such as is presented here. Even though the purchase of the interest of a cotenant is not at judicial sale, the purchaser takes the place, as cotenant, of the one whose interest he buys, and, as held in the *McNamara* case, *supra*, the lien of one cotenant paying off an incumbrance on

the common property, is not one entitled to be recorded. In such a case, the one purchasing such interest purchases subject to equities between the cotenants. In the instant case, the mortgagees (plaintiffs and the bank) became simply lien holders on the one-third interest of A. C. Watson, and were not purchasers, and did not become, as such mortgagees, tenants in common with the others. They were simply lien holders. The mortgages were properly recorded. It seems to us, as contended by appellee, that it is simply a question of priority of liens. The mortgages (plaintiffs' and People's Savings Bank's) being properly recorded, this appellant must be held to have notice of them, while plaintiffs and the bank had no notice of her claim or lien. While this appellant has a lien or claim against her brother, A. C. Watson, we think she is not entitled to have it decreed to be prior to the liens of the mortgages of plaintiffs and the bank. But for such intervening rights, her right as surety to be subrogated, even in advance of payment by her, could be protected by the decree. *City of Keokuk v. Lore*, 31 Iowa 119; *Bankers Surety Co. v. Linder*, 156 Iowa 486. This, of course, is true as between this appellant, her brother and Robb, as to his mortgage, which this appellant signed and upon which she concedes she is liable. As between the parties, she would doubtless be entitled to subrogation. But the question in this case is whether, under this record, she is entitled to such relief as against third persons, who, without notice, have rights intervening. No cases are cited by this appellant upon this proposition. It is contended by counsel for plaintiffs, who are the only ones besides this appellant who argue the question of subrogation, that the plaintiffs were not in privity to the accommodation contract between this appellant and her brother, and that the surety statutes before cited have to do only with the parties who are so in privity to the contract; that such arrangement cannot affect third persons

who have intervening rights without notice. It is not claimed, and could not be from the record, that plaintiffs and the bank had any notice that there was any undisclosed agreement between this appellant and her brother, which would create the relation of principal and surety. They seem to have relied upon the record, showing simply a mortgage by the two sisters to the insurance company, and took their mortgages relying thereon.

As before stated, they concede that, as between Robb, this appellant and A. C. Watson, this appellant would have the right to ask that the Robb mortgage be satisfied from the undivided one third of the irregular tract owned by A. C. Watson, but claim that, as between intervening rights of plaintiffs and the bank, who have mortgage liens, without knowledge or notice of the arrangement, this appellant may not set up her suretyship claim as a prior claim to that of the plaintiffs, and they say that the real question involved is one of priority of liens or the priority of rights. The appellee cites no authority to sustain this contention. The very authority cited by appellant (7 Cyc. 725) is to the effect that, as between himself and the party accommodated, the accommodation party is, in effect, a surety, and his right to recourse against the party accommodated is that of a surety against his principal debtor. Plaintiff concedes this to be the rule. Plaintiff does not cite any authority on the question as to the rights of intervening third persons without notice. Upon an independent investigation, in which we are somewhat limited as to time, we find this doctrine, in 37 Cyc. 383:

"Subrogation, being an equity springing from the relation between the parties, and created and enforced for the benefit and protection of the one in whose favor it is originated, may be asserted or waived at pleasure, either expressly or by implication, but not to the detriment of the subrogee's creditors, who, in turn, are entitled to subro-

gation to his right of subrogation, and may be assigned and enforced by the assignee. The ordinary doctrine of estoppel also applies. Thus the equitable right to substitution is waived by the conduct of a would-be subrogee in urging another person to buy land without disclosing to him an intention to assert, in any event, any sort of claim to it, resulting from facts or rights then existing, and without notifying him of the existence of any such facts or contingent claim. A creditor is not entitled to subrogation to a lien which, but for his own laches, he might have had."

And at page 387, same volume, we find this:

"The right of subrogation is one of equity merely, and due diligence must be exercised in ascertaining it. Laches in taking advantage of the right will forfeit it; and subrogation is not allowed in favor of one who has permitted the equity he asserts to sleep in secrecy until the rights of others would be injuriously affected by its assertion and enforcement. Thus a surety who for an unreasonably long time has permitted himself to appear in the light of the principal debtor cannot be subrogated, to the prejudice of intervening equities, although the rule is otherwise where there are no supervenient equities; and, where the rights of third persons have not intervened, it has been held that a delay, short of the statutory period of limitations, will not bar a party of his right to be subrogated to the rights of another."

So that while, as between the parties to the accommodation agreement, this appellant would be entitled to be subrogated to the rights of Robb, because of the suretyship relation, it is quite clear that, as to the plaintiffs and the bank, because without notice, and because this appellant permitted herself to appear in the light of principal debtor, in that the record showed that this appellant, with her sister, had signed the Robb mortgage, and there was

nothing to indicate to plaintiffs or bank that there was any suretyship arrangement, she ought not to be permitted to assert, as against them, her claim of suretyship and ask subrogation to their prejudice. We think the same rule would not apply to the Robb judgment as to the Robb mortgage.

It is our conclusion, then, that, for the reasons given, this appellant has lost or waived her right of subrogation as to the plaintiffs and the bank.

4. **MORTGAGES:**
priority: unre-
corded mort-
gages: notice:
evidence.

4. The foregoing is a re-adoption of the opinion of Mr. Justice Preston upon the original submission of the case. There remains to be considered the question of priority as between the plaintiffs' mortgages and the mortgage of the defendant People's Savings Bank. The petition for rehearing was granted on this point.

The first of plaintiffs' mortgages was for \$6,100, and was executed on March 1, 1901. The second was for \$8,900, and was executed on March 3, 1903. These mortgages were both withheld from the records until December, 1906. In the meantime, a part of the real estate included in the plaintiffs' mortgages was mortgaged by Watson to the People's Savings Bank, on July 11, 1905. This mortgage was duly recorded two days later. The amount thereof was \$1,850. The plaintiffs did not place their mortgages on record until shortly after the discovery of the mortgage of the defendant bank. Right of priority over the mortgage of the defendant bank is predicated upon the claim that, prior to July, 1905, the plaintiffs had notified Castner, the cashier of the defendant bank, of the existence of their mortgages. This part of the plaintiffs' case is stated succinctly in the written opinion of the trial court as follows:

"In the case, the plaintiff undertook to prove notice to the bank of the existence of their mortgages, before the

date of the execution of the bank mortgage. Both plaintiffs testify to conversations with Castner, the cashier of the bank, had before the date of the bank mortgage, in which said cashier was told that plaintiffs had mortgages covering all the real estate owned by Alexander C. Watson. The cashier denies having the talk with Grant Clark; admits the conversation with John R. Clark, in substance, but fixes the time as after the bank mortgage had been executed and recorded. All three of these witnesses appear to be credible, with equal opportunity of knowing and remembering the matters testified to, and the testimony of the plaintiffs appears as reasonable as that of the cashier. I am of the opinion that the contention of the plaintiffs at this point is sustained by the weight and preponderance of the evidence, taking into consideration all the facts and circumstances of the case, as shown by the evidence."

It will be seen from the above that the plaintiffs had the advantage of two witnesses in their behalf against one in behalf of the defendant. Ordinarily, this count would furnish ground for claiming a preponderance for the plaintiffs. It should not be overlooked, however, that the plaintiffs are witnesses in their own behalf. The fact testified to by them is one of controlling importance, and rests upon their indefinite recollection of a casual conversation which is alleged to have occurred ten years prior to the time of the giving of their testimony. There are circumstances appearing in evidence of considerable significance, and these should be considered with great care in weighing the credibility of this conflicting testimony. The statute provides a very simple method whereby a mortgagee may protect his priority of lien against all subsequent purchasers, by simply filing the same for record. The operation of the statute, when complied with, works equitably to the protection both of the mortgagee and of the public. For some reason, the plaintiffs did not avail themselves of

the recording statute. Though pressed for a reason upon the witness stand, they gave no explanation of why their mortgages were not recorded. The only fair inference that can be drawn from the evidence is that they preferred not to record them, and that they intentionally withheld them. Watson, the mortgagor, was insolvent. He had, however, several hundred acres of land, all of which was encumbered, and all of which was included in the plaintiffs' mortgages. His so-called "home place" consisted of 133 acres, of which Watson was the owner of only an undivided one third. The remaining two thirds were owned by his sister. Brother and sister occupied the tract together as a home. Watson understood that his interest in the "home place" was not included in the Clark mortgages. He testified that such was his understanding with the plaintiffs; that the plaintiffs drew the mortgages and advised Watson that they did not include the "home place;" and that he signed the same without reading. This testimony was not denied. Watson in good faith informed Castner that his interest in the "home place" was clear, except a \$2,000 mortgage to Robb. Castner examined the public records, and found the title to be in the condition thus represented. In reliance thereon, he parted with full consideration for the mortgage taken by him. It is undisputed that, after the mortgages of both parties had been recorded, there was more or less conversation and negotiation between them concerning a proposed sale of one to the other of their securities. The substantial difference of the testimony between the parties is that the plaintiffs claim that these negotiations began before July, 1905; whereas the defendant claims that they began after the recording of the mortgages, when the conflict of interest between them was apparent. Although the plaintiffs testify that conversations were had prior to July, 1905, they are unable to fix the event within a less space of time than 18 months; nor are they able to

show any satisfactory reason why such negotiation should occur, in the absence of apparent conflict of interest between them. No explanation is given why the plaintiffs should prefer to hold their mortgages from public record, and yet be willing to publish their existence orally. No business relations appear ever to have been had between the plaintiffs and Castner. They do not appear ever to have done any business previously with the defendant bank. The evidence in the record fails to disclose a satisfactory reason why the conversation claimed by plaintiffs should have been had prior to July, 1905. We think their direct testimony to the fact should be held to the test of reasonableness in the circumstances shown, and that its credibility should be doubted, if it fails to meet such test. There is much in the attitude of the parties, as disclosed by their pleadings prior to the trial, which tends to weaken the testimony of plaintiffs on this point. This action was begun by the plaintiffs in July, 1913. The defendant answered December 18, 1913. The case was reached for trial on February 2, 1915. On that date, plaintiffs filed a pleading wherein for the first time they charged actual notice to the defendant bank. Castner was not at that time connected with the defendant bank, nor was he then a resident of the state, but was a resident of the state of Washington. Time had to be obtained for the taking of his testimony. On April 9, 1914, the plaintiffs filed a pleading in the case as against Mary E. Watson, as follows:

"That plaintiffs hold a mortgage upon all of the real estate described in its substituted petition, including that part of the premises upon which George L. Robb has a mortgage which is prior to plaintiffs' mortgage, including the mortgage of the Peoples Savings Bank, which is claimed by said bank to be prior and superior to the mortgage claimed by plaintiff upon the same tract of ground. Plaintiff makes the answer of George L. Robb, and also the an-

swer of the Peoples Savings Bank, Exhibits 1 and 2, respectively, of this amendment by way of reference to have the same force and effect as if rewritten, and which answers are filed in this proceeding in the office of the clerk of the district court of Monroe County, Iowa. Plaintiff further states that the George L. Robb mortgage is a lien upon the interest owned by Mary E. Watson in and to the premises described in the answer of George L. Robb, Alexander C. Watson heretofore being the owner of an undivided one-third interest, and Mary E. Watson the owner of an undivided two-thirds interest therein. That the remaining portion of the tracts of ground described in plaintiffs' petition is insufficient to satisfy plaintiffs' claim; and, if the entire amount of the mortgage of George L. Robb is satisfied out of the interest of Alexander C. Watson in the premises referred to in the answer of George L. Robb, and the mortgage of the Peoples Savings Bank is established as a prior lien to that of plaintiffs in and upon the interest of Alexander C. Watson, the properties will be insufficient to satisfy plaintiffs' claim."

It cannot be said that the foregoing pleading was an admission of the priority of the mortgage of the defendant bank; but, in view of the fact that the plaintiffs had not, in any pleading prior to February 2, 1915, alleged any notice of any kind to the defendant bank, the fair implication of the pleadings as a whole, as they appeared for a period of 18 months prior to the trial, was that the defendant bank's mortgage was, for want of notice, superior to those of the plaintiffs. The testimony discloses no conduct on the part of Castner which was inconsistent with his testimony on this subject, whereas the conduct of the plaintiffs was inconsistent with their testimony. Taking the case in all its circumstances, therefore, we think the testimony in behalf of defendants the more reasonable, and therefore the more credible. We reach the conclusion that the proof

of actual notice to the defendant bank prior to July 11, 1905, is not of that satisfactory character which should obtain in such cases. It follows that priority should have been awarded to the defendant bank, and the decree below will be modified to that extent. In all other respects, the decree below will be affirmed, except that, because of the holding at this point, the plaintiffs and defendant bank will change places as to priorities as to the bank's mortgage, and to that extent.—*Modified and affirmed.*

GAYNOR, C. J., WEAVER, SALINGER and STEVENS, JJ., concur.

LADD and PRESTON, JJ., dissent.

PRESTON, J.—I dissent from Paragraph 4 of the opinion.

Briefly, there were two witnesses for plaintiffs, to one for the bank, on the question of notice. This, of course, is not always the criterion. But the trial court saw them, and stated and found that they were of equal credibility. They were equally interested. I see nothing particularly improbable in the story of the two. Furthermore, I think the record shows that plaintiffs had been carrying Watson for years in his cattle business, and that this was, and had been for years, known generally in the community, and that Watson had mortgaged everything to plaintiffs. We have a rule that we give some consideration to the findings of the trial court. I see no reason, in this case, to bend or break the rule. I would affirm on all points.

LADD, J., joins in this dissent.

F. M. COOLEY, Plaintiff, v. W. S. AYRES, Judge, Defendant.

JUDGMENT: Conclusiveness—Non-Modification by Collateral Record—Certiorari—Intoxicating Liquors. The date of a judgment may not be controlled by a collateral record relating thereto.

PRINCIPLE APPLIED: Proceedings were instituted to enjoin defendant from the unlawful sale of intoxicating liquors. A hearing was had. On the calendar appeared the following, to wit: "Trial and decree as per entry to be signed." The decree was entered on the record book January 26th, and bore said date, to wit, January 26th. Further proceedings were instituted on January 26th of the same year to punish defendant for a violation of the said decree. A hearing was had. If defendant was guilty, it was on a sale made on January 22d. Defendant was convicted. He instituted certiorari. The return by the court to the writ recited that the hearing on the application for an injunction was held on January 13th, and that the court then orally announced that the decree would be granted, and the aforesaid entry was made on the calendar.

Held, this recital could not control the date of the decree, and, as the sale in question was prior to the existence of the injunctive decree, the defendant therein must be discharged.

JUDGMENT: Entry, Record, Etc.—When Judgment Exists. Principle recognized that no judgment can exist until the same is entered on the record book.

Certiorari from Polk District Court.—W. S. AYRES, Judge.

TUESDAY, JUNE 26, 1917.

ON information duly filed, the plaintiff was convicted of having violated a liquor injunction, and in certiorari proceedings, contests the validity of such conviction.—*Judgment Annulled.*

E. S. Thayer, for plaintiff.

George A. Wilson, for defendant.

LADD, J.—The county attorney, in the name of the state, filed a petition praying that the plaintiff herein be enjoined from maintaining a liquor nuisance. The defendant answered, and a written decree, signed by the trial judge, purporting to be rendered on January 26, 1916, was entered of record. It recited that:

1. JUDGMENT:
conclusiveness:
non-modification
by collateral
record: cer-
tiorari: intoxi-
cating liquors.

“Now on this 26th day of January, 1916, the same be-

ing one of the regular days of the January, 1916, term of this court, the application of the plaintiff herein came on for hearing, the State of Iowa, plaintiff, appearing by its attorney, George A. Wilson, county attorney in and for Polk County, Iowa, and the defendant, F. M. Cooley, appearing in person and by his attorney, F. T. Van Liew."

Following this are the findings and formal decree. On the same day, an information charging plaintiff herein with having violated the decree of permanent injunction by unlawfully selling intoxicating liquors on January 22d, previous to the entry of said decree, was signed, and a trial had on March 6th following, at which he was adjudged guilty of contempt, and a fine of \$500 imposed. He then sued out a writ of certiorari, to which the trial court filed his return in due time. Therein he recited that the hearing was had on January 13, 1916; that, upon submission, he on that day orally announced that the decree would be entered as prayed. This memorandum appears on the calendar: "Trial and decree as per entry to be signed." A transcript of the evidence was included in the return. The points raised by the petition are: (1) That there was no competent evidence that plaintiff herein ever violated the injunctive decree; (2) that the court should not have received the affidavit of one Gilliam in evidence, when plaintiff herein demanded that the witness be orally examined as a witness; (3) that said affidavit was not admissible as evidence; and (4) that the recitals in the affidavit, if true, were not sufficient to support the conviction.

Only the first point need be considered. The decree was entered January 26, 1916, four days after the contempt is alleged to have been committed. No other record entry is before us. True, the presiding judge recites in his return that the hearing occurred January 13th previous; and, if this were so, his announcement in the hearing of defendant that a decree would be entered as prayed would

sufficiently apprise him without the service of the writ. *Coffey v. Gamble*, 117 Iowa 545; *Hawks v. Fellows*, 108 Iowa 133; *Milne v. Van Buskirk*, 9 Iowa 558.

But is the mere certificate of the presiding judge that the hearing was had at a date other than recited in the decree sufficient to overcome the latter? Of course, the notation on the judge's calendar does not constitute the judgment or decree, but is, ordinarily, a mere reminder or direction to the clerk of the court to enter the same. *Towle v. Leacox*, 59 Iowa 42; *Winter v. Coulthard*, 94 Iowa 312; *Kennedy v. Citizens' Nat. Bank*, 119 Iowa 123; *Martin v. Martin*, 125 Iowa 73. Here, it indicated only that a decree to be signed was to be entered. It is not a part of the record. *Case v. Plato*, 54 Iowa 64. *Traer Bros. v. Whitman*, 56 Iowa 443; *State v. Manley*, 63 Iowa 344. And, as between the memorandum on the calendar and the entry in the record book, the latter governs. *Traer Bros. v. Whitman*, supra; *Christie v. Iowa Life Ins. Co.*, 111 Iowa 177.

Nor can it be said that evidence of an oral announcement of the judge is entitled to any more weight than his memorandum thereof in the court calendar. All previously said is merged in the decree as spread on the record book, and, as said in *Bahn v. Nunn*, 63 Iowa 641:

"There can be no judgment until it is entered in the proper record of the court. It cannot exist in the memory of the officers of the court, nor in memoranda entered upon books not intended to preserve the record of judgments. * * * It is not competent to prove a judgment in any other way than by the production of the proper record thereof."

Martin v. Martin, 125 Iowa 73; and see *Callanan v. Votruba*, 104 Iowa 672, where the court said:

"It is not competent to prove a judgment in any other

way than by the production of the proper record thereof."

See *Kennedy v. Citizens' Nat. Bank*, 119 Iowa 123, where the court said:

"While in one sense a judgment is 'rendered' when it is announced by the judge, yet, until that judgment is entered of record, there is no competent evidence of such rendition. It cannot exist or be dependent upon the memory of the officers of the court or in memoranda not embraced in the record, which the law provides shall be made."

The only competent proof, then, that judgment was rendered is the record thereof, and that conclusively shows that the decree was rendered the same day it was entered of record, January 26, 1916, or four days subsequent to the sale of the pint of whisky. In *McGlasson v. Scott*, 112 Iowa 289, the court held it to have been an error to receive any evidence of the decree other than the record or an authenticated copy thereof. A decree properly entered should indicate the time, place, parties, matters in dispute, and the result. *Barrett v. Garragan*, 16 Iowa 47; *Church v. Crossman*, 41 Iowa 373; *Coffey v. Gamble*, 117 Iowa 545. This so did, and there is no warrant in the record for saying that there was a hearing or trial prior to that recited in the decree. The function of the return is to bring the record, as made, before this court, and to correct the same, and, in so far as the return conflicts with the record, it must be disregarded. We do not say that a case may not be heard on a particular day and decree entered on another, or that, on application, the record might not have been corrected to show the facts. What we do hold is that the record of the decree duly entered is conclusive as against extraneous evidence, such as oral evidence, returns to writs, and the like; that, where a decree distinctly recites that there was a hearing on a day named, and decree entered on that day, this is not overcome by a return to a writ of certiorari saying that the hearing occurred at a different time.

It follows that, as there appears to have been no injunction ordered or decreed at the time of the alleged violation thereof, the plaintiff should have been discharged. The judgment of the district court is—*Annulled*.

GAYNOR, C. J., PRESTON, SALINGER and STEVENS, JJ.,
concur.

ARTHUR DUFFY, Appellant, v. HARDY AUTO COMPANY et al.,
Appellees.

TRIAL: Objections and Exceptions—Failure to Enter—Effect.

- 1 Failure to except, within three days, to a ruling on a motion, works a complete waiver of all objections to such ruling. So held on a ruling on a motion to transfer equitable issues. Section 3749, Code, 1897.

LIENS: Creation by Statute—Automobile Repairs. Whether one

- 2 has a lien, under Section 3130, Code, 1897, on an automobile for repairing the same, *quære*.

LIENS: Forfeiture—Bailment for Repairs—Excessive Claim.

- 3 Claiming, in good faith, a lien on an article for repairs, in an amount in excess of what is ultimately found to be due, does not work an entire forfeiture of the lien.

LIENS: Evidence—Sufficiency. Evidence reviewed, and held suffi-

- 4 cient to establish a right to a lien on an automobile for repairs thereto.

EVIDENCE: Books of Original Entry—Ledger. A so-called "ledg-

- 5 er" may constitute a book of original entries.

Appeal from Pocahontas District Court.—D. F. COYLE,
Judge.

TUESDAY, JUNE 26, 1917.

THIS action was brought originally by plaintiff against defendants for the conversion of an automobile, in which plaintiff demanded \$1,250. Defendants answered, and, by cross-petition in equity, asked the foreclosure of a lien on said automobile for \$248.25 for repairs and services on the

automobile, furnished by defendant company. At the same time, defendant filed a motion to transfer to equity the equitable issue presented by the cross-petition, in order that the equitable issue might be tried first. Appellant states that, in so far as this case is concerned, the issues are simply those raised by the motion to transfer to equity, and the ruling thereon, after which the case was tried in equity on the issues raised by the cross-petition to determine whether or not defendants were entitled to a foreclosure of their alleged lien. Defendants deny plaintiff's claim that defendants are seeking to foreclose a common-law lien, but contend that they rely on a statutory lien, as well as a common-law lien. The court found that, prior to the institution of this suit, plaintiff was indebted to defendant in the sum of \$201.21 for labor and material furnished for said automobile; that the defendant was entitled to the foreclosure of its lien in the sum of \$146.70, and was entitled to a judgment against the plaintiff in the sum of \$201.21. A special execution was ordered for the sale of the automobile to satisfy the lien, and that a general execution issue for the balance of the judgment and costs. The motion to try the equitable issue first was sustained. A further statement of facts will appear in the opinion. The plaintiff appeals.—*Affirmed.*

V. P. McManus and Kenyon, Kelleher & Price, for appellant.

J. M. Barry and Robert Healy, for appellees.

PRESTON, J.—1. First, as to the motion to try the equitable issue first: There is some confusion, and evidently a mistake in the dates, in the abstract in regard to this, and it has not been corrected by the additional abstract. The record is that the case was tried on the merits on January 26, 1916, and that the motion to

1. TRIAL: objections and exceptions fallure to enter effect.

try the equitable issue first was sustained in November, 1916, or about ten months after the case was tried on the cross-petition. The answer and cross-petition were filed in May, 1915, and the motion was filed on the first day of May, 1915; so that we shall assume that the ruling on the motion was in November, 1915, instead of 1916, as stated in the abstract.

Appellees contend that no exception was taken to the ruling of the court sustaining the motion, and that, for that reason, that question may not now be presented for determination. The abstract recites that the ruling on the motion "was made by the court in the absence of counsel. At the time of the trial, an exception was taken to said ruling, but the court failed to note the exception of record." From this record, it appears that appellant does not claim that any exception was taken at the time of the ruling, nor for about two months thereafter, or until the trial in January. Code Section 3749 provides that:

"The party excepting to the decision must do so at the time it is made, unless it is upon a motion or demurrer, in which case it may be taken within three days."

As said, no claim is made that an exception to the ruling on the motion was taken within the time prescribed by the statute. From the record, it further appears that, when the case came on for trial in January, the plaintiff objected to proceeding with the trial on the issues raised by the answer and cross-petition in equity, because the original petition was filed in November, 1914, and the answer and cross-petition were not filed until May, 1915, and, further, because the cross-petition raises no issue which is not cognizable and could not be tried and determined in the law action first brought. But it seems to us that the objection at that time was not good, because such an objection would have been such as could have been made as against the motion itself. The ruling on the motion had

been made some two months before. The court did not transfer the cause from the law to the equity calendar, and the plaintiff's claim still stands on the law side for trial, unless the determination of the cross-petition adjudicates the claim set up in plaintiff's petition. Section 3435 of the Code provides that, where the action has been properly commenced by ordinary proceedings, either party shall have the right by motion to have any issue heretofore exclusively cognizable in equity, tried in the manner hereinafter prescribed in cases of equitable proceedings; and, if all the issues were such, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings. We think appellees' contention at this point ought to be sustained. *Gate City Land Co. v. Heilman*, 80 Iowa 477.

Furthermore, though we do not determine the point, it would seem as though the motion was properly sustained. The cross-petition asked the enforcement and foreclosure of a lien, which could not well be done in a law action. The defendants refused to deliver the automobile to the plaintiff because they claimed a lien on the machine for repairs. Whether this adjudicates the plaintiff's claim, as set out in his petition, that there was a conversion of the machine by the defendants, we do not determine, for the reason that that question is not before us and has not been argued.

2. As stated, appellant contends that the cross-petition sought to foreclose a common-law lien, and that this may not be done in equity. We think this question is disposed of by what has been said on the motion to try the equitable issue first. However, appellees contend that a common-law lien on an automobile exists in favor of a mechanic, whether a garage keeper or not, who supplies labor and materials for the repair of the car, as long as he retains the possession of it, and cite *Aldrich v. Jenkins*, 171

2. LIENS: creation by statute: automobile repairs.

Ill. App. 310; *Rehm v. Viall*, 185 Ill. App. 425.

And they contend that they were not relegated to their common-law lien alone, but that they are entitled to a statutory lien, under Section 3130 of the Code, providing that:

"Property transported by, or stored or left with, any forwarding and commission merchant, express company, carrier or bailee for hire shall be subject to a lien for the lawful charges thereon for the transportation and storage thereof, or charges and services thereon or in connection therewith;" etc.

On this proposition, they cite *For v. Smith*, 143 Ga. 547 (85 S. E. 856), *Broom v. Dale*, (Miss.) 67 So. 659, and other cases. We are inclined to this view, but deem it unnecessary to determine the point, because we have already determined that appellant is not in a position to present the question as to the trial of the cross-petition in equity.

3. The claimed lien of defendants for repairs was somewhat larger than the amount ultimately found by the court on the trial, and it is contended by appellant that the defendants should have been held to the exercise of good faith in their attempt to enforce their lien, and that items were included in the claim for which a lien was demanded and disallowed, and that, therefore, the entire lien should have been rejected. Mechanics' lien cases are cited to support this proposition. The theory of such cases seems to be that the statute providing for mechanics' lien requires that the claimant must file a just and true statement. But we think that, in this case, there is nothing to show bad faith on the part of the defendants in making the larger claim. As we understand the holding of the trial court, some of the items claimed for, while they were furnished by defendants, could not properly be claimed as a lien, because the warranty under

3. LIENS: forfeiture: bailment for repairs: excessive claim.

which the machine was sold was so broad that some of these items were necessary in order to comply with the warranty.

4. **LIENS: evidence: sufficiency.** 4. It is next contended by appellant that the evidence on behalf of the defendants was insufficient to sustain their claim, and that the preponderance of the evidence sustained the contention of plaintiff. This is the point most seriously argued. This involves the determination of a fact question; and, as we have often said, it is not our practice to attempt to review the testimony, since it can serve no useful purpose, and would extend the opinion beyond proper limits. We shall, therefore, content ourselves with a brief statement of the claims of the parties, with some brief observations as to our views of the testimony, but without attempting to cover the entire question as to the disputed fact questions.

It appears that, in July, 1913, defendant company sold the automobile in question through its salesman, one Morrison. Appellant contends that, in making the sale, Morrison agreed, substantially, to keep the car in good running order for a year, free of charge; that the tires would run 3,000 miles; that, if the car did not keep in order, or if the tires did not run 3,000 miles, everything would be replaced, unless plaintiff ran the car into a ditch and broke it; that any poor workmanship on the car or any fault of the factory would be made good, without expense to plaintiff, for a year, and so on. The salesman denied making any of the warranties alleged, save that he gave them a written guarantee that, in the event that the car proved defective in material or workmanship within a year, the manufacturers of the car would replace the parts, free of charge,—the regular manufacturer's warranty,—and that he would make good any fault of the car within a year from the sale. Appellants contend, and introduced evidence tending to sup-

port their claims, that the machine did not work according to the agreement as they claim it to have been, and that all the work or repairs performed by defendants was necessary to make it comply with the agreement; except that they claim that, after the car had been used a year or so, they made an agreement with defendants to substantially reconstruct the car, and that they were to pay defendants \$35 therefor, and that, for that amount, defendants were to place a magneto on the car, and would only charge for the labor of the employee in putting the magneto on, not to exceed 1½ days of labor, and that the car would be placed in first-class condition, without further charge except \$35. The trial court found against plaintiff as to this last item, and that the defendant agreed to keep the car in repair substantially as claimed by plaintiff, but that such agreement should not be held to include repairs which were made necessary by reason of the negligence of the plaintiff.

The plaintiff complained that, at the start, he had trouble with the clutch, and that he took the car to the defendants' garage, and that there was trouble with the lighting system and the starter. Plaintiff says he took the car back to defendants and asked them to fix it, from 5 to 8 times. The plaintiff also claimed that the batteries were not charged, and it did not run, but the evidence on behalf of defendants tends to show that it was because the machine was not properly supplied with gasoline and not properly operated. Plaintiff also complained that the radiator leaked, and says that defendants came to his house 2 or 3 times to put the car in order. Plaintiff testifies that he never asked defendants to make any repairs except to keep their contract, except in regard to the magneto. Perhaps some other complaints are made, but this, in a general way, shows plaintiff's claim in regard to the car.

On the other hand, defendants contend that a part of the troubles at least were due to the way in which the ma-

chine was operated. It appears that plaintiff had never run an automobile before the purchase of the car in question, was a farmer, and he says that he did not understand the mechanical features of an automobile. There is but little dispute, if any, in the evidence that, at one time, one of the Duffys was unable to stop the car, and ran over a cement sidewalk and into the stone abutments of a store building. A disinterested witness testifies that the cement sidewalk was 8 inches above the street level. The frame of the car was broken, but just how this was done is not shown by the record, except that there is a statement made by the plaintiff that his brother John broke it, running over a tile ditch. One of the defendants testifies that, at one time, one of the Duffys ran into defendants' garage, while going at the rate of 20 miles an hour, and crashed into an automobile inside the garage; that Duffy blamed the brakes, but witness says that the brakes were immediately tried in the presence of Duffy, and it was found that the brakes worked properly. Duffy denies the rate of speed, and says that he was going at the rate of 11½ miles an hour. Witnesses who appear to be disinterested testify to having seen the Duffy car driven at various times on a flat tire, and at a high rate of speed while driving on a flat tire. The evidence shows that there were a number of dents in the rims, indicating hard usage, such as having driven on a flat tire, or on the rim without a tire. The court found, and we think the preponderance of the evidence sustains the finding, that the casings for which a charge was made were rim cut, and that defendants were under no obligation, under the agreement, to furnish the new casings which were furnished, and charged plaintiff with \$20.25 for this item. This was before the expiration of the year. The court further found that plaintiff should not be charged with any other repairs or labor until after the expiration of the year, or down to August 20, 1914.

The other items for which the court allowed a recovery were charges after that date. The court also found that, at the time plaintiff claims to have delivered the car to defendants for repairs, for which, as he contends, he was to pay but \$35, the car was delivered to defendants for general repair, as well as for the purpose of placing a magneto thereon, and that this was without any specific agreement as to what it would cost, and that neither party intended or understood it to be binding upon defendant in making his final charges. The evidence shows that, at that time, the frame of the car was broken. We think plaintiff's theory at this point is improbable, since, as the court found, if the frame was broken, plaintiff would not have been likely to have delivered the car to defendant solely for the purpose of placing a magneto thereon. We have not attempted to cover all the details; but, without further discussion as to the facts, it is our conclusion, after reading the record, that the finding of the trial court at this point was right.

5. It is contended by appellant that the proper foundation was not laid for defendants' books of account, and that, therefore, the account was not proven. There was evidence as to some of the items, independent of the books. The defendants' method of keeping books was described in detail, and, while it is true that the book produced was called a ledger, yet there was no day book. Entries were made on this so-called ledger from slips. We shall not go into the evidence in detail at this point. We have held that a ledger may be a book of original entry, although made up by posting from other slips. We think, under this record, and the holding in *Ricker v. Davis*, 160 Iowa 37, that the books were admissible.

There was no error, and the judgment of the district court was right. This being so, the judgment is—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

CLYDE DUNNING, Appellee, v. M. L. BURT, Appellant.

APPEAL AND ERROR: Harmless Error—Errors Against Prevailing Party. Errors against appellant on issues on which he prevailed are harmless.

TRIAL: Instructions—Form, Requisites and Sufficiency—Correct But not Explicit—Waiver. If an instruction is correct, as far as it goes, though not as explicit as desired, request must be made for the more explicit instruction, or the right thereto, if it exists, will be waived. Especially is this true when the instruction given is fully as explicit as the pleadings.

TRIAL: Instructions—Province of Court and Jury—Assumption of Fact. The court may well assume as true a fact testified to by both plaintiff and defendant.

Appeal from Taylor District Court.—THOS. L. MAXWELL, Judge.

WEDNESDAY, APRIL 4, 1917.

REHEARING DENIED TUESDAY, JUNE 26, 1917.

SUIT upon promissory note for \$1,000. The defendant pleaded that the note was obtained by fraudulent representations and that its consideration had failed, and that the plaintiff was not a good-faith purchaser thereof in due course. There was a verdict for the plaintiff for \$800 and interest thereon, such sum being the amount paid for the note by the plaintiff. From the judgment entered on the verdict, the defendant has appealed.—*Affirmed.*

Haddock & Son and Wm. M. Jackson, for appellant.

Flick & Flick and Frank Wisdom, for appellee.

EVANS, J.—The payee of the note sued on was the National Fence Supply Company. The note bore date of June 23, 1913, and matured January 1, 1914. The consideration for the note was represented by two written

agreements executed concurrently therewith, which were as follows:

"Exhibit A.

"1912 Issue

"A. W. Hiner, Secretary. Chas. Kubach, Gen. Mgr.

"National Fence Supply Company,

"Wichita, Kansas.

"Manufacturers and Dealers in Concrete Fence Post
Supplies.

"General Agency Agreement.

"Know all men by these presents: That the National Fence Supply Co., of Wichita, Kansas, has, this 23rd day of June, 1913, constituted and appointed M. L. Burt, of Bedford, Iowa, their true and lawful general agent, to sell the multiple molds to manufacture the reinforced concrete fence posts; also to appoint agents to sell the said molds in the following territory, to wit: Decatur, Wayne, Ringgold Counties, all in Iowa.

"This indenture witnesseth that, for and in the sum of \$1,000.00, receipt of which is hereby acknowledged, the said National Fence Supply Co. hereby agrees to give and does give to the said agent two sets of multiple molds for demonstrating purposes, and the exclusive agency in the above named territory as long as his business shall amount to \$288 per year, not to exceed five years.

"It is hereby further agreed and understood that, as a part of the above consideration, the said company hereby agrees to furnish to the said agent all additional multiple molds at \$2.50 per set on board the cars at factory. The said agent shall make a report to the said company at the end of each and every month. The said company hereby further agrees to take notes when the same are quoted good at local banks. All railroad rights reserved.

"It is hereby agreed that the foregoing contains the entire contract between the parties hereto.

"Ship to By E. S. Burns.

"P. O. Bedford, Iowa. M. L. Burt.

".....

"Gen. Agent."

"Exhibit B.

"A. W. Hiner, Secretary.

"Chas. Kubach, General Manager.

"National Fence Supply Company,

"Manufacturers and Dealers in Concrete Fence Post
Supplies, Wichita, Kansas.

"Bedford, Iowa, June 23, 1913.

"This is to certify that I or we hereby agree to do for M. L. Burt \$1,500.00 worth of business in the territory assigned to him by the National Fence Supply Co., also to give him complete instructions in the introduction and the sale of our goods in his territory, and further agree to instruct anyone that he may choose.

"The above agreement is to be fulfilled in 90 days; otherwise the above agreement is to be to the satisfaction of M. L. Burt, of Bedford, Iowa.

"[Signed] National Fence Supply Co.,

"Per E. S. Burns, General Agent."

The defendant testified that the principal consideration relied on by him was the agreement of Burns to resell \$1,500 worth of his territory for the benefit of the defendant, and that this should be done before the note should become payable. The real defense is concentrated upon the failure of the payee to perform this agreement and upon the contention that the payee entered into such an agreement with a fraudulent intent not to perform.

The plaintiff, a local banker, purchased the note on August 4, 1913. The answer is quite voluminous, and sets forth various details of fact upon which the general aver-

ment is predicated that the transaction was a fraudulent scheme on the part of the payee of the note to obtain same without consideration.

The trial judge instructed the jury upon the subject of alleged fraud and false representations. He also instructed in substance that, if the jury found that the note was obtained by fraud, and yet found that the plaintiff was a good-faith purchaser, then the plaintiff could recover only the amount paid by him for the note. This was shown to be \$800, and such was the amount of the verdict.

1. The appellant assails several of the instructions bearing upon the question of the original fraud, and the assignment of errors in the argument is largely directed against alleged errors in the instructions on that subject. Counsel for the appellant have overlooked the fact that the finding of the jury was in favor of the defendant on that issue. There was no other ground upon which a verdict for \$800 could have been rendered. As bearing on that subject, therefore, errors in the instruction were without prejudice to the defendant. Such assignments, therefore, need not be considered.

2. In Instruction No. 7, the right of the plaintiff to recover notwithstanding the alleged fraud of payee, was made to depend upon whether he "had knowledge or notice of said fraudulent representations."

Instruction No. 9 made his right of recovery depend upon whether he "had knowledge and notice of such fraud." Appellant complains of these instructions in that they are too broad and sweeping. His argument is that it was sufficient to defeat the plaintiff if it appeared that he had notice of some of the false representations, or if he had notice of a part of the fraud. We think the differentiation thus urged is not justified by the record before us. The

instructions could have been more specific, but further specification was not requested.

The fraud alleged by the defendant was pleaded in his answer in very general terms. The notice to the plaintiff was pleaded as follows:

"That plaintiff, at and prior to the time of the so-called purchase of defendant's note, had notice of the matter and things herein set out, and had notice of the facts attending the giving of the note in suit, and had notice of the agreement of the said Burns to resell \$1,500.00 worth of territory before requiring the payment of said note, and that plaintiff is not a good-faith purchaser of said note in the usual course of trade without notice."

There was no allegation in express terms charging the plaintiff with notice that the payee did not intend to perform its agreement to resell territory. The instructions complained of, therefore, were quite as specific as the allegations of the answer would fairly permit.

3. So far as the breach of the agreement to resell constituted a failure of consideration as between the payee and the maker of the note, the trial judge instructed that this defense of itself was not available as against the plaintiff, it appearing without dispute that he purchased the note before any breach had occurred. Complaint is directed against this instruction because it assumed the fact as proven that the note was purchased before breach of the contract. It is argued that such question of fact was for the jury, even though the testimony of the plaintiff was undisputed. Such fact, however, was established by the testimony of both plaintiff and defendant. The plaintiff testified to the date of purchase as August 4th, and the defendant testified to his acquiring knowledge of such purchase in December, some time before the note became due. He also testified that he knew,

3. TRIAL: instructions: province of court and jury: assumption of fact.

shortly after the execution of the note, that the payee was offering it for sale. He made no objection to such course of action on the part of the payee. We think from the record before us that this instruction was proper.

The legal questions involved in the case are quite elementary, and we need not dwell upon them. The real controversy was one of fact. The finding of the jury thereon, and the overruling of a motion for a new trial by the trial court, are quite conclusive upon us. The record before us discloses no prejudicial error. The judgment must, therefore, be—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

J. ERISMAN, Appellee, v. CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, Appellant.

CARRIERS: Carriage of Goods—Interstate Commerce—Limiting

- 1 **Liability—Reasonableness.** The condition in an interstate bill of lading that claims for loss of or damages to the shipment shall be made in writing to the initial or delivering carrier *within four months* after the delivery or apparent loss, is reasonable and binding, and the exclusion of such condition is reversible error.

CARRIERS: Carriage of Goods—Interstate Commerce—Carmack

- 2 **Amendment—Non-Exemption of Connecting or Terminal Carrier.** The Carmack Amendment to the Hepburn Interstate Commerce Act does not relieve a connecting or terminal carrier from liability on interstate shipments for loss or damage caused by such carrier, even though such amendment does grant the shipper a right of action against the initial carrier for *all* loss or damage, irrespective of the line on which the same may have occurred.

CARRIERS: Carriers of Goods—Interstate Bill of Lading. The

- 3 **"remedy or right of action"** which is reserved to the holder of an interstate commerce bill of lading, by the Carmack Amendment to the Interstate Commerce Act, in addition to the grant of a right of action against the initial carrier, is measured by the general common law *as declared by the Federal courts*, and not by the diverse statutes and public policies of the several states.

CARRIERS: Carriage of Goods—Receipt in Good and Delivery in
4 Bad Condition—Carmack Amendment—Presumption. The Carmack Amendment to the Interstate Commerce Act has in no wise abrogated the rebuttable rule of the common law that, when goods are received by the initial carrier in good condition and delivered by the terminal carrier in bad condition, it will, in an action against the terminal carrier, on an interstate shipment, be presumed that the damage was caused by such terminal carrier.

WEAVER and SALINGER, JJ., dissent.

Appeal from Wayne District Court.—THOS. L. MAXWELL, Judge.

TUESDAY, JUNE 26, 1917.

ACTION to recover damages to goods shipped by plaintiff from Osceola, Nebraska, to Corydon, Iowa, over the Union Pacific and the Chicago, Burlington & Quincy Railroads, the former being the initial carrier. The case was originally brought in justice court, and, upon a trial there, judgment was rendered for plaintiff in the sum of \$19.25. Defendant sued out a writ of error to the district court and was there heard on said writ, resulting in a dismissal of the writ. The case comes here on appeal from this ruling.—*Reversed.*

Palmer Trimble and Miles & Steele, for appellant.

K. E. Sallman, for appellee.

PER CURIAM.—I. Defendant's answer
 1. CARRIERS: carriage of goods: interstate commerce: limiting liability: reasonableness. in justice court consisted of a general denial and some affirmative pleas in defense, to wit, that plaintiff at no time before bringing suit made any demand on defendant for the payment of damages, and that he did not, within four months after the delivery of the merchandise, make any claim in writing to the defendant for said damages, and did not at any time make any such claim in writ-

ing to the Union Pacific Railroad Company at Osceola, Nebraska. Plaintiff showed that the goods were in good condition when delivered to the Union Pacific Railroad Company at Osceola, and in damaged condition when he received them from defendant at Corydon, Iowa, and the amount of his damages. He also said that, at the suggestion of defendant's agent, he made out a statement of his claim and handed it to the agent. Defendant then offered the bill of lading issued by the Union Pacific Railroad Company, and also certain parts thereof; among others, a condition that all claims for loss, damage or delay to goods must be made in writing to the carrier at point of origin or at point of delivery within four months after the delivery of the property. The bill of lading was received in evidence, but the condition quoted was rejected. It then moved for judgment, and its motion was overruled, and thereupon, judgment was rendered for plaintiff in the amount hitherto stated. The writ of error challenges the correctness of these rulings, and also claims that the judgment was unwarranted, because there was no proof that the goods were damaged while in the possession of the defendant.

We are agreed that the trial court was in error in denying defendant's offer of the condition contained in the bill of lading as to when claims for damages should be presented, and are of further opinion that, while perhaps plaintiff's testimony that he made out a statement of his claim and handed it to defendant's agent at Corydon was proper, yet it was insufficient, in and of itself, to show the nature of the claim, which was in writing, and which was not shown to have been lost or destroyed.

II. The condition embodied in this bill of lading was reasonable and binding on the plaintiff, although made by the initial carrier, and, in order to recover, he must show by competent evidence, not only that he delivered the statement, but the terms of the statement itself. The latter

he could not do by parol testimony. *Stevens v. St. Louis S. W. R. Co.*, (Tex.) 178 S. W. 810; *Missouri, K. & T. R. Co. v. Harriman Bros.*, 33 Sup. Ct. Rep. 397; *Southern Express Co. v. Caldwell*, 21 Wall. 264 (22 L. Ed. 556); *Bailey v. Missouri Pac. R. Co.*, (Mo.) 171 S. W. 44. The decision below must be reversed for these reasons.

There are, however, some other questions in the case which are much more troublesome, and upon which we are not entirely agreed. While defendant's counsel make no claim that a terminal or connecting carrier may not be liable for loss or

2. CARRIERS: carriage of goods: interstate commerce: Carmack Amendment: non-exemption of connecting or terminal carrier.

damage to goods while in its possession, some doubt has arisen in the minds of some of the members of the court as to whether or not there is or can be any such liability, and also as to the nature of the proof to establish such liability.

It is conceded, or at least should be, that, before the enactment of what is known as the "Carmack Amendment" to the Hepburn bill (34 Stat. at L. 593, Ch. 3591; Comp. Stat. 1913, Sec. 8592), the terminal carrier was liable, and that all the consignee need do was to show that the goods, when delivered by him to the initial carrier, were in good condition, and, when surrendered to him by the terminal carrier, were in a damaged condition, casting the burden upon the defendant of showing non-liability.

The material parts of this Carmack Amendment read as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass.

and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

Did the so-called Carmack Amendment change either of these rules? First, then, as to the rule of liability of any save the initial carrier. That it was not the intention of Congress to change the rule as to the liability of a terminal carrier, or a connecting one, and that it in fact did not do so, has already been settled by many decisions, including those of the Supreme Court of the United States, some of them announced before this appeal was taken. See, among others, the following cases: *Cincinnati, N. O. & T. P. Ry. Co. v. Rankin*, 36 Sup. Ct. Rep. 555; *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 36 Sup. Ct. Rep. 541; *St. Louis S. W. R. Co. of Texas v. Ray*, (Tex.) 127 S. W. 281; *Kansas City S. R. Co. v. Carl*, (Ark.) 121 S. W. 932; *Bichlmeier v. Minneapolis, St. P. & S. S. M. R. Co.*, (Wis.) 150 N. W. 508; *Eastover M. & H. Co. v. Atlantic C. L. R. Co.*, (S. C.) 83 S. E. 599; *St. Louis & S. F. R. Co. v. Mounts*, (Okla.) 144 Pac. 1036; *Atchison, T. & S. F. R. Co. v. Boyce*, (Tex.) 171 S. W. 1095; *Chicago, R. I. & P. R. Co. v. Harrington*, (Okla.) 143 Pac. 325; *Glassman v. Chicago, R. I. & P. R. Co.*, 166 Iowa 254.

The rule is announced in the following language by

the Supreme Court of the United States in *Rankin's case*, *supra*:

"Counsel concede liability of a common carrier under the long-recognized common-law rule not only for negligence, but also as an insurer, and that, unless the Carmack Amendment * * * has changed this rule, the railway is responsible for damages not exceeding specified value. But they insist that in *Adams Exp. Co. v. Croninger*, 226 U. S. 491 (57 L. Ed. 314, 44 L. R. A. [N. S.] 257, 33 Sup. Ct. Rep. 148), we held this amendment restricts a carrier's liability to loss 'caused by it.' And, consequently, they say, the trial court erred when it charged: 'In this case the carrier is held to the highest degree of care for the safe transportation of the animals.' Construing the Carmack Amendment, we said, through Mr. Justice Lurton in the case cited (pp. 506, 507): 'The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;" and plainly implies a liability for some default in its common-law duty as a common carrier.' Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line."

Again, in the *Blish Milling* case, *supra*, that court said:

"There are only two questions presented here, and these are thus set forth in the brief of the plaintiff in error: '1st. That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of Sec. 20 of the Hepburn bill (34 Stat. at L. 593, Chap. 3591, Comp. Stat. 1913, Sec. 8592). 2d. That, under the stipulation in the bill of lading providing for the filing of claims for loss or damage, the action was barred.' The first conten-

tion is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment, so far as it is valid under the act." *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 648 (57 L. Ed. 683, 686; 33 Sup. Ct. Rep. 391). See *Adams Express Co. v. Croninger*, 226 U. S. 491, 507, 508 (57 L. Ed. 314, 320, 321, 44 L. R. A. [N. S.] 257, 33 Sup. Ct. Rep. 148); *Cleveland C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 591, 36 Sup. Ct. Rep. 177; *Southern R. Co. v. Prescott*, 240 U. S. 632, 637, 36 Sup. Ct. Rep. 469, *Northern P. R. Co. v. Wall*, decided April 24th, 1916 (241 U. S. 87, 36 Sup. Ct. Rep. 493)."

It will be noticed that this act does not, either expressly or by implication, exempt the terminal or any other carrier from liability. Indeed, the contrary appears. In the first place, the amendment reserves to the holder of a bill of lading any remedy or right of action which he has under existing law; and second, the carrier on whose line the loss occurs is expressly made liable to the initial carrier for any damages it may have been required to pay to the owner of the property. Surely, the remedy of the owner against the terminal carrier for loss or damage to his property while in its possession has not been taken away by this Carmack Amendment. It can hardly be conceded that Congress intended to take away from owners of goods shipped into this state the right to sue a terminal carrier for damages done while in transit, and to provide him a

remedy only against the initial carrier, which may be a line of road operating in some remote state. If this was the intent of Congress, the act itself is a delusion and a snare.

The object of the act was to settle the law applicable to interstate commerce, which theretofore had been in considerable confusion, as to the liability of the initial carrier in the shipment of goods in interstate commerce, and to make it responsible for the acts of all connecting carriers (thus making these connecting carriers its agents); and also to provide a statutory rule permitting recovery by the initial carrier of the amount of the loss or damage, from the company on whose line the loss, damage, or injury was sustained. The statute was aimed at initial carriers, and was not intended to apply to connecting or terminal ones save as it made them responsible to initial carriers for damages occurring on their own lines. No cases have been cited which hold that there is no remedy against a connecting or terminal carrier, and we do not think any can be found. The cases cited clearly settle the liability of terminal carriers.

III. What is the basis of liability of a terminal or connecting carrier? Is it a state statute, or a rule of common law recognized and enforced by all courts, both state and national? While there may be no national Federal common law as such, yet Federal courts recognize the common law of the several states, and in some instances undertake to declare it for themselves, even to the extent of saying that a state court has misinterpreted it; and reversals are not uncommon because the state court did not correctly decide the common-law rule. The liability of a carrier, in the absence of statute, is that given by the common law, and, if the statute be merely declaratory of the common law, it is recognized and enforced by all courts as

3. CARRIERS: carriers of goods; interstate bill of lading.

such. So that the liability of connecting and terminal carriers, except in the instances named in the Carmack Amendment, is given by the common law, and that law has always been recognized and enforced by the Federal courts, and is in harmony with the common law of the several states. See *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 343, 345 (12 L. Ed. 465); Hutchinson on Carriers (3d Ed.), Vol. 1, Sec. 236, and cases cited; 4 Ruling Case Law, 947; *Beard & Sons v. Illinois Cent. R. Co.*, 79 Iowa 518; also *Smith v. State of Alabama*, 124 U. S. 465 (8 Sup. Ct. Rep. 564); *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92 (21 Sup. Ct. Rep. 561). But for the adoption of the Carmack Amendment, it would not be contended that an action to enforce liability against a terminal carrier would not lie, even were there no statute or state decision upon the subject.

This liability is not founded upon a local statute, nor is it in any manner dependent thereon. It exists because of the duty resting upon a common carrier, a duty enforced by all the courts of the country, the same as any other common-law obligation. The Carmack Amendment expressly provides that nothing therein shall deprive any holder of a receipt or bill of lading of any remedy or right of action he may have under existing law. What is meant by this exception? Surely, some rights under existing laws are saved to the shipper, and, even if it be held that it refers to Federal laws, the rule of liability of a terminal carrier has been recognized and enforced by the Federal courts as a part of the general law of the land. If this be not true, then it is pertinent to inquire what rights under existing laws were preserved by the exception found in the Carmack Amendment. There was and is no Federal statutory law upon the subject, save as it may have been enacted by this Carmack Amendment; and, as the Federal Supreme Court has expressly held that the obligations of

connecting and terminal carriers are not affected by this act, save as it makes them expressly liable in some instances to the initial carriers, then, according to well-known rules of construction, Congress must have been content with the rules applied and enforced by the state courts on the subject of this liability, for it did not attempt to make any change therein. Speaking to this point, Chief Justice White, in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 437 (27 Sup. Ct. Rep. 354, 51 L. Ed. 553, 557), said:

"A statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

See, as further supporting these views, *Kansas City So. R. Co. v. Carl*, 227 U. S. 639 (33 Sup. Ct. Rep. 391); *St. Louis S. W. R. Co. of Texas v. Ray*, 127 S. W. 281; *Atchison, T. & S. F. R. Co. v. Word*, (Tex.) 159 S. W. 375; *Missouri, K. & T. R. Co. v. Ward*, (Tex.) 169 S. W. 1035.

The only effect of the Carmack Amendment, as applied to connecting or terminal carriers, is to give them the benefit of all lawful conditions or provisions in the contract made by the shipper with the initial carrier. This is the effect of all the decisions so far made by the Supreme Court of the United States. It is said, however, that these suggestions run counter to the rules announced in *Adams Exp. Co. v. Croninger*, 226 U. S. 504 (33 Sup. Ct. Rep. 148). As we read that case, it is in line with our own conclusions. We quote the following from that case:

"Prior to that (Carmack) amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that

of the general common law as declared by this court and enforced in the Federal courts throughout the United States (*Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, 28 L. Ed. 717), or that determined by the supposed public policy of a particular state (*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. Rep. 132, 48 L. Ed. 268), or that prescribed by statute law of a particular state (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. Rep. 289, 42 L. Ed. 688)."

The author of that opinion, in referring to the proviso found in the Carmack Amendment, held that the words "existing law" meant the general common law as declared by that court, and not the supposed public policy of a particular state, or that prescribed by statute law of a particular state. He said:

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would * * * destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

Again, in *Boston & M. R. Co. v. Hooker*, 233 U. S. 97 (34 Sup. Ct. Rep. 526), the court said:

"The subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation. * * * That by the Carmack Amendment the subject matter of the liability of railroads

under bills of lading issued for interstate freight is placed under Federal regulation so as to supersede the local law and policy of the several states, whether evidenced by judicial decision, by statute, or by state constitution.

* * * That in matters not covered by its own express terms it had the effect of establishing the common-law rules respecting the carrier's liability, as laid down in the previous decisions of this court, and adopted generally by the Federal courts."

To the same effect, see *Kansas City So. R. Co. v. Carl*, 33 Sup. Ct. Rep. 391; *Missouri, K. & T. R. Co. of Tex. v. Harris*, 34 Sup. Ct. Rep. 790. Coming down to the later cases already referred to, wherein it is expressly held that, since the enactment of the Carmack Amendment, an action will lie against a connecting or terminal carrier, or that all may be sued jointly, as pointed out in *Rankin's* case and the *Blish Milling* case, *supra*, it is manifest that the liability of a connecting or terminal carrier is not founded on state statutes, or on the public policy of any particular jurisdiction, but upon the general common law, as declared by the United States Supreme and other Federal courts throughout the Union. See, also, *Cleveland, C., C. & St. Louis R. Co. v. Dettlebach*, 36 Sup. Ct. Rep. 177.

As the defendant's liability is predicated not upon a state statute or the public policy of a state, but upon the general common law as applied by the Federal courts, we have next to inquire whether or not the

4. CARRIERS: carriage of goods: receipt in good and delivery in bad condition: Carmack Amendment: presumption.

Carmack Amendment abrogates the general rule that all a shipper need do in the first instance, in an action against a terminal carrier, is to prove that the goods were in good condition when delivered by him to the initial carrier, and in a broken or damaged condition when received by him from the terminal carrier. It is well to bear in mind the exact point presented for discussion. We

have no occasion to determine what the rule may be in an action against a connecting carrier, or in an action by an initial carrier against a connecting or terminal one for subrogation under the Carmack Amendment—with these questions we have nothing to do at this time. The main question here has already been stated. It is plain and clear cut. Ordinarily, it would be enough to quote the latest pronouncement of the Supreme Court of the United States upon this subject. In *Galveston, Harrisburg & S. A. R. Co. v. Wallace*, 32 Sup. Ct. Rep. 205, that court said:

“Under the Carmack Amendment, as already construed in the *Riverside Mills* case, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another state, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different states, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to de-

liver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed."

Nothing said in *Southern R. Co. v. Prescott*, 36 Sup. Ct. Rep. 469, militates against this view. There was a valid contract made by an initial carrier with the shipper, limiting the liability of the terminal carrier as a warehouseman, and it was held that this contract was binding upon the shipper, and could be relied upon by the terminal carrier. Again, it was held that, as the terminal carrier's liability was as a warehouseman only, and as the company was liable only for negligence, and not as an insurer, the owner had the burden of proving negligence, especially where the loss was shown to have been due to fire. The following quotation gives the gist of that decision:

"It was explicitly provided that in case the property was not removed within the specified time, it should be kept, subject to liability 'as warehouseman only.' The railway company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima-facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence. * * * In the present case, it is undisputed that the loss was due to fire which destroyed the company's warehouse with its contents, including the property in question. The fire occurred in the early morning, when the depot and warehouse were closed.

The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the railway company."

It will thus be seen that in this case the court announced the general rule as to presumptions, but held that they did not apply, for the reasons stated. We have expressly held that all plaintiff need do under the Carmack Amendment, where the action is against a terminal carrier, is to show good condition of the goods when delivered to the initial carrier, and bad or damaged condition when received by him from the terminal carrier. See *Glassman v. Chicago, R. I. & P. R. Co.*, 166 Iowa 254; *Carr v. Chicago, R. I. & P. R. Co.*, 173 Iowa 444. The same doctrine is announced in the following cases: *Duvall v. Louisiana W. R. Co.*, (La.) 65 So. 104; *Eustover M. & H. Co. v. Atlantic Coast Line R. Co.*, 83 S. E. 599; *St. Louis & S. F. R. Co. v. Mounts*, 144 Pac. 1036; *Chicago, R. I. & P. R. Co. v. Harrington*, (Okla.) 143 Pac. 325; *Collins v. Denver & R. G. R. Co.*, (Mo.) 167 S. W. 1178; *Willett v. Southern R. Co.*, (S. C.) 45 S. E. 93; *St. Louis, S. F. & T. R. Co. v. Fenley*, (Tex.) 118 S. W. 845; *Kansas City So. R. Co. v. Carl*, (Ark.) 121 S. W. 932.

We shall not take the time or space to quote from these cases. They each and every one hold that the Carmack Amendment does not change the rule as to what a plaintiff must prove in order to recover in an action for loss or damage to goods in interstate shipment against a terminal carrier. There are no decisions to the contrary which we have been able to find. *St. Louis, B. & M. R. Co. v. Gould*, (Tex.) 165 S. W. 13, was an action against the initial carrier, and it was there held immaterial where the loss occurred, and the question here presented was in no manner involved.

In *Carlton Produce Co. v. Velasco, B. & N. R. Co.*, (Tex.) 131 S. W. 1187, the action was by an initial carrier

against a connecting one to recover damages paid by it to a shipper. The action was bottomed upon the Carmack Amendment, and it was held incumbent upon the initial carrier to show that the damage was done by the connecting carrier. It is said in that case that no presumption arose in favor of the initial carrier under the act, and that it was required to prove damages done to the goods while in the custody of the connecting carrier. It will be noticed that the action was under the Carmack Amendment, and that it was against a connecting and not a terminal carrier. *Charleston & W. C. R. Co. v. Varnville Furn. Co.*, 35 Sup. Ct. Rep. 715, was an action against a terminal carrier to recover damages to an interstate shipment of goods, and for penalty imposed by a statute for failure to pay a claim promptly. The question presented was the validity of the state statute imposing the penalty, and it was held that, as it imposed a penalty upon a terminal carrier for losses on roads in other jurisdictions, and increased its liability by a fine difficult to escape, it overlapped the Federal act (Carmack Amendment) as respects the subject grounds and extent of liability, and was therefore invalid. What was said with reference to presumptions had reference to this state of facts.

It may be well, in closing, to call attention to the presumptions arising under the Carmack Amendment in actions by a shipper against an initial carrier, leaving aside actions against a connecting carrier. In an action against an initial carrier, the question as to where or on whose line the loss occurred is entirely immaterial. All the shipper need do in the first instance, in an action against the initial carrier, is to prove that loss or damage occurred at some time during shipment. In such cases, there is no presumption as to where the loss occurred, for that is immaterial; but a presumption does arise that, wherever the damage occurred, the initial carrier is responsible, and the burden

is upon it to show that it is not liable, because the damage was due to an act of God or public enemy, or that it was caused by the act of the shipper or his agent. Or, if the action is bottomed on the negligence of any of the carriers, as, for instance, as warehousemen, the carrier must prove that the loss was due to some exempt cause, as by fire. That being shown, most courts hold that the burden of showing negligence is then on the shipper. This is one kind of presumption.

Another, which in no manner conflicts with the previous one, is the presumption which arises in an action against a terminal carrier for loss or damage to goods, as to where or on whose line the loss occurred. This latter is the one involved in this case, in addition to the further one, that there was also an additional one like unto the first, which had to be met by the terminal carrier in the event it did not affirmatively prove that the loss or damage occurred on some other line of road.

Failure to distinguish between these two kinds of presumptions is likely to cause difficulty. We have to deal, then, with the presumption as to where the loss occurred, it being conceded that the Carmack Amendment has not deprived plaintiff of his cause of action against the terminal carrier. What is this presumption? Is it a rule of public policy, or of state enactment, or is it a rule of evidence and of procedure which is in no manner mentioned in the Carmack Amendment? That it is the general rule applied by all courts, state as well as Federal, unless changed by the Carmack Amendment, is conceded. This presumption is a rule of evidence founded on logic and human experience. In due course of business, freight is safely handled and transmitted in good condition from one carrier to another until it reaches its final destination, and it is presumed that, when this freight reached the hands of the delivering carrier, it was in good condition. If it was not, then the

delivering carrier, having received the goods and having had them since their receipt, has the better and oftentimes the only knowledge as to the condition of the goods when received by it, and their treatment thereafter. The rule is founded, as we have said, on logic, human experience, and on administrative necessity or convenience, and we see nothing whatever in the Carmack Amendment in conflict therewith. It does not conflict with any other presumption created or recognized by that amendment. As already observed, this amendment in no manner undertakes to say, by presumption or otherwise, where the loss actually occurred. In an action against the initial carrier, this is entirely immaterial. It becomes material under that act when, and only when, the initial carrier sues a connecting or terminal carrier for reimbursement, and, as this action is not of that kind, we need not consider the rule in such cases.

There are no contrary and conflicting presumptions here, and it will be presumed that the damage was done while the goods were in the possession of the terminal carrier. It is a rebuttable presumption, and, if defendant shows that the damage occurred on another line, it is under no liability. There is, we may say parenthetically, no presumption under the act that the actual damage occurred while the goods were in possession of the initial carrier. If the terminal carrier fails to show that the damage did not occur on its line, then it has another presumption or prima-facie case to meet, and that is to show that the damage was due to some of the excepted perils, or was not of a kind for which it should be held liable under the original contract of shipment with the initial carrier. Until these presumptions are met, liability of the terminal carrier is shown, or at least a prima-facie case is made out. There are no counter presumptions, and the presumption does not conflict with any proved facts.

Our conclusion is that the Carmack Amendment has not taken away from a shipper the right to sue a terminal or connecting carrier, and that his remedy is not alone against the initial carrier; that, in an action against a terminal carrier, the rules of practice, procedure and evidence are not changed by the said Carmack Amendment, and that, while the case must be reversed on another ground, the trial court did not err in its conclusion that judgment should not be reversed for failure of proof.—*Reversed.*

GAYNOR, C. J., LADD, EVANS, PRESTON and STEVENS, JJ., concur.

SALINGER, J. (dissenting). The courts have indulged a presumption, made by them or by statutes, that, where goods are received by the initial carrier in sound condition, and the last carrier delivered them damaged, the damage was done by the last carrier. The question is whether, by Section 20 of the Carmack Amendment, Congress effectively substituted a presumption that the initial carrier caused damage found at delivery by the last carrier, or otherwise effected the abrogation of said presumption against the last carrier. This must be answered by (a) determining what said "presumption" is, in order to determine whether, being what it is, Congress has power either to abrogate it or to change its application; (b) ascertaining whether, the power existing, Congress has exercised it.

This "presumption" is either (1) court or statute made, or (2) a state policy or regulation, or (3) a judicial policy. And creating, defining or giving it effect is "a rule of decision" wherewith the courts apply the presumption of continuity, and a rule of convenience, in suits which assert that a carrier has damaged a shipment. See *Moore v. New York, N. H. & H. R. R. Co.*, (Mass.) 53 N. E. 816; *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 35 Sup. Ct.

Rep. 715; *Bailey v. Missouri Pac. R. Co.*, (Mo.) 171 S. W. 44; *American Silver Mfg. Co. v. Wabash R. Co.*, (Mo.) 156 S. W. 830, at 832; *Missouri, K. & T. R. Co. of Tex. v. Harris*, 34 Sup. Ct. Rep. 790; *Boston & M. R. Co. v. Hooker*, 34 Sup. Ct. Rep. 526; *Beard v. Illinois Cent. R. Co.* 79 Iowa 518, at 523; *Chicago, R. I. & P. R. Co. v. Harrington*, (Okla.) 143 Pac., at 328.

Can Congress change these as to interstate shipments?

Either the courts or the legislature can make trial rules. In the absence of statute, the former may make the presumption of continuity the basis of holding the last carrier liable, or may hold that same is insufficient to make it liable, or abrogate it, or substitute for it. The legislature can declare that stated things shall raise a stated presumption as to liability, and fix the burden of proof. *Hunter v. Colfax Cons. Coal Co.*, 175 Iowa 245, at 257; *South Covington & C. St. Ry. v. Finan's Admrs.*, (Ky.) 155 S. W. 742, 744. It follows that it may change theretofore existing rules on presumed liability and burden of proof. *Hunter v. Coal Co.*, supra. If it may make rules on these, it may abolish or change them when made by the courts; and it is settled that rules that have been evolved by the courts may properly be abrogated by the legislature. See *Hunter's case*, supra, and *Borgnis v. Falk Co.*, (Wis.) 133 N. W. 209; *Jensen v. Southern Pac. R. Co.*, (N. Y.) 109 N. E. 600, 604; *Mondou v. New York, N. H. & H. R. Co.*, 32 Sup. Ct. Rep. 169; *State v. Creamer*, (Ohio) 97 N. E. 602, 606; *In re Opinion of Justices*, (Mass.) 96 N. E. 308, and *State v. Clausen*, (Wash.) 117 Pac. 1101. It can abolish the common-law rule with respect to the assuming of risk of injury from defective appliances (*Seaboard Air Line R. Co. v. Horton*, 34 Sup. Ct. Rep. 635, at 639), and annul the presumption of guilt theretofore arising from the finding of an indictment (*Ford v. Dilley*, 174 Iowa 243).

Within certain limits, Congress may do all that a state

legislature can, or supersede anything which a legislature has enacted. It follows that, within those limits, Congress may so deal with court-made law. Interstate commerce is within the field of such action. It has been, therefore, held that an act of Congress supersedes an Ohio statute which makes the mere proof of the existence of defects in appliances prima-facie evidence of negligence; and that the Carmack Amendment supersedes local law which puts the burden of proof to show want of negligence upon a warehouseman. *Southern R. Co. v. Prescott*, 36 Sup. Ct. Rep. 469.

It is true, but not material, that actions based on a Federal statute are "triable and tried in a state court; hence local rules of practice and procedure were applicable." *Chesapeake & O. R. Co. v. De Atley*, 36 Sup. Ct. Rep. 564, at 566, right column. This settles what may be done if Congress *does not* intervene, but has no bearing on whether it *can* intervene.

It seems clear that Congress has power to abrogate or change the presumption indulged in against the last carrier, whether by statute or evolved by the courts.

II. Has Congress changed these as to interstate shipments? If it has, it was done by the following statute:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of

such receipt or bill of lading of any remedy or right of action which he has under existing law." Sec. 7 of Carmack Amendment to Sec. 20 of Hepburn Act, 34 Statutes at Large, 584, c. 3591.

It is settled that the provision of this amendment, that nothing therein contained "shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," does not preserve this presumption, because that proviso refers only to such rights and remedies as the holder may have had at the time of his action, under existing *Federal* law. *Adams Exp. Co. v. Croninger*, 33 Sup. Ct. Rep. 148; *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 35 Sup. Ct. Rep. 715; *Joseph v. Chicago, B. & Q. R. Co.*, (Mo.) 157 S. W. 837, at 838; *Southern R. Co. v. Bennett*, (Ga.) 86 S. E. 418.

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In *Carlton Prod. Co. v. Velasco, B. & N. R. Co.* (Tex.) 131 S. W. 1187, at 1188, it is said:

"Presumptions indulged in by courts prior to the enactment of that act in regard to the final carrier have no bearing or effect upon cases arising under that act. Those presumptions have been effectually destroyed by the declaration that the initial carrier in interstate shipments is liable no matter on what line the damages may have occurred."

Though it is not done so expressly, the same conclusion is announced in *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 35 Sup. Ct. Rep. 715. There, the Supreme Court of South Carolina defends a statute penalty by a statement which the Supreme Court of the United States interprets "to mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible is itself in fault." The Federal decision points out that "the defendant happened to be the last carrier of the line, and in

many states, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remains so until the latest moment when it could have been harmed," and that, while this was first treated as a true presumption of fact, it became, if it was not always, a rule of substantive law, a rule of convenience calling on the last carrier to explain. It is then said that there is thus presented a case "that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the state, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law." A reversal is put on the ground that "the special regulations and policies of particular states upon the subject of the carrier's liability for loss or damage to interstate shipments * * * have been superseded." This has since been followed in South Carolina. *Spence v. Southern R. Co.*, (S. C.) 85 S. E. 1058.

In a word, the Federal Supreme Court deals with the case as one wherein the last carrier was penalized because of indulgence in a presumption of negligence created by statute, and nullifies the statute because of the Carmack Amendment.

In *Galveston, H. & S. A. R. Co. v. Wallace*, 32 Sup. Ct. Rep. 205, at 207, it is said that the initial carrier must now treat the connecting carriers as its agents for all purposes of transportation and delivery; that the whole transaction "is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different states, both on the initial carrier's railroad."

III. It is open to serious question whether anything in the language of the Carmack Amendment creates a presumption against the initial carrier. As written, it does

no more than to make him paymaster for whosoever, including himself, may have injured an interstate shipment, giving him recourse over upon proof that some other participant in the carriage did the injury. While *Carlton Prod. Co. v. Velasco, B. & N. R. Co.*, decided by the Supreme Court of Texas, 131 S. W., at 1188, construes the act to work a destruction to the presumption theretofore indulged, even that is not so much a declaration that the same presumption rules against the initial carrier that once ruled against the delivering one, as it is a holding that the last presumption has been destroyed because of the obligation placed upon the initial carrier; and so of *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 35 Sup. Ct. Rep. 715. Beyond all question, the holding of this case rules that the Carmack Amendment destroys the presumption as to the last carrier, but this is not necessarily a finding that the same presumption is now raised against the initial carrier. It, too, can rest upon the fact that what the Carmack Act places upon the initial carrier is inconsistent with allowing the presumption against the last carrier still to rule. It is authority against indulging the presumption, but perhaps not authority for a claim that the same presumption rules against the initial carrier as before the act prevailed against the delivering carrier. A closer question is made of it by *Galveston, H. & S. A. R. Co. v. Wallace*, 32 Sup. Ct. Rep., at 207, which holds that the initial carrier must now treat the connecting ones as its agents for all purposes of transportation and delivery; that the whole transaction "is to be governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been made between stations in different states, both on the initial carrier's railroad." And see *Storm Lake T. & T. Factory v. Minneapolis & St. L. R. Co.*, 209 Fed. 895; *Collins v. Denver & R. G. R. Co.*, (Mo.) 167 S. W. 1178, at 1179. And the initial carrier has the bur-

den of proof to show that the loss resulted from some cause for which neither it nor any of its connecting carriers are responsible. Wherefore, its defense must or may include such proof as, before the act, the particular connecting carrier who was sued had to make. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, (Ga.) 86 S. E. 421; *Gamble v. Union Pac. R. Co.*, (Ill.) 104 N. E. 666; *Brinson v. Norfolk S. R. Co.*, (N. C.) 86 S. E. 371; *Texas Midland R. Co. v. Becker*, (Tex.) 171 S. W. 1024; *St. Louis, B. & M. R. Co. v. Gould*, (Tex.) 165 S. W. 13; *Georgia, F. & A. R. Co. v. Blush Milling Co.*, 36 Sup. Ct. Rep. 541, 544; *Thomas v. Blair*, (Mich.) 151 N. W. 1041; *Coover v. Spokane, P. & S. R. Co.*, (Wash.) 141 Pac. 324; *Kansas City & M. R. Co. v. New York Cent. & H. R. R. Co.*, (Ark.) 163 S. W. 171. It may no longer defend by urging that the last carrier is to blame. *Karr v. Baltimore & O. R. Co.*, (W. Va.) 86 S. E. 43.

IV. The history of the amendment demonstrates that, in enacting same, Congress acted under certain conceptions. It has been held that Congress acted because public policy demanded that the shipper should not be left remediless on account of the immensity of traffic and the complexity of connecting railroad business, which made his proving on what lines his loss occurred a practical impossibility, while it was easy for the carrier to locate loss or damage (*Willett v. Southern R. Co.*, [S. C.] 45 S. E. 93); further, that Congress acted to save the injured shipper from falling between two stools and being compelled to sue over and again as in each suit he failed in proof as to the particular carrier whom he had impleaded, which created a situation where he had to accept such settlement as should be proposed; that the act was intended to facilitate remedy by locating the responsible carrier (*Atlantic C. L. R. Co. v. Riverside Mills*, 31 Sup. Ct. Rep. 164); that its purpose was to aid in establishing unity of responsibility (*Georgia, F.*

& A. R. Co. v. Blish Milling Co., 36 Sup. Ct. Rep., at 544); that it was intended to effect that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of diverse requirements of state legislation and decisions (*Southern R. Co. v. Prescott*, 36 Sup. Ct. Rep. 469, at 472). On the whole, it is perhaps not unreasonable to construe the amendment into substituting the initial carrier for the delivering carrier, so far as presuming who did the damage goes. If that be a tenable interpretation, it cannot matter that the substitution be unreasonable. Nor is it that. While perhaps most of the states indulged in the presumption against the last carrier, at least some did not. See *Marquette H. & O. R. Co. v. Kirkwood*, 45 Mich. 51. And those that did were at liberty to change. Be that as it may, the Federal legislation on the subject is paramount. If that be so, and if Congress raised this presumption against the initial carrier, can a presumption that the last carrier is to blame, which presumption rests upon state authority, exist side by side with a Federal statute declaring that this presumption exists against the initial carrier? It would seem to be a logical impossibility to have a presumption that, if a shipment which started in good condition is delivered in damaged condition, the last carrier damaged it, and at the same time have one available in the same case, upon the same evidence, that the initial carrier did the damage. It is manifest that the Federal and the state presumption are addressable to meet an identical situation. Now, in the very nature of things, there can be no presumption which is not exclusive, in the sense that to presume a fact at all is, of necessity, to presume no other fact in conflict therewith. If it be presumed, for the purpose of the law of descent and distribution, that, if two brothers die in shipwreck, and there be no direct evidence whether the deaths were or were not simultaneous,

the younger died last, can there also be a presumption that the older died last? Is not presuming that the younger lived longest as much a presumption that the older did not? Suppose a Federal statute declared that the first person found in the possession of counterfeited money be presumed to have coined it. Might a state, either by state decision or legislative enactment, declare that, upon proof that several had been in possession of such money, it should be presumed that the one last in possession was guilty of the coining?

If we assume that Congress has raised just such a presumption against the first carrier as before quite universally prevailed against the last, we should not indulge in a construction which would retain what Congress intended to cure, and, side by side with that cure, retain what Congress thought were the evils to be remedied.

4-a

It has been suggested that Congress intended no more than to make all participants in the carriage the agents of the initial carrier, thus making the latter responsible, without reference to which connecting carrier did the damage. I am not so clear that this was all that was intended. But assume it is all. If that be so, whether Congress intended to abrogate the presumption against the last carrier by raising it against the initial carrier, becomes quite immaterial. If the act of Congress makes the presumption against the last carrier needless, or gives it no place wherein to operate, it is quite as effectively superseded as if a different presumption had been substituted for it. It has been pointed out how, in various ways, it was the purpose of the Congress to take hold of the field and to help the complaining shipper to ease and definiteness in dealing with the remedy for his loss. Beyond all question, it was the purpose of the amendment to preserve uniformity of procedure in cases dealing with interstate shipment, to obviate confu-

sion and uncertainty, to make the location of the one responsible, certain and easy. That the act was intended to be a means to these ends which Congress had the power to accomplish, see *Hudson v. Chicago, St. P. M. & O. R. Co.*, 226 Fed. 38; *Looney v. Oregon Short Line R. Co.*, (Ill.) 111 N. E. 503; *Croninger's case*, supra; *Hart v. Pennsylvania R. Co.*, 5 Sup. Ct. Rep. 151; *Pennsylvania R. Co. v. Hughes*, 24 Sup. Ct. Rep. 132; *Chicago, M. & St. P. R. Co. v. Solan*, 18 Sup. Ct. Rep. 289; was to aid in establishing unity of responsibility, *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 36 Sup. Ct. Rep., at 544; that it was intended to effect that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of diverse requirements of state legislation and decisions, *Southern R. Co. v. Prescott*, 36 Sup. Ct. Rep. 469, at 472. Equally clear is the method by which the Federal act intended to accomplish what it conceived to be an advantage to the shipper. It makes the initial carrier the principal. Assuming that this is all it does, and it yet makes every connecting carrier the agent of that principal. The moment that is done, Congress has provided a remedy which accomplishes certainty in redress, and which makes the presumption against the last carrier utterly needless. Since Congress enables the shipper to recover, no matter which actor in the chain of transportation damaged the shipment, it, of course, made it unnecessary to prove, either by testimony or by presumption, that any particular carrier in the line did the damage. The moment Congress provided a remedy, it made it quite immaterial whether first, an intermediate or last carrier caused the damage. For that reason alone, it was intended that the former presumption against the last carrier should no longer obtain.

It was said in *Southern R. Co. v. Prescott*, 36 Sup. Ct. Rep., at 472, 473, that, where it is manifest that Congress

intended that the obligations of the carrier with respect to the service within the purview of the statute shall be governed by uniform rule in the place of diverse requirements of the state legislation and decisions, when the question arises as to responsibility under a bill of lading, the question "is none the less a Federal one because it must be resolved by the application of general principles of the common law."

On either theory, and without reference to whether Congress should or should not have done this, it has made the presumption upon which the appellee in this case prevailed no longer available to him. It may reasonably be added that, since all the cases agree, the Carmack Amendment made neither new liability nor new remedy, and, as it should be held that it sought to accomplish *something*, it was its purpose to change this rule of evidence. In my opinion, that is just what its purpose was.

V. What is opposed, *Willett v. Southern R. Co.*, (S. C.) 45 S. E. 93, *Eastover M. & H. Co. v. Atlantic C. L. R. Co.*, 83 S. E. 599, *Duvall v. Louisiana W. R. Co.*, (La.) 65 So. 104, *Chicago, R. I. & P. R. Co. v. Harrington*, (Okla.) 143 Pac., at 328, and *Glassman v. Chicago, R. I. & P. R. Co.*, 166 Iowa, at 263, make much of holdings that the Carmack Amendment does not in *terms* relieve the last carrier from his "liability," and rest themselves on a statement in *Moore v. New York, N. H. & H. R. R. Co.*, (Mass.) 53 N. E. 816, that the presumption against that carrier is not mentioned in the amendment. The answer is:

a. The Carmack Act creates neither new right, liability nor remedy. The liability of the carrier is still created by the common law (*St. Louis & S. F. R. Co. v. Heyser*, [Ark.] 130 S. W. 562, at 565; *Galveston, H. & S. A. R. Co. v. Wallace*, 32 Sup. Ct. Rep., at 206; *Storm Lake T. & T. Factory v. Minneapolis & St. L. R. Co.*, 209 Fed.

at 903); wherefore, there is no claim in this case that the act relieves the carrier from any "liability."

b. As said in *Adams Express Co. v. Croninger*, 33 Sup. Ct. Rep. 148, "though there is no reference to the effect upon state regulation, (where) it is evident that Congress intended to adopt a uniform rule and relieve such contract from the diverse regulation to which they had been theretofore subject," such state regulation, though not referred to at all in terms, must cease.

Permission in terms is unnecessary if the power be needed to effectuate what is expressly permitted. See *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 35 Sup. Ct. Rep. 715; *Missouri, K. & T. R. Co. v. Harriman Bros.*, 33 Sup. Ct. Rep. 337; *Adams Exp. Co. v. Croninger*, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 33 Sup. Ct. Rep. 155; *Lefebure v. American Exp. Co.*, 160 Iowa 54; *Bailey v. Missouri Pac. R. Co.*, (Mo.) 171 S. W. 44; *St. Louis & S. F. R. Co. v. Heyser*, (Ark.) 130 S. W., at 566. The employers' liability case declares that the test of power "is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant of power conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce."

c. The mere fact that Congress has chosen to take possession of a field, of itself shuts out state action in all that can arise in such field; not merely oppugnancy, but that which is coincidental (*Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 35 Sup. Ct. Rep. 715); and Congress has so taken possession of injury to or loss of interstate shipments, and of state action upon that subject. It has taken possession of the whole field, with intent to supersede all special state provisions, regulations, policies, constitutions, statutes and decisions. See *Donovan v. Wells Fargo & Co.*, (Mo.) 177 S. W. 839; *Michelson v. Judson*,

(Ill.) 109 N. E. 281; *Spada v. Pennsylvania R. Co.*, (N. J.) 92 Atl. 379; *Mitchell v. Atlantic C. L. R. Co.*, (Ga.) 84 S. E. 227; *Robinson v. Louisville & N. R. Co.*, (Ky.) 169 S. W. 831; *Bailey v. Missouri Pac. R. Co.*, (Kansas City Court of Appeals) 171 S. W. 44; *Gamble v. Union Pac. R. Co.*, (Ill.) 104 N. E. 666; *Boston & M. R. Co. v. Hooker*, 34 Sup. Ct. Rep., at 528; *Joseph v. Chicago, B. & Q. R. Co.*, 157 S. W., at 838; *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 35 Sup. Ct. Rep. 715; *Kansas City S. R. Co. v. Carl*, 33 Sup. Ct. Rep. 391, at 394; *American Silver Mfg. Co. v. Wabash R. Co.*, (Mo.) 156 S. W., at 832. As said in *Adams Exp. Co. v. Croninger*, 33 Sup. Ct. Rep. 148, almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it; that, by means of the Carmack Amendment, Congress has occupied the entire field of interstate shipments, and wholly ousted the states from control thereof.

d. Indirection may suffice. State rights have been saved merely because they were not included in an enumeration of what was taken. *Seaboard A. L. R. Co. v. Horton*, 34 Sup. Ct. Rep., at 639.

Missouri, K. & T. R. Co. of Tex. v. Harris, 34 Sup. Ct. Rep. 790, 794, is no denial of power to effectuate these incidental regulations under the amendment, but, on the contrary, concedes such power. It holds that the state has power to discourage captious delay in settlement "of small but well-founded claims" arising out of interstate shipments by providing the taxation of an attorney fee as costs, and that this is so "until Congress does speak."

5-a

In *Ducall v. Louisiana W. R. Co.*, (La.) 65 So., at 105, it is said that the court sees no inconsistency between the Carmack Amendment and this "rule of evidence;" that

"Congress was conferring a right of action; was not dealing with the question of what evidence the court should deem to be sufficient for the proof of a particular fact at issue between the litigants;" that "the said rule of evidence has absolutely nothing to do with the substantial rights of the parties; that it is simply an aid to the court in weighing the evidence;" and that it is not understandable why Congress needed to or should take away or change a salutary evidence rule in order to give this added privilege. All this states, in effect, that the act does not abrogate the state presumption because it is not done in terms, and because such presumption is a mere rule of evidence. That failure to express in terms is not decisive has been seen; and, since Congress *can* abrogate or change rules of evidence, the fact that the presumption in question is a mere rule of evidence, is manifestly neither proof nor disproof as to whether the amendment accomplished the abrogation of such rule.

Chicago, R. I. & P. R. Co. v. Harrington, (Okla.) 143 Pac., at 326, disposes of the question by the naked statement that the presumption is but a rule of evidence; by just saying that the presumption is not abolished by the amendment; and by citing *Duvall's* case, alone.

St. Louis & S. F. R. Co. v. Mounts, (Okla.) 144 Pac. 1036, is content to say that, while all state laws pertaining to substantive rights connected with interstate shipments have been abrogated, state law still rules in respect to remedy and procedure in state courts. So of *Elliott v. Chicago, M. & St. P. R. Co.*, (S. D.) 150 N. W. 777, which, in addition, had to decide and did decide nothing but the here immaterial proposition that both the initial and the connecting carrier may be sued. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 36 Sup. Ct. Rep., at 543; *Bickhneier v. Minneapolis, etc. R. Co.*, (Wis.) 150 N. W. 508; *Kansas City S. R. Co. v. Carl*, (Ark.) 121 S. W. 932; *Duvall's*

case, *supra*; and *Eastover M. & H. Co. v. Atlantic C. L. R. Co.*, (S. C.) 83 S. E. 599, join. Manifestly, the mere fact that the last carrier may still be sued does not prove that a certain presumption is available against him in the suit.

The *Eastover* case argues further that presumption often takes the place of proof in logical inquiry as to who is liable, because "the last man who handles a package is presumed to have damaged it if it be damaged; for, if he did not damage it, he, above all others, knows it." This may be a first-rate statement of why the presumption existed prior to the Carmack Amendment, but it does not seem to be in any way addressed to the question whether such presumption, no matter how logical its entertaining may in itself be, has room to operate since the Carmack Act raises that presumption against the initial carrier. The case concludes with the naked statement:

"In our opinion, the Carmack Amendment has not qualified the law as declared in *Willett v. Railway*, 45 S. E. 93. * * * The cases cited by appellant from the Supreme Court of the nation do not at all militate against the conclusions to which we have come; they rather sustain them."

Kansas City S. R. Co. v. Carl, (Ark.) 121 S. W. 932, recognizes that there is a Carmack Act, to the extent of holding that the same makes invalid all contracts to limit the initial carrier's liability for loss of freight. Upon this it holds that, therefore, an initial carrier cannot contract to limit the liability of the defendant in the case, a connecting carrier. It also adheres to the presumption against the last carrier. It does not, however, indulge in any disposition or even discussion of the question whether the amendment has abrogated the presumption which the decision affirms.

5-b.

We have said in *Glassman v. Railway*, 166 Iowa, at

261, that the Carmack Act has made no change in regard to the point in consideration here. I have to say that, if the language used in *Glassman's* case were *decision*, and if it be assumed that the decision is right, it still must yield if it be clear that the Supreme Court of the United States has decided or will decide otherwise. But, in my opinion, all that was said in the case on this point is *dictum*. It is absolutely undeniable that it involves a dispute limited to whether *direct* evidence established that defendant caused the damage, or, on the other hand, that someone else was to blame. It seems well settled in principle that there is no room for such presumption as is here under consideration, where direct evidence is even obtainable, to say nothing of when such evidence is actually produced; and, if the presumption is not in the case, then, though it be conceded that in a proper case Federal law had not affected the presumption, all said in *Glassman's* case on the effect of such Federal legislation was purely moot.

The inference or presumption based on the instinct of self-preservation and the love of life is never indulged in if there is, or is obtainable, direct evidence on the conduct of the injured person, or the circumstances of the injury. *Dunlavy v. Chicago, R. I. & P. R. Co.*, 66 Iowa 435; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa 150; *Reynolds v. City*, 72 Iowa 371; *Hopkinson v. Knapp*, 92 Iowa 328; *Salyers v. Monroc*, 104 Iowa 74, 77; *Ellis v. Leonard*, 107 Iowa 487; *Morbey v. Chicago & N. W. R. Co.*, 116 Iowa 84; *Burk v. Walsh*, 118 Iowa 397; *Ames v. Waterloo & C. F. R. T. Co.*, 120 Iowa 640; *Phinney v. Illinois Cent. R. Co.*, 122 Iowa 488; *Golincaux v. Burlington, C. R. & N. R. Co.*, 125 Iowa 652. The bottom reasoning is that, if this presumption be not permitted, a failure of justice may result. It follows that, if there be direct evidence, or it be obtainable, this reason for the rule fails, and that, if there be direct evidence, all that is said on whether

something has affected the presumption need not and should not be said.

The basis for indulging the presumption that a particular carrier caused damage is that, without it, it would be exceedingly difficult for the claimant to prove his case against the carrier he had elected to sue. When he has or can obtain direct evidence of what, without, must be supplied by presumption, he has no suit in which it is proper to declare the status of such presumption. This is emphasized by the fact that the inference for the instinct of self-preservation does not present a case of the presumption on one side and counter-proof on the other, but a case wherein a presumption never becomes active if direct evidence be obtainable. "Direct evidence of what took place is of higher character than the mere inference to be drawn from the instinct of self-preservation." (*Bell v. Incorporated Town of Clarion*, 113 Iowa 126), and it has been held that, where there are no facts shown indicating either accident or mistake, and facts are shown pointing strongly to suicide, "the presumption against suicide ceases to control." *Prudential Ins. Co. v. Dolan*, (Ind.) 91 N. E., 970, at 971, left column.

"Presumptions are indulged to supply the place of facts; they are never allowed against asserted and established facts. When these appear, presumptions disappear." *Lincoln v. French*, 105 U. S. 614; *Thayer's Treatise on Evidence*, 346.

Such presumptions are a rule of convenience like the one "requiring the party who relies on a license to show it." *Moore v. New York, N. H. & H. R. R. Co.*, (Mass.) 53 N. E. 816. Suppose, on prosecution, the State made direct proof that defendant had no license, would it still have the presumption which rests on the thought that it could not obtain such direct evidence? Suppose a claim that one absent for seven years or more was dead, and direct evidence

on whether he was, would the presumption of death be added to such evidence?

5-c

When it comes to the effect of the existence of direct evidence upon a presumption, no sound reasoning can draw a distinction between the presumption of love of life and the presumption that a particular carrier injured a shipment; and the rule as to such effect has never been limited to the first presumption. So it has been held that, when there is substantial evidence that delay alleged did not occur on the line of the carrier sued, it is error to let the jury have the presumption that the delay in the shipment was caused by the negligence of the terminal carrier. *Gulf, C. & S. F. R. Co. v. Brackett*, (Tex.) 162 S. W. 1191. *Sicetland v. Boston & A. R. Co.*, 102 Mass. 276, decides that there was no case for the jury against the terminal carrier, because there was as much evidence that some earlier carrier caused apples to freeze in interstate shipment as there was that the last carrier, the one sued, had caused such damage. 6 Cyc. 491, note, construes the *Sicetland* case, and that of *Louisville & N. R. Co. v. Tennessee Brewing Co.*, (Tenn.) 36 S. W. 392, to hold that, if it appears that presumably injury resulted before the goods reached the last carrier, it will not be held liable in the absence of direct evidence; and the same authority, in its notes and annotations (points 38 and 39), points out that, if the shipper accompanies the shipment, the presumption does not apply.

It seems manifest that the *Glassman* case had no occasion to decide the point in this case. That which it is unnecessary to decide is not *decided* though something is said that purports to decide it. If a cause can be affirmed without passing upon an asserted Federal right, such right will not be inquired into (*New Orleans & N. E. R. Co. v. National Rice Milling Co.*, 34 Sup. Ct. Rep. 726), nor does

it matter that the dictum is invited. The test of *obiter* is not how it was induced. That a decision is needless is not changed by showing how it was invited. It does not matter that, in *Glassman's* case, there was an assignment which assailed an instruction for ruling that the presumption was not affected. On appeal, it should not have been passed upon, beyond saying that the charge was erroneous because it injected whether a presumption had or had not been changed, when, because of direct evidence, it was immaterial whether or not it had been changed.

Elliott v. Chicago, M. & St. P. R. Co., (S. D.) 150 N. W. 777, at 778, is dictum as to presumptions, because its argument is addressed to the proposition that the shipper may sue either carrier, "if he *knows* which one among a number of carriers caused the injury." *Railway v. Harrington*, *supra*, is in similar case. It says that "*direct evidence* appears to show that the injury complained of occurred while the property was in the hands of this carrier." Where the plaintiff "*knows*" which of several carriers did the damage, or if there is direct evidence which one did, there is no room for indulging in presumptions on which one did, and all said under such conditions concerning the law of presumptions is, as seen, dictum, pure and simple.

I am firmly persuaded that we should reverse on the ground that the presumption against the last carrier will not avail to prove the case of plaintiff, because the Federal law has substituted for such presumption one that the initial carrier caused the damage.

WEAVER, J., concurs in this dissent.

C. I. FAWLEY, Appellee, v. C. H. SHELDON, Appellant.

PLEADING: Issue, Proof and Variance—Brokers—"To Find Purchaser"—"To Sell." An allegation that a broker was employed "to find a purchaser" may be sustained by evidence that he was

employed "to sell," but without power to fix the terms of sale.

BROKERS: Commission—Sale to One Not Known to be Broker's

- 2 **Customer.** A broker armed with simple authority to find a purchaser, on terms to be dictated by the owner of the property, or a broker armed with authority to find a *cash* purchaser in an amount to be dictated by the said owner, is entitled to no commission on a sale by the owner to a purchaser *not known to the owner to have been procured by the broker.*

BROKERS: Commission—Sale to One Not Known to be Broker's

- 3 **Customer—Effect.** The effect of want of knowledge on the part of an owner of property that he was selling to a customer secured by his broker is not sufficiently presented to the jury by a statement, in effect, that the failure of the broker to apprise the owner that he (the owner) was dealing with a customer secured by the broker, bore only on the question as to whether the broker did procure such purchaser.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

TUESDAY, JUNE 26, 1917.

ACTION to recover commission on the sale of real estate. There was a trial to a jury and a verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

F. L. Anderson, for appellant.

Voris & Haus, for appellee.

1. **PLEADING: issue, proof and variance—brokers: "to find purchaser," "to sell."** PRESTON, J.—The petition alleges that defendant was the owner of a stock of hardware, and verbally agreed to pay plaintiff the sum of \$150, as a commission, if plaintiff would find a purchaser to whom said stock might be sold; that, pursuant to such agreement, plaintiff did find and procure one Miller as a purchaser, and said stock was sold to Miller. Defendant denied all allegations of the petition.

Appellant contends that plaintiff declared upon an oral agreement to find a purchaser, and that the proof does not sustain the allegations, because the testimony showed that the undertaking was to make a sale for cash; and that the proof shows, without dispute, that the sale was not for

cash, because defendant took a note for \$3,900 in part payment; and that, therefore, plaintiff had not performed his agreement, and is not entitled to a commission.

Appellee contends that, although the plaintiff in his testimony does not word the contract just as alleged in the petition, yet it means the same thing; that is, that plaintiff was to find a purchaser. In his testimony, plaintiff says, "Mr. Sheldon told me that he would pay me \$150 commission if I would sell the stock for him;" and that later, defendant repeated his former statement. The defendant testifies:

"I told Mr. Fawley that, if he could sell my stock of hardware for cash, I would pay him a commission. I had no further talk with him about it until after I had completed the sale to Mr. Miller."

On cross-examination, he testified:

"He told me that he was advertising the stock, and showed me some letters he had received. I think I read one or two of them. He told me that he had written some letters. I know he told me he was trying to sell the stock; he told me he was doing some advertising. I suppose that it was costing him something to advertise—it usually did me. Yes, I knew as a matter of fact he was trying to dispose of that stock for me, and I knew it was in pursuance of the talks he had had with me before, that I was to pay him a commission if he sold it. The first time Mr. Breed came to the store, I asked him where he got his information, and he said Joe Streater had told him of the stock. Breed wanted to trade for it, and I told him the stock was not for trade. When he went away the first time the transaction, as far as he and I were concerned, was ended. A few days after that,—I don't remember just how long,—Mr. Breed returned to the store with Oscar Miller. Miller was represented to be the man who wanted to buy the stock. Fawley came to the store a little later, and was

introduced to Mr. Miller. He was acquainted with Mr. Breed. After we had done some talking, I gave them the refusal of the stock for a week or ten days. I gave them the price at which I would sell. No, I hadn't told Mr. Breed the price I would take when he was there the first time. The first time I named a price was that morning when Mr. Miller was there. When Breed came there the first time and commenced talking trade, I didn't want to do business with him at all. But when Miller was brought there by Breed, I fixed the price, and told them my price was 100 cents on the dollar, invoice price, plus 5 per cent for freight. Q. That is what you had told Mr. Fawley you would sell for, wasn't it? A. I don't remember whether I did or did not. Q. You wanted Mr. Fawley to make a sale of the place? A. Yes, I told him. Q. Didn't you tell him what the price would be? A. No, sir; I didn't tell him what the sale would amount to—what the stock would amount to. Q. Well, you told him it was 100 cents on the dollar? A. Whatever it was,—yes, I told him 100 cents on the dollar. Q. How much were you to have for freight? A. Five per cent. Q. When did you tell him that? A. That morning, I think, after I talked with Mr. Miller and Mr. Breed. Q. But what did you tell him about the price at the time you listed it with him? A. I don't remember as I told him. Q. How did you expect him to sell it unless he knew what the price was? A. To the best of my recollection, I told Mr. Fawley if he sold the stock of hardware, I would pay him a commission. Q. Didn't you give him any price? A. Nothing was said about the price. Q. Then you expected him to get a buyer and you would fix the price, did you? A. I expected to have something to say about it. Q. As a matter of fact, when the buyer came, you did fix the price? A. Yes, sir. Q. And told Mr. Fawley the price you had fixed? A. I told him that day the price I had fixed, yes, sir."

A part of this testimony, or the way he puts it in one place therein, where he says that he expected plaintiff to get a buyer, sustains the allegations of plaintiff's petition, although plaintiff puts it that he was to sell. We think it cannot be seriously claimed that, by the use of the words that plaintiff was to sell, either party contemplated that plaintiff was to have authority to conclude a binding contract to sell defendant's property. And, as said in some of the cases, such words usually mean that the agent is to negotiate a sale by finding a purchaser, etc. See *Keim v. Lindley*, (N. J.) 30 Atl. 1063, 1073; *Ford v. Easley*, 88 Iowa 603; *Bird v. Phillips*, 115 Iowa 703; *Furst v. Tweed*, 93 Iowa 300; *Holmes v. Redhead*, 104 Iowa 399. So that we think the allegations of the petition are sustained, in so far as the point is made that the proof showed a contract to sell, whereas the petition alleged a contract to find a purchaser. It is contended by appellant that, if the contract is to make a sale, and the sale is to be a sale for cash, a commission is not earned unless the agent makes a cash sale, and the acceptance of a note is not cash. The plaintiff in his testimony said nothing as to the terms of sale,—that is, as to whether it should be cash or not,—and defendant testifies that it was to be a cash sale. Appellant cites authority that, under plaintiff's testimony, a sale without any terms' being mentioned as to whether it should be cash or not, is a cash sale.

In the instant case, the undisputed evidence is that plaintiff sold his stock of goods for \$1,500 cash and a note signed by one Breed, for \$3,900. But, as we have already held, the jury was justified in finding that, under the testimony, the contract was that plaintiff was to find a purchaser. The more important point in the case, we think, is the question as to the effect of plaintiff's failure to inform defendant that Miller, the purchaser,

2. BROKER'S: commission: sale to one not known to be broker's customer.

er, was plaintiff's customer. The appellant contends that the evidence is undisputed that defendant did not have such notice or knowledge before the consummation of the trade. Appellee contends that there is evidence tending to show that defendant did have such knowledge. The question is presented by appellant in different ways; first, by motion to direct a verdict for the defendant. Of course, a different rule obtains on motion to direct a verdict, and on the submission of the case to the jury under instructions. If the evidence was in conflict as to defendant's knowledge or notice of that fact, then the motion to direct a verdict on that ground was properly overruled; but, in submitting the case to the jury, the effect of the want of such notice, if the jury should so find, should be submitted under proper instructions. The question was raised further by appellant by offered instructions by him, and we think his exceptions to the instructions given are sufficient to save the point, although counsel for appellee contend otherwise. The trial court instructed the jury in Instruction No. 4, which is, in part, as follows:

"And the fact, if it be a fact, as claimed by defendant, that plaintiff did not communicate to defendant that said Oscar Miller was the plaintiff's customer is material only as it may be given weight with all of the other facts and circumstances, as tending to prove that plaintiff did not procure such purchaser."

The appellant offered a number of instructions covering in different ways the thought that it was material that plaintiff should have notified the defendant that Miller was plaintiff's customer, and that a failure so to do would, under certain circumstances, prevent a recovery by plaintiff. Appellant's contention at this point now is that the evidence was such that the jury could have found the facts to be such as to bring the case within the law as announced in *Blodgett v. Sioux City & St. P. R. Co.*, 63 Iowa 606, and

other like cases which will be referred to later; while appellee contends that the case is more like *Rounds v. Alee*, 116 Iowa 345; although, as we understand his argument, he concedes that Instruction No. 4 is erroneous, but, as said, claims that the appellant did not properly except to it.

There are some other circumstances which perhaps ought to be referred to, bearing on the question as to whether or not defendant had knowledge or notice that Miller, the purchaser, was the plaintiff's customer, so as to claim a commission from the defendant, and as bearing on the question as to whether the terms of the sale were agreed upon or specified. It is plaintiff's claim that he furnished Mr. Miller as a purchaser through a subagent, John Breed. There is evidence tending to show that, in February, 1915, Breed, who was a stranger to both parties to this suit, called at the defendant's store in the town of Coggon and had a conversation with defendant about his stock of hardware, which conversation was overheard by plaintiff, who had desk room in defendant's store—plaintiff had had no communication with Breed before this; that, after Breed left defendant's store, plaintiff went to the depot with Breed, who told plaintiff that he (Breed) knew of a man at Anamosa who might be interested, and plaintiff told Breed that there was a commission of \$150 for selling this stock, and if Breed would interest this man, he would divide the commission. In March, Breed returned to Coggon with Miller, who looked the stock over and obtained from defendant an option to purchase it. While Miller and defendant were talking about the stock, plaintiff came into the store, and was introduced to Miller by the defendant. The next week, Miller called again, and purchased the stock from defendant, paying \$1,500 cash, and giving his note for the balance, \$3,900, signed by himself and Breed, due in one year. There is evidence tending to show that neither plaintiff nor his alleged sub-

agent, Breed, informed defendant that Miller was the customer of the plaintiff, and that defendant did not know until after the deal was closed that plaintiff would claim a commission. The defendant testified that he did not know and understand that he was dealing with a customer produced by plaintiff, and appellant contends that he had no reason to believe that he was dealing with the plaintiff's customer. On the other hand, it is contended by appellee that there was evidence from which the jury could find that defendant did know that fact, and that at least there was a conflict on this point; and we think this is so. It appears that Breed came to defendant and proposed a trade, which was refused. There is no claim that plaintiff first brought Breed to the town of Coggon. Defendant testifies:

"The first time Breed came to the store, I asked him where he got his information, and he said Joe Streater had told him of the stock. Breed wanted to trade for it, and I told him the stock was not for trade. When he went away the first time, the transaction, as far as he and I were concerned, was ended."

When Breed left the store that morning, plaintiff accompanied him to the station, and, as before stated, had a talk with him in regard to dividing the commission; and plaintiff says then:

"I came back to the store and told Mr. Sheldon that Mr. Breed knew of a man in Anamosa that he was going to try and bring up and buy the stock. I returned to the store and informed Mr. Sheldon of my arrangement with Mr. Breed immediately after Mr. Breed left."

There may be other circumstances bearing on this. At any rate, it is appellee's contention that, according to the testimony of plaintiff, defendant had full knowledge of the arrangement Fawley had just made with Breed; and that, if Breed afterwards returned with the purchaser, such

purchaser must be considered as a customer of plaintiff's under his arrangement with Breed; for Sheldon had no relations whatever with Breed, and he contends that Miller was in fact secured by Breed after his arrangement with Fawley.

As to whether or not the contract was that plaintiff was to secure a purchaser on specified terms, it should be noted that the petition did not so allege. We have already set out the testimony of the defendant in cross-examination on the question as to the alleged terms, so that there is no testimony in the case by either party that a definite price was fixed at which defendant should sell his stock. Defendant testifies, as before set out, that nothing was said about the price, and he also says that he expected plaintiff to get a buyer, and he (defendant) would fix the price, and that he did fix the price. So that, in this view of the testimony, plaintiff, according to his claim, brought the purchaser, Miller, to the defendant, and Miller and the defendant negotiated as to the terms of sale. The most that can be said as to any definite terms of sale is that it is claimed that the stock should be sold at 100 cents on the dollar, and 5 per cent added for freight. But the jury could have found from the testimony that the sale was to have been a cash sale, and that it was not a cash sale. They could have found, also, that the terms of sale were not agreed upon and that they were not a part of the contract, but that defendant and Miller negotiated and fixed the terms themselves; and they could have found that defendant had no knowledge or notice that Miller was plaintiff's customer, and that plaintiff would claim a commission. This being so, even though defendant's motion for a directed verdict was properly overruled on this ground, still, as defendant asked an instruction bearing upon the question of defendant's want of knowledge that Miller was plaintiff's customer, and such instruction being in line with the follow-

ing cases, it should have been given. *Blodgett v. Sioux City & St. P. R. Co.*, 63 Iowa 606; *Boyd v. Watson*, 101 Iowa 214; *Gilbert v. McCullough*, 146 Iowa 333; *Seever v. Cleveland Coal Co.*, 158 Iowa 574, 588.

As before shown, the court instructed that defendant's knowledge on this subject was material only as tending to prove that plaintiff did not procure the purchaser; but we think this was too narrow, and was to the prejudice of the defendant. Had the jury found that the terms of sale were not fixed, but that they were determined by negotiation between Miller and defendant, and that it was to have been a cash sale, whereas it was not for cash, then we think the defendant was entitled to know that plaintiff was claiming that Miller was defendant's customer, and that plaintiff was anticipating a commission. Had defendant known that fact, it might have had an important bearing in his mind in the negotiations between defendant and Miller. The facts are not, of course, exactly like those in the cases last cited, but, as said, there is one theory of the evidence upon which the jury could have found as contended by defendant, which would make the rule laid down in the cases applicable. Appellee relies on the case of *Rounds v. Alee*, 116 Iowa 345. There may be one theory of the testimony which would render the rule in that case applicable also, had the jury so found. But the distinction between the *Rounds* case and the *Blodgett* and *Boyd* cases is pointed out by the court in *Gilbert v. McCullough*, 146 Iowa 333, at 336, where it is said that, in the *Rounds* case, the price was named and the sale effected at such price; while in the others, the consideration was a matter of negotiation.

It is our conclusion that Instruction No. 4 is erroneous, and that defendant was entitled to an instruction on

8. BROKERS: commission: sale to one not known to be broker's customer: effect.

the theory suggested, and that, for this reason, the judgment must be reversed.

Appellee contends that, as there was evidence tending to prove that plaintiff was employed to find a purchaser for the stock at invoiced price, plus five per cent for freight, according to plaintiff's testimony, or to find a purchaser, according to the defendant's testimony, at a price to be fixed by him, and that the purchaser was procured and the sale in fact made at a price on terms satisfactory to the defendant, therefore, in such a case, plaintiff is entitled to recover, under the authorities; and cites *Reid v. McNerney*, 128 Iowa 350, *Hanna v. Collins*, 69 Iowa 51, and cases from other jurisdictions. But in the cases just referred to, the question as to whether the seller of property had knowledge or notice that the agent was claiming the purchaser to be his customer was not involved.

Some other questions are argued briefly. One is that the court erred in sustaining plaintiff's objection to questions propounded to Streator. But the record is such that it is doubtful, to say the least, whether appellant is in a position to be heard here. This, and perhaps some of the other questions, are not such as are likely to occur upon another trial, and we shall not take the time or space to discuss them.

For the error pointed out, the judgment is reversed and the cause remanded for a new trial.—*Reversed and remanded.*

GAYNOR, C. J., LADD and STEVENS, JJ., concur.

T. B. HANLEY, Trustee, Appellee, v. FIDELITY & CASUALTY COMPANY, Appellant.

APPEAL AND ERROR: Parties Entitled to Allege Error—Invited
1 Error—Requesting Instructions, etc.—Effect. Requesting in-

structions or special findings on disputed questions of fact is a concession that the evidence is such as to justify the giving of such instructions and the submission of such questions, and precludes a subsequent change of front and an insistence *that the evidence is insufficient to support the verdict or findings returned.*

EVANS, J., withholds judgment on this point.

APPEAL AND ERROR: Parties Entitled to Allege Error—Estoppel by Asking Instructions, etc.—Avoidance of Estoppel. Whether unsuccessful insistence, at all proper stages of the trial, that all questions arising on the record are questions of law and not of fact, would arm the party with right to ask, under protest, instructions and special findings, without forfeiting his right to insist on the insufficiency of the evidence to support a verdict or finding adverse to the party, *quere.*

TRIAL: Direction of Verdict—Overcoming Prima-Facie Case. Principle recognized that seldom may a defense be made so complete and impregnable as to overcome, *as a matter of law*, an already prima-facie made case for recovery.

INSURANCE: Accident Insurance—"Accident" Defined. An "accident," within the meaning of a policy insuring against accident, is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and unexpected to the person to whom it happened. Applied to the case of one who, in fastening a board on a box, suffered an injury, by the screw driver's unexpectedly slipping from the screw head and from there to the floor, causing the operator to fall heavily against the head of the tool.

APPEAL AND ERROR: Harmless Error—Jury Negating Fact on Which Refused Instruction is Based. When, at defendant's request, the jury passes on the question whether a deceased was suffering from any disease that contributed to his death, and finds in the negative, defendant suffers no prejudice by being refused an instruction which directed the jury as to the rule to follow if it found it equally consistent that death might have been caused by accident or by disease.

PLEADING: Amendments—Permissible in Order to Cure Careless Oversight. An amendment may be permitted in order to cure an oversight due to the negligence of the pleader. Applied

where an action was brought on a policy of insurance which, by its terms, had expired, the amendment alleging a renewal.

TRIAL: Instructions—Cautionary—Limiting Purpose of Testimony.

7 Error does not necessarily follow a refusal to caution the jury as to the purpose for which certain evidence was received. It will ordinarily be presumed that the jury considered the testimony for the *professed* purpose for which it was offered, and for no other purpose.

TRIAL: Instructions—Province of Jury—Materiality of State-

8 **ments of Hypothetical Question.** An instruction is properly refused which permits the jury to say what are and what are not the material and important features of the hypothesis embodied in a given question.

INSURANCE: Proof of Loss—Waiver—Evidence. A waiver of

9 formal proofs of death is shown by evidence that, promptly following the death of deceased, the beneficiary repeatedly requested the company to furnish the necessary blanks, and was refused, the company taking the exclusive position that deceased died of disease and not of accident, as provided in the policy.

NEW TRIAL: Newly Discovered Evidence—Diligence. The find-

10 ings of the trial court on conflicting affidavits as to diligence in discovering new evidence, have the force and effect of the verdict of a jury.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

SATURDAY, JANUARY 20, 1917.

REHEARING DENIED TUESDAY, JUNE 26, 1917.

THE plaintiff, as trustee for Edith S. Hatfield, administratrix of the estate of William J. Hatfield, deceased, instituted this action at law upon a benefit certificate of accident insurance issued to said William J. Hatfield in his lifetime, of which certificate the said Edith S. Hatfield is the sole beneficiary. The defendant by its answer admitted the membership of William J. Hatfield and the issuance to him of the certificate sued upon, but denied that he was injured or came to his death in any manner or from any cause against which the association had undertaken

to insure him, and averred that his death was the result of disease and bodily infirmity. There was a trial to a jury, resulting in verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Sullivan & Sullivan, for appellant.

Dowell, McLennan & Zeuch, Thomas B. Hanley, and Parker, Parrish & Miller, for appellee.

WEAVER, J.—The defendant is an accident insurance company, having its principal office in the city of New York. On July 12, 1911, said company issued to William J. Hatfield, a resident of Portland, Oregon, a policy or benefit certificate, insuring him, among other risks, against bodily injury sustained at any time during the term of one year "through accidental means, and resulting directly, independently and exclusively of all other causes in death." This policy was extended or renewed at the end of the year, and was in force on June 14, 1913, when Hatfield died. Within a few days after his death, the widow notified the company thereof, and of her claim that such death was the result of accident, and asked to be furnished blanks upon which to prepare formal proofs of loss. After some correspondence, the company declined to furnish the blanks and refused to admit any liability upon its contract, claiming that the death of the insured did not result from accidental injury within the meaning of the policy. The widow, having been appointed administratrix of the estate of the deceased, and acting under authority of the court, appointed the plaintiff herein her trustee for the collection of said insurance, who thereafter instituted this action for that purpose.

The petition recites the issuance of the policy and its maintenance in force until the death of the insured, as above stated, and alleges that his death resulted from bodily injury from external, violent and accidental means, in-

dependent of all other causes, which injury was occasioned in the following manner: The deceased was at his home, and, at the time in question, was engaged in attempting to fasten a board or false bottom on a small box standing on the floor of the room. In so doing, he made use of a ratchet screw driver. Having laid the board on the box and placed a screw in position to be driven through the board, deceased adjusted the tool for that purpose, and, while bending over it to bring his weight upon said tool and thus force the screw into place, the box tipped, and the point of the driver slipped from the screw, causing him to fall forward with his whole weight upon the upper end of said tool, which struck him in the breast, injuring him in such manner that he died on the same or following day. It is further alleged that due proofs of loss were furnished the defendant within one month after the death of the insured. By way of amendment, the plaintiff also pleads that defendant, having been duly notified of the death of the insured, and being requested to furnish blanks for formal proofs of loss, refused such request and denied all liability on account of such death, thereby waiving any other or further proofs, and is therefore estopped to plead or prove want of such proofs as a defense to this action.

The defendant does not deny the making of the contract sued upon, or that the same was still in force at the date of Hatfield's death, but does deny that such death was caused by or was the result of any accident or injury against which the deceased was insured. It also alleges affirmatively that the insured died from natural causes—disease and bodily infirmity.

The evidence on the part of plaintiff tends to show that deceased was a man of about 58 years of age, 5 feet 11 inches in height, and weighed 247 pounds. He was a traveling salesman, and had been engaged in that business for many years. He had returned home from one of his trips

but a short time before his death, and his wife testifies that he seemed to be in perfect health, and was making no complaint of any kind. On the day in question, he had been in the garden with his wife, gathering flowers, and later walked down town, where he procured the board and materials for fixing the box. Returning home, he proceeded with the work in a manner described by the witness as follows:

"He was leaning over the box like this, and you have to press on it hard to turn the screw, and he got over it with his whole weight, and when he had the screw driver pulled out, the box toppled over and threw the screw driver out of the head of the screw, and he fell against it with an awful thud. At the time, he held the head of the screw driver against his breast, as he pushed it down with the handle of the screw driver. Q. How was he pressing upon this? A. With his full weight, right over like this against it. He had put in three screws before he fell. After he fell, he was just crumpled up and could not get his breath, and just struggled like he was dying, and I thought he was. I stood on the other side, looking right towards him. He was standing on the opposite side of the box from the screw he was trying to drive in, and I stood right on this side, looking right at him, watching him doing it. I suppose I was $2\frac{1}{2}$ feet away from him. After he fell, he was making an awful noise, struggling just like he could not get his breath at all, and we, the maid and I, grabbed him and dragged him to a chair, and he kept getting whiter and whiter, and I turned around to the telephone and called a doctor. During all this time, he seemed to be in most terrible pain and agony. His face was ashen pale and his lips were purple. The doctor came in about an hour. During this time, he was in awful agony, seemed to be in terrible agony, clawing at his breast, and this continued until the doctor gave him some medicine. The doc-

tor gave him some medicine, but it never eased him. He got so he did not groan so terribly, but never got easier after that, and died about 2 o'clock in the morning."

The wife appears to have been the only person present, at the time of the alleged injury, except a housemaid, Maggie Bell, who was not called as a witness by either party. Sometime during the following month, and about three weeks after burial, the body of the deceased was exhumed at the instance of the defendant, and a post mortem examination made by physicians. Upon the information alleged to have been obtained by means of this examination, the defense principally rests. Five physicians attending the autopsy made and signed a written report of their findings. Omitting therefrom details which do not appear to disclose any facts of material importance, we quote the following statement, descriptive of the heart and blood vessels:

"Heart and blood vessels: Clotted blood in pericardium probably from a puncture of the heart by the embalmer's trochar; such a puncture is present near the apex.

"Marked atheromatous condition of the entire thoracic aorta, with an atheromatous ulcer three eighths inch in diameter in the ascending portion. There is a blood clot between the coats of the arch of the aorta, and extending into the descending portion about eight inches in length in entire extent, and perhaps two thirds of the circumference of the vessel.

"Heart: Enlarged to nearly twice its normal size. Marked amount of fat distributed over its entire surface. Left ventricle markedly hypertrophied. Mitral valves markedly atheromatous, thickened and shortened. Aortic semilunar valves atheromatous. The coronary arteries show a marked degree of atheromatous change. There is blood diffused into the tissue of the base of the heart.

"Brain: No evidence of injury to brain. No evidence of apoplexy. Blood vessels at base are atheromatous.

"We, the undersigned, are of the opinion that the cause of death was a hemorrhage into the wall of the arch of the aorta. We also believe that the diagnosis of angina pectoris was justified by the autopsy findings."

If we understand the technical terms employed in the report, an "atheromatous condition" is one indicating a degenerative condition of the inner coat of the blood vessels, and a "hypertrophied" heart is one enlarged beyond its natural or normal proportions. Aside from the testimony of the undertaker to the effect that, in preparing the body for burial, he discovered no bruises or marks of injury, the evidence offered by the defendant consists entirely in the evidence of the physicians who united in the report of the autopsy, and another physician who was examined as an expert concerning the normal condition and appearance of the human heart and as to the result or effect of certain abnormal conditions. The witness last mentioned was asked and gave his opinion of the effect of a blow upon the breast or chest, and whether such a blow could result in the rupture of an aneurism or dilation of the aorta or large artery through which the heart supplies pure blood to the system. As witnesses on the stand, the several physicians attending the autopsy unite with a fair degree of unanimity in expressing the opinion stated in their report that the deceased died of angina pectoris. This term appears, however, to be one of somewhat indefinite significance, descriptive of the symptoms arising from a variety of causes. It may be due, says one of the defendant's expert witnesses, to aneurisms or tumors pressing on the organs or nerves in the mediastinal region, and to arterio sclerosis. Of the deceased, he says, "He was suffering from this group of symptoms which I call 'angina.'" This witness expresses his own opinion that Hatfield's death was from the effects of an aneurism of the aorta. The evidence also tends to show that the heart of the deceased was very considerably

enlarged; that his arteries showed a hardened or sclerotic condition, such as is frequently found in men advancing in age; and that the inner coating of the aorta and arteries showed atheromatous patches; and that, at one point in the aorta, there was an aneurism or dilation of that vessel. At this point, they say that there was a slight rupture in the inner coat of the aorta, through which the blood had made its way between the inner and outer coats, and, to use the physicians' phrase, had "dissected its way up and down," creating a condition to which they ascribe his death. In short, in the opinion of these witnesses, the abnormal conditions of the heart and blood vessels were of a character rendering the man liable to sudden death, a result which might have been precipitated by slight cause or mere ordinary exertion, or even in sleep, without any known external cause.

In rebuttal, the plaintiff introduced the evidence of a witness who qualified himself to speak as an expert. In reply to interrogatories put to him, he expressed the opinion that the effect of the injection of embalming fluid into the body of a deceased person is to render the arteries harder than normal; that nearly all men undergo a hardening of the arteries as age approaches, and that it is unusual to find a person over 50 or 60 years of age without some evidence of arterio sclerosis; that hypertrophy of the heart is not an uncommon condition of persons engaged in active life; that ordinarily a large man has a larger heart than one of smaller stature; and that the fidelity of a heart enlarged to one and a half or twice its normal size may last just as long as a heart of normal condition, provided the compensation does not give way from disease, extreme age or something of that kind. In answer to a hypothetical question embodying the alleged circumstances of the injury and death of the deceased and the alleged facts stated in the report of the autopsy, the witness was permitted to say

that, in his judgment, the blow received by the fall of the deceased upon the head of the screw driver was sufficient to produce the death of the insured, and that, in his opinion, such was the cause of the death. While admitting that a post mortem examination is or may be the most satisfactory method of arriving at the cause of death, the witness expressed the opinion that Hatfield's death was caused by the blow upon or in the vicinity of the solar plexus, producing a paralysis of the sympathetic nerves.

At the close of the evidence, there was no motion by either party for a directed verdict, and, after argument by counsel, the cause was submitted to the jury upon the evidence and the instructions given by the court for a general verdict upon the issues joined, and for answers to certain special interrogatories submitted at the request of the defendant. Later, the jury returned a verdict for plaintiff for the full amount of his claim, and to each special interrogatory, returned a finding favorable to the plaintiff. Judgment was entered on the verdict on February 19, 1915. On the 6th of March following, the time for filing motion having been extended, the defendant moved for a new trial, assigning as grounds therefor nearly 50 errors alleged to have been committed by the trial court in its rulings and instructions, and alleging an entire want of sufficient evidence to sustain the verdict of the jury. Later, on April 3, 1915, defendant amended its motion, alleging the discovery of new evidence which it would be able to produce on another trial, and in support thereof filed affidavits. A resistance to the motion, also supported by affidavits, was filed on behalf of the plaintiff. The motion was denied, and error is also assigned upon this ruling.

I. Consideration of the first proposition laid down in appellant's brief is rendered somewhat difficult from the

1. **APPEAL AND ERROR:** parties entitled to allege error: invited error: requesting instructions, etc.: effect.

fact that counsel group together therein no less than 27 assignments of error. We think, however, that, taking them all together, they may be treated as raising the question of the sufficiency of the evidence to sustain the verdict and special findings returned by the jury.

Upon the record, as disclosed in the abstract, the defendant is not in position to rely upon this objection. Neither at the close of the evidence nor at the close of all the evidence did appellant move for a directed verdict, but proceeded to the argument and submission of the case in the usual way. Also, before the court had charged the jury on its own motion, appellant submitted requests for instructions to the jury upon: (1) The burden of proof; (2) the construction of the contract; (3) how the verdict would be affected by a finding that the death of the insured person was caused partly by accidental injury and partly by disease; (4) the effect of a finding that the theory of death by disease was equally consistent with that of death from accidental causes; (5) the effect upon the verdict to be returned if the deceased suffered a rupture of a blood vessel while engaged in a voluntary act; (6) the effect of a finding that the blood vessels of the deceased were in a weakened condition, and that, but for such condition, there would have been no rupture; (7) the effect to be given the proofs of death; (8) the rule to govern the consideration of expert testimony; (9) the definition of the word "accident;" and (10) the time or period covered by the policy. In addition to this, the defendant presented and asked the court to submit to the jury six special interrogatories, as follows:

"(1) Did the plaintiff furnish proofs of death to the defendant within 60 days of the date of the death of William J. Hatfield?

"(2) Did the defendant waive the furnishings of proofs of the death of William J. Hatfield?

"(3) Was William J. Hatfield afflicted with any dis-

ease or weakness of his blood vessels on and prior to the 13th day of June, 1913?

"(3) Was William J. Hatfield afflicted with any disease or weakness of his heart on and prior to the 13th day of June, 1913?

"(5) Did the diseased and weakened condition of the blood vessels in the body of William J. Hatfield contribute to his death?

"(6) Did the diseased and weakened condition of William J. Hatfield's heart contribute to his death?"

Several of the instructions so requested were incorporated, in substance, in the court's charge to the jury. Of the interrogatories so submitted at appellant's request, the first and second were answered in the affirmative, and each of the other four in the negative.

It is true that the requests for instructions were prefaced by the following proposed instruction:

"You are instructed that plaintiff is not entitled to recover in this case, and you should return a verdict for the defendant."

This does not direct the court's attention to any ground or reason upon which a directed verdict is asked, and is entirely insufficient to raise the question of the sufficiency of the evidence. Moreover, when so asked in connection with a large number of other requests adopting the theory of the existence of jury questions, it may be presumed that the undisclosed ground of the first request was something other than an alleged insufficiency of the evidence. In this connection, we may also note that, as the petition stood at the beginning of the trial, plaintiff had pleaded an insurance contract which, by its terms, had expired before the death of the insured, and had neglected to plead a renewal or extension of the term, and this defect was not remedied by amendment until the trial was near its close. Had the trial gone to a submission without the amendment, a re-

covery for the plaintiff could not have been sustained. There is some indication in the requested instruction to which we have referred, and others which we have not quoted, that these requests had been prepared before the amendment to the petition, and with an eye to the issues as at first joined, rather than to the issues as they stood when the trial was completed.

Few rules are better settled than that a ruling by the trial court or the submission of a question of fact to the jury cannot be assigned as error by the party asking it. He cannot be heard to complain of the giving of an instruction requested by him, or of the giving of another which is in substance like the one so requested. *Renner v. Thornburg*, 111 Iowa 515; *Campbell v. Ormsby*, 65 Iowa 518; *Beaver v. City of Eagle Grove*, 116 Iowa 485; *Kinney v. McFaul*, 122 Iowa 452, 454; *Bryce v. Burlington, C. R. & N. R. Co.*, 128 Iowa 483.

So, too, when he asks an instruction to the jury, or a special finding upon any stated proposition of fact, it implies a concession upon his part that there is evidence to justify the giving of such instruction or submission of such question, and, if it result in a verdict or finding contrary to his wishes, he will not be permitted to change front and insist that there is no evidence to sustain it. The decisions to this effect are very numerous. For example, in *Cash v. Dennis*, 159 Iowa 18, 29, we said of the position taken by appellant:

"It is next urged that the court erred in submitting to the jury the question of testamentary capacity, appellant claiming that there was not sufficient evidence to justify the submission of this question to the jury; but it appears that the defendant made no motion to withdraw the consideration of this question from the jury, * * * but rather gave the court to understand that the appellant wished it submitted to the jury, for appellant submitted to

the court and asked the court to give instructions upon this question, and asked that they be submitted to the jury; and the instructions given by the court are substantially the same as those asked by appellant. It is well settled that appellant cannot complain now of the action of the court in doing what appellant then asked the court to do."

In *Gordon v. Chicago, R. I. & P. R. Co.*, 154 Iowa 449, among the reasons assigned by this court for denying the appellant's contention that a finding of negligence had no support in the testimony was the following:

"Moreover, the defendant asked instructions covering this feature of the case, thus admitting that these were questions of fact for the jury."

In *Light v. Chicago, M. & St. P. R. Co.*, 93 Iowa 83, 86, it appearing that appellant had asked an instruction which, though refused, was substantially given by the court in its own charge, the court says:

"It will be observed that this instruction, which the court refused to give, embraced all the acts of negligence pleaded, and the very matter now complained of; hence, having insisted by offering the instruction that it was correct, the defendant cannot now be heard to complain if the court erroneously adopted its view, even though it be true that thereby the court submitted a matter to the jury as to which there was no evidence."

In *Spicer v. City of Webster City*, 118 Iowa 561, the court submitted to the jury a special interrogatory whether the city had actual notice of a defect in its street, and the jury answered in the affirmative. On appeal, it was insisted that the answer was without support in the evidence. but we said:

"If this be conceded, appellant cannot complain, for it requested an instruction, proper in form, which was fairly embodied in the seventh and fourteenth paragraphs given, submitting this precise issue. A party may not lead the

court into the commission of error, and then make it a basis for reversal."

In the recent case of *Cheney v. Stevens*, 173 Iowa 288, we said that the objection that the verdict is unsupported by the evidence was unavailable to the appellant, for the reason that appellant requested the court to give the jury various instructions directing the jury upon the law bearing upon the issues of fact raised by both counts of the answer. This, we said, was tantamount to an admission in court that there was evidence for the jury upon both issues, and it is well settled that a party making such requests cannot thereafter insist that the record presents no jury question, and this is especially so whether the court either gives the instructions asked or embodies the substance thereof in its charge. See, also, *Evans v. Roberts*, 172 Iowa 653, 661; *Miller v. Harrison County*, 171 Iowa 270, 273. In *Murphy v. Cochran*, (Iowa) 134 N. W. 1085, it is said that a party having elected to submit a question as one of fact to a jury which returns a verdict against him, "cannot again change front and ask that the matter be determined in his favor as a matter of law." Again, in *Allison v. Jack*, 76 Iowa 205, 208, it is said:

"The pleadings show that the instructions are applicable to the issues, and, as plaintiff asked instructions which are applicable to evidence of the same character as the instructions in question contemplate, they cannot now claim that these instructions are not applicable to the evidence."

The same rule is observed in other jurisdictions. For example, it has been held that:

"When a question is submitted to the jury at the request of a party to a suit, he will not be heard to say that an adverse finding thereon is not sustained by sufficient evidence." *Chicago, B. & Q. R. Co. v. Johnston*, (Neb.) 95 N. W. 614.

And again:

"Without entering upon a criticism of the theory on which the cause was submitted to the jury, it is sufficient answer to defendant's objection to say that the instruction mentioned was given at its request, and it cannot now be heard to say that the finding of the jury on an issue submitted at its request is not sustained by sufficient evidence." *Chicago, R. I. & P. R. Co. v. Sizer*, (Neb.) 95 N. W. 498.

Says the Pennsylvania court:

"A party who solicits and obtains an instruction from the trial judge will not be permitted to allege here that there was no evidence to justify it." *Auburn B. & N. Works v. Schultz*, (Pa.) 22 Atl. 904.

See, also, *McDonald v. Minneapolis, St. P. & S. S. M. R. Co.*, (Mich.) 63 N. W. 966. In *Watson Cut Stone Co. v. Small*, (Ill.) 54 N. E. 995, the court, while expressing the view that the evidence upon several of the alleged acts of negligence was insufficient to sustain the judgment below, says:

"But, however that may be, we are of opinion this cannot now be urged as a cause for reversal, because appellant asked the thirty-second instruction upon the theory that it was not liable for any negligence charged, and the court gave at its instance several instructions in which is submitted to the jury the question of any and all negligence charged against it."

That the case before us falls clearly within the scope and reason of the rule of the authorities is clear, and we are not now called upon to define its limitations or the exceptions thereto, if any. It may well be that, where a party's timely objection to the sufficiency of the evidence has been overruled, and he has made unavailing efforts to have the matter treated as

2. APPEAL AND
ERROR: parties
entitled to
allege error.
estoppel by
asking instructions,
etc.:
avoidance of
estoppel.

one at law, and the question is being sent to the jury over his protest, a request by him for instructions in harmony with his theory of the case will not estop him to review his objection to the sufficiency of the evidence, both in a motion for new trial and upon appeal. Such is not the state of this record, and decision upon the question thus suggested must await the presentation of a case appropriate for its consideration.

3. TRIAL: direction of verdict: overcoming prima-facie case. There is no serious dispute in this case that defendant did insure the deceased; that the policy or contract was in force at the time of Hatfield's death; and that, if his death was the result of "bodily injury sustained through accidental means, and resulting directly, independently and exclusively of all other causes," then the defendant is liable. Appellant has planted its defense upon a denial that such was the cause and manner of the death of the deceased, and upon an affirmation of the fact that such death was the result of disease, and not of accidental injury. Upon the trial, the plaintiff clearly made a prima-facie case for a recovery. Having done so, it is difficult to conceive how a defense resting solely upon expert opinion that the death might have been, or was in fact, the result of disease, could be made so complete and impregnable as to make the issue one of law; but be that as it may, the defendant accepted the hazard of voluntarily going to the jury upon a series of findings submitted at its request, in which all the vital propositions of fact in support of its defense were separately committed to the arbitrament of the jury. Contrary to its hopes and expectations, the jury has negatived each and every one of those propositions, and, as we have seen, it is not now competent for appellant to say that such findings are without support in the evidence. The verdict is, therefore, not vulnerable to the objection as made, and if appellant is entitled to a new

trial, it must be found in some of the other alleged errors assigned.

This conclusion renders it unnecessary for us to review many of the authorities cited to us in the briefs. We may also add that, even were we not to apply the rule of law just discussed, we should still be compelled to hold, upon the whole record, that the evidence was sufficient to take these questions to the jury, and the court did not err in so ruling.

II. In the second proposition advanced, appellant assigns error upon the ruling of the court in refusing 11 different requests for instructions to the jury, because counsel say they were correct statements of the law, and the subject matter of them was not fairly or correctly covered by any of the instructions given by the court upon its own motion.

We cannot extend this opinion to quote *in extenso* the many requests made, and, as counsel have argued them in general propositions, we will speak of them in the same manner. It may be conceded that some of them contain appropriate statements of the law applicable to the case on trial, but, on comparison of each of them with the charge as given to the jury, we find no correct rule asked for by the appellant and essential to a proper submission of the issues which is not fairly covered by or embodied in the instructions given by the court. Others of the requests refused are clearly wrong; as, for example, two of them would direct the jury that, if Hatfield's death did not occur within one year from the date of the policy, July 11, 1911, there could be no recovery, ignoring the conceded fact that the insurance contract had been extended an additional year by renewal. Others are more argumentative than otherwise, and have no appropriate place in a charge to a jury.

The general assignments of error above referred to are not sustained by the record, and must be overruled.

III. The third proposition is that the court erred in refusing a requested instruction defining the meaning of the word "accident," as follows:

"You are instructed that an accident is defined to be the happening by chance or taking place unexpectedly, not according to the usual course of things; an event taking place without one's foresight or expectation, undesigned, sudden and unexpected. An event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and unexpected to the person to whom it happens. It is the happening of an event without the occurrence of the will by the person by whose agency it was caused; or the happening of an event without any human agency.

"The term 'accident,' used in its ordinary and popular sense, means the happening by chance; taking place unexpectedly; not according to the usual course of things, or not as expected. If an injury or death is the result of a man's intentional act, it is not an accident; but if, preceding the injury, something unforeseen, unexpected and unusual occurs which produced the injury, then the injury has resulted from accident or from accidental means.

"A person may do a certain act, the result of which may produce what is commonly called accidental injury or death, but the means are exactly what the man intended to use and did use and was prepared to use. The means were not accidental, but the result might be accidental; and, if you find that the said William J. Hatfield placed himself in a position where injury or death would follow, so long as he remained in such position and injury, and death did result by reason of such voluntary position, then this would not be an accidental injury, and you should find for the defendant."

Instead of instructing as thus requested, the court charged as follows:

"An accident is any event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and unexpected to the person to whom it happened. The happening of an event without the concurrence of the will of the person by whose agency it was caused, or the happening of an event without any human agency. And you are instructed that, if such an accident occurred to the said William J. Hatfield, and if you find that such accident was the moving or producing cause of his death, without which his death would not have occurred, and that his death resulted from said accidental cause, independent of all other causes, including diseased condition of his body, then your verdict should be for the plaintiff. But if you fail to so find, your verdict should be for the defendant."

"Accident" is one of those words which seem to be the subject of an infinite variety of definition, though the essential thought or idea thereby represented is one of the commonest and most familiar character. In its general and popular sense, no one misunderstands it, but no one seems as yet to have been able to state it in other words of such scientific or critical exactness as to command universal approval even of those who speak with authority. There are many words in everyday use among people generally, so familiar and so well known that attempts to define them in other words which shall be at once full, complete and exact, serve to cloud rather than to clarify their meaning to ordinary comprehension. This the courts have quite generally come to recognize, and it is now well settled that "accident," as used in insurance contracts, is to be given its meaning and effect as employed in general usage. Nevertheless, while conceding this to be correct, courts still persist in the effort to critically define the word.

exhausting the resources of the language in stating and restating the meaning of the word in ever varying forms, without advancing a pace nearer finality of definition. The precedents in which the subject is treated are too nearly numberless to justify any attempt at this time to indulge very largely in citation. The decisions, or many scores of them, are very carefully digested in 1 C. J. 390 *et seq.*, and the definition adopted by a decided majority of the courts stated as follows:

"Accident denotes an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency, an event happening without any human agency, or, if happening through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; something unexpectedly taking place, not according to the usual course of things; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; something happening by chance; a mishap."

It is enough at this time to add that the definition of "accident," as given by the trial court, or its substantial equivalent, has been often approved, and is not at variance with our own decisions. It is substantially in the language used in *McGlinchey v. Fidelity & Casualty Co.*, 80 Me. 251, and quoted approvingly by us in *Carnes v. Iowa S. T. M. Assn.*, 106 Iowa 281, 285. See, also, Bouvier's Law Dictionary, and *United States Mut. Acc. Assn. v. Barry*, 131 U. S. 100. Nor does it in any essential respect differ from the definition requested by appellant, except in the argumentative application of the rule asked for in such request. To have charged as thus asked would have been to utterly mislead the jury into the thought that, if Hatfield voluntarily undertook to drive the screw, and in so do-

ing was injured by slipping or falling upon the screw driver, then such injury was not accidentally caused, within the meaning of the policy,—a rule which, if carried to its logical extent, would render the protection of an accident insurance policy the merest farce. Practically speaking, every unexpected or unintended personal injury may be traced in some of its lines of causation to the voluntary act of the victim. For instance, he is a hunter, and is wounded or killed by the explosion of his gun; or he is a carpenter, and the ladder which he is climbing slips or breaks, precipitating him to the ground; or a woodsman, who chops down a tree which falls in an unexpected direction and crushes him; or a swimmer, who, mistaking his strength or skill, ventures too far from shore and is drowned; or a surgeon or embalmer, whose instrument slips and wounds his hand, inducing fatal blood poisoning; or any other person who voluntarily undertakes any kind of work, or mere diversion, and in so doing unexpectedly and unintentionally sets in motion some force, bringing upon himself an injury; or, by reason of some intervening unlooked-for event, such as a slip or a fall, or the breaking or the slipping of the tool with which he is employed, he is seriously hurt,—the result in each and every case would not have taken place had the person suffering the injury not voluntarily placed himself in the position where he received the harm complained of; but we think no court would for a minute give ear to the construction that such injuries are not clearly accidents, or are not caused by accidental means, within the meaning of the law and of the contract of insurance.

- IV. Error is also assigned upon the
 the court's refusal to give an instruction to
 the effect that, if the jury found it "equally
 consistent that the death of Hatfield might
 have been caused by accident or might have
5. **APPEAL AND
 ERROR:** harm-
 less error:
 jury negating
 fact on which
 refused instruc-
 tion is based.

been caused by disease or bodily infirmity, this would not make out a case of death through accidental means," within the meaning of the contract. In this we think the court did not err. The rule which counsel doubtless had in mind is one having its most important application to cases where there is no eyewitness of the death or injury complained of, and the truth must be arrived at by circumstantial evidence alone. The substance of the rule, so far as applicable here, was sufficiently embodied in the court's instructions upon the burden of proof and preponderance of evidence. But even if, as a technical proposition, the instruction was a proper one, its omission worked no prejudice to the appellant, because the jury, upon a question submitted at appellant's request, affirmatively found against the contention that deceased was afflicted with any disease contributing to his injury.

6. PLEADING :
amendments :
permissible in
order to cure
careless oversight.

V. The exception taken to the order of court permitting the plaintiff to amend the petition by alleging the renewal of the insurance at the end of the first year, cannot be sustained. The omission thus cured was clearly a mere oversight, though, perhaps, a careless one. Appellant's conduct, from the first presentation of the claim, was an implied admission that the contract of insurance was still in force at the date of Hatfield's death, and that its defense, if any, was based solely on the theory that his death occurred from other than an accidental cause. Its vigorous opposition to the allowance of the amendment was, of course, within its rights; but the court was too clearly within its discretion in overruling the objection to present any debatable question. That the ruling was also manifestly in the interest of justice and fair play is seen from the fact that, when resistance to the amendment was found unavailing, and appellant was re-

quired to produce its own records, the renewal of the insurance was admitted without contest.

7. TRIAL: instructions: cautionary: limiting purpose of testimony.

VI. Plaintiff put in evidence the correspondence between Mrs. Hatfield and the appellant, in which she asked to be furnished blanks to enable her to furnish formal proofs of the death of the insured, and appellant's refusal of her request, or to recognize any liability on account of such death. Among appellant's requests for instructions was one to the effect that such correspondence or proofs were not to be considered as evidence to establish the facts concerning Hatfield's death, but only as bearing upon the question as to whether the required proofs were furnished, as provided by the contract. The only professed purpose of the offer of this testimony was to show acts by the appellant constituting a waiver of the necessity of formal proofs, and we cannot assume that the jury would give to them any other effect. If the court were required to enumerate to the jury all the things which each item of evidence does not tend to prove, instructions would become endless. It may, and sometimes does, happen that certain testimony is of such character as may naturally be misapprehended by the jury, and accorded weight on questions to which it has no proper application, and in such case, a cautionary instruction as here asked would be entirely proper. Such instructions are, however, largely within the discretion of the court, and refusal thereof is not error.

8. TRIAL: instructions: province of jury: materiality of statements of hypothetical question.

Further exception is taken to the refusal of the court to charge with respect to the testimony of expert witnesses that, if the jury found that the hypothetical statements on which an expert opinion is based are, "in material and important particulars, incorrect, unfair, partial and untrue," then the answer given is entitled

to no consideration. The request embodies an erroneous proposition of law, in that it permits the jury to say what are and what are not the material and important features of the hypothesis embodied in any given interrogatory. *Ball v. Skinner*, 134 Iowa 298, 305. The request was properly refused.

VII. The contention that there was no proper waiver by appellant of formal proofs of loss is not sustained by the record. It is shown without dispute that, promptly upon the death of Hatfield, his wife, in person or by attorney, notified the appellant thereof, and repeatedly asked to be furnished with the necessary blanks for proof. Appellant then referred plaintiff to its examiner at Seattle. Applying then to the examiner for the blanks on at least two occasions, they were refused, and she was pointed to the result of the post mortem examination as the reason why the appellant declined to consider the question of its liability or to comply with her request. Under such circumstances, it evidences something of hardihood for appellant, when suit is brought upon the claim, to set up a failure to furnish formal proofs as a defense to plaintiff's right of recovery. No objection was ever raised on that score when payment was demanded, but, on the contrary, the refusal of the demand was placed solely on the ground that the autopsy disclosed that the death of the deceased was the result of natural causes, and not of accident. The showing of waiver was so clear and undisputed as to admit of no question. *Bloom v. State Ins. Co.*, 94 Iowa 359, 363; *Pray v. Life Ind. & Sec. Ins. Co.*, 104 Iowa 114, 118; *Stephenson v. Bankers Life Assn.*, 108 Iowa 637; *Keane v. Century Fire Ins. Co.*, 150 Iowa 658, 664.

VIII. Next to the argument that the verdict is not supported by the evidence, the assigned error most urgently pressed upon our attention relates to the overrul-

9. INSURANCE:
proof of loss:
waiver: evi-
dence.

10. NEW TRIAL:
newly discov-
ered evidence:
diligence.

ing of appellant's motion for a new trial. As we have before said, time seems to have been extended for such motion from the entry of judgment, on February 19, 1915, to March 6th following. The motion then filed was based entirely upon alleged errors of the trial court in its rulings and instructions, substantially such as we have already considered. On April 3d following, an amended motion was filed, setting up a new ground for a retrial of the case because of the claimed discovery that Maggie Bell, the maid living with the Hatfields at the time of the death of the insured, would testify to facts concerning the circumstances of the alleged injury differing very materially from the testimony given by the widow, and tending strongly to show that deceased was not injured in the manner or to the extent claimed, and that he died from disease. The affidavits in support of the motion were those of a Mr. Harsh, an examiner in the employ of the insurance companies interested in the defense, and another by one of defendant's counsel. The first affidavit states that, upon examining into the facts and circumstances of Hatfield's death, the examiner learned that Maggie Bell was an eyewitness of the facts in connection with the alleged accident, and that thereupon, he made an effort, by correspondence and by wire and by employing assistance, and later by making a personal trip from Des Moines to Oregon, to locate Maggie Bell, but was unable to do so until March 20, 1915, when, through persons at Portland, Oregon, he found that she was living at Marshfield in that state. Thereupon, through the assistance of others, a sworn statement by Miss Bell was procured. He further says that, when he personally visited Oregon, he applied to Mrs. Hatfield to ascertain where he could find the desired witness, but the widow professed not to know her residence or address. He then proceeds to state what the said Maggie Bell would have testified to, had she been a witness on the trial. Without

setting it out at length, it may be said that such evidence, if given, would have afforded material support to the theory of the defense. The affidavit of the attorney is to the effect that Mr. Harsh had been active in investigating the facts of the case for the use of the defense; that the affiant had frequent talks with Harsh concerning the whereabouts of Maggie Bell; and that he had at all times understood from Harsh that he had made diligent effort to find the said witness, but without avail until March 20, 1915; and that, until that time, he knew nothing of what such witness would testify to. He further says that he has read the original affidavit of Maggie Bell and the statements made in the affidavit by Harsh, and that he believes that, if Miss Bell were present as a witness, she would testify substantially as stated by Harsh.

In resistance to the motion for a new trial, the plaintiff presents the affidavits of Mrs. Hatfield, of two lawyers who represented her in Portland, and of one of her attorneys in charge of the litigation here. Mrs. Hatfield admits that Harsh called upon her, making inquiry generally into the circumstances of her husband's death, and, among other things, asked where Maggie Bell was to be found. In reply thereto, she told him that Maggie had gone to the home of her brother, in Norway, Oregon, but further told him she understood that the girl had left Norway, but affiant was in communication with her by letter and would soon know where she was; and if Harsh desired to know, she would then be glad to give her address. Soon thereafter, affiant did ascertain the address, but Harsh never inquired further, and, had he done so, she would have given him the information. The affidavits of the Portland attorneys state that Mr. Harsh called upon them, and that, in conversation with them, they, or one of them, informed him where Maggie Bell had gone. They further say that Harsh expressed his confidence that the companies had a

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perfect defense in the testimony of the medical experts, and said, in substance, that he did not care what Maggie Bell or Mrs. Hatfield might say, for he did not think plaintiff would ever get her case to the jury. The general effect of the affidavit of plaintiff's attorney at Des Moines is that he had several interviews with defendant's counsel, Mr. Sullivan, about taking depositions at Portland; that Mr. Sullivan expressed his purpose to rely wholly upon the expert testimony of the medical witnesses, at no time mentioning Maggie Bell, or any desire to obtain her presence or testimony. He further says that, pending the trial, when, upon an amendment to the petition, defendant had a right to a continuance, Mr. Sullivan refused to accept a continuance, but insisted that the trial go on to a finish. In rebuttal, the second affidavit of Harsh was submitted, denying the statements made by Mrs. Hatfield and her Portland attorneys.

In denying the motion thus made and resisted, we are very clear that the court did not abuse the discretion with which it is vested in such matters. In so far as the affidavits of Harsh and Sullivan tend to show diligence in ascertaining the location of Maggie Bell, or in obtaining her testimony upon the trial, such alleged facts are fairly put in issue by the affidavits filed in resistance, and the finding of the trial court thereon has the effect and conclusiveness of the verdict of a jury. It seems quite incredible, if the strong desire to obtain this testimony was not of later birth, that the location of the witness could not have been discovered during the nearly two years intervening between the death of Hatfield and the trial of the case. Indeed, it is much easier to infer that, as Maggie Bell was living in plaintiff's family at the time, and was one of the witnesses signing the proofs of Hatfield's death, the companies looked upon her as a witness who, if not hostile to them, would at least be friendly to the plaintiff.

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and were content to leave her undisturbed until the adverse result of the trial stimulated them to redoubled efforts. This thought is emphasized by the fact that appellant went to trial without application for time or motion for continuance to secure the attendance of such witness or to obtain her deposition. It is also a matter of some significance that, while the appellant claims to have possession of the affidavit or sworn statement of Maggie Bell, it was withheld from the court, and the statement of Mr. Harsh alone is relied upon for the matter which he hopes to prove by her. It is further to be said that the statements of Harsh, tending to show his diligence, are exceedingly indefinite and general, and, if we except his call upon Mrs. Hatfield, are made up of conclusions rather than of specific facts. There is no reversible error in the refusal of a new trial.

Finding no ground for disturbing the judgment appealed from, it is, therefore,—*Affirmed*.

GAYNOR, C. J., and PRESTON, J., concur.

EVANS, J., concurs in the result, but does not wish to be bound by the discussion as to the effect of requests for instructions or special findings upon the right of a party asking same to deny the sufficiency of the evidence.

W. H. HOOPES & SONS, Appellee, v. F. H. SIMPSON FRUIT COMPANY, Appellant.

SALES: Performance of Contract—Inspection Prior to Payment—

Assumption of Dominion over Property. Full inspection by vendee of property, prior to paying therefor, as contemplated by an executory contract of sale of property by description, followed by assumption of full dominion thereover by vendee, relieves the vendor of all responsibility as to the goodness, fitness, or quality of the property. So held in a sale of apples.

Appeal from Muscatine District Court.—M. F. DONEGAN, Judge.

SATURDAY, MARCH 17, 1917.

REHEARING DENIED TUESDAY, JUNE 26, 1917.

ACTION to recover damages for breach of both an express and implied warranty, growing out of the sale of three carloads of apples by defendant to plaintiff. Defendant denied the alleged warranties, pleaded that plaintiff accepted the apples after inspection, and waived any warranty thereof. It also pleaded that plaintiff took possession of the apples without paying for the same, and thereafter, and after notice or knowledge of their condition, paid for at least two of the cars, and waived whatever warranty may have been made thereof. It also alleged that plaintiff never in fact paid for the apples, and that it had no right to rescind the contract for the purchase thereof, or to recover damages on account of the sale. On these issues, the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

D. V. & R. S. Jackson, for appellant.

J. F. Devitt, for appellee.

SALES: performance of contract: inspection prior to payment: assumption of dominion over property.

DEEMER, J.—1. Plaintiff is a copartnership, engaged in buying, selling and shipping fruit and vegetables, with its home office at Muscatine, Iowa, and defendant is a corporation engaged in the same business at Flora, Illinois. On October 13th, 18th and 22d, plaintiff ordered of defendant three cars of apples, one to be shipped to Ironwood, Michigan, another to Plainview, Minnesota, and the third to What Cheer, Iowa. It is claimed that each and every car was warranted and represented to be No. 1. good, merchantable, sound stock.

and further that, as both parties understood that the apples were for consumption as food, and plaintiff had no opportunity to inspect the same, there was an implied warranty that the same, when delivered, should be fit for the purpose intended. It avers that the apples as shipped did not correspond with either the express or implied warranty; that they were decayed and wormy and not suitable for food. We understand that the plaintiff does not claim to have rescinded the sale, but its claim is for damages suffered by it due to defendant's breach of warranty. We shall notice the defenses as we proceed.

Defendant honored plaintiff's order, and shipped the goods to the points designated in the several orders. The goods were consigned to defendant's own order, and bills of lading for each car were issued to defendant's order, with the notation, "Notify W. H. Hoopes & Co." As plaintiff did its banking business at Muscatine, defendant drew its three drafts for the purchase price of the apples, attached bills of lading thereto, and forwarded them to the Muscatine State Bank for collection. Representing that it wished to inspect the apples before paying for them, plaintiff induced the bank, without the knowledge of defendant, to surrender the bills of lading to the plaintiff, but the drafts were not paid until afterward. The draft for the Ironwood car was paid November 14, 1914, and the drafts for the other two cars were paid on the day this action was commenced, when the amount thereof was turned over to the bank; but the bank was immediately garnished upon an attachment issued in this case, and defendant has never received the money. The first car was shipped to Ironwood, Michigan. The apples were there inspected by one Lobb, a local broker, acting for plaintiff, and sold and delivered to a customer at that point. As the customer claimed they were not as represented, they were finally sold to it at 90c per hundredweight, f. o. b.

Ironwood. Defendant received the following letter from the plaintiff with reference to this and other cars:

"Muscatine, Iowa, Oct. 31, 1914.

"F. H. Simpson Fruit Co., Flora Ill. Gentlemen: C. B. & Q. car No. 112863 was rejected at Ironwood, Mich., and we are having same sold on commission. Our people report very inferior stock with considerable rottage. We did not write you at the time of this rejection, thinking car would be better after they got into it.

"We yesterday received rejection on Illinois Central car 399984, and our customer sent us a sample of the apples by parcel post, which certainly are a bad lot. Our people at Darlington advised it would be hard to find a perfect apple in the whole car, and that nearly every apple is specked. Now we settled with our Sigourney people on car received there and took quite a loss, and our Sigourney customer was up to call on us, and told the writer that the car had a heavy shrinkage from rottage and specks. We expected a car of good orchard run apples, to be sound and free from rots.

"Car No. 6714 to Eyota, Minn., was rejected, and we sold same to Elkton, S. D., and don't know how we will come out on the new sale.

"These rejections from such widely separated parties would indicate that this stock must be very poor, and that rottage complained of by all parties must be in the car, and that your loaders have been running in some drops and rots, possibly in your absence, as we do not think you would countenance any such loading if you were present. We have asked our people to let us have full report on cars and will do what is right with them and will submit to you. We are working on a very close margin of 5c to 10c per cwt.

"Yours truly, W. H. Hoopes & Sons."

The car shipped to Eyota, Plainview, Minnesota, was

inspected by plaintiff's agent at that point, and, according to the letter, delivered to Elkton, South Dakota. This car was rejected by the buyer and abandoned to the railway company as worthless. The What Cheer car was resold to a man by the name of Reisman. On October 31, 1914, plaintiff notified defendant of the rejection of this car, and that it had adjusted the matter by allowing the purchaser a discount of 20c per hundred. The car shipped to Ironwood was paid for by plaintiff November 19, 1914. The agreed price for the car was as follows: \$168.88 for the What Cheer car; \$162.20 for the Plainview car; and \$172.99 for the Ironwood car. Plaintiff claims that the Plainview car was worthless, and that it received nothing therefor.

There was sufficient testimony to take the case to the jury on the proposition that defendant misrepresented the character of the apples, or that there was a breach of warranty made before the sale, and that plaintiff suffered some damage on account thereof. But it is argued, first, that the court erred in not permitting defendant to show how and for what purpose plaintiff got the bills of lading without paying the drafts attached. During the trial, defendant offered to show that the bills of lading were surrendered by the bank to the plaintiff for the purpose of making an inspection of the apples, and that, pursuant thereto, an inspection was made by plaintiff, or its agent, before any complaint was made. We think this testimony should have been received.

The testimony shows that the bills of lading were turned over by the bank so that the apples could be inspected, and that plaintiff then guaranteed payment of the drafts; but there is no definite showing that the apples were immediately inspected, and defendant was deprived of the right to show that they were immediately inspected. The record also shows that plaintiff did not pay for the goods until long after it knew they were not as represented.

The offered testimony would have tended to show that the sale was by description, and that the vendee was entitled to examine the goods before accepting them, and, upon such examination, to receive or reject the same. And if, upon mere view, it can be determined whether or not the goods were of the kind described, the acceptance thereof by the vendee, or the disposition of the same as his own, amounts to a waiver of the defects, and he cannot be heard to complain.

We understand the law to be well settled that, when goods are tendered by the seller in performance of an executory contract of sale, and accepted by the buyer after opportunity of inspection, without objection, the purchaser is liable for the price agreed upon, unless there be warranty intended to survive the acceptance. *Allison v. Vaughan*, 40 Iowa 421; *Hirshhorn v. Stewart*, 49 Iowa 418; *Mackey v. Swartz*, 60 Iowa 710.

The same doctrine applies where there is a breach of an implied warranty. See *Berthold v. Seever's Mfg. Co.*, 89 Iowa 506. Of course, there may be a warranty which will survive the sale, and which may be enforced after delivery and acceptance of the property. But this usually applies to property subject to inspection, or definitely ascertained property which is the subject of sale.

Here there were no words of warranty, and no particular apples were the subject of a sale. Any which would answer the description could have been furnished by the seller, and plaintiff was not bound to accept any which were tendered him in performance of the agreement unless they complied with the description given of the apples. *Davidson v. Smith*, 143 Iowa 124, involved a specific car of melons to be delivered to the buyer at Des Moines for shipment to Webster City. No right of inspection was involved in that case, and the sale was treated as an executed one on delivery of the property to the carrier. In most of the

cases relied upon in support of a contrary rule, the purchase price was paid before inspection, or it was not paid at all. Here it was paid after full inspection and knowledge of the defects in the goods. Thinking that it had the right to, and that it was its duty to inspect, according to the offered testimony, it secured the bills of lading, made an inspection, and then, without giving any notice of its intended action to the defendant, handled the goods as its own; and, under the authorities, this relieved the seller from all responsibility as to the goodness, fitness or quality of the property. See cases hitherto cited, and *Allison v. Vaughan*, 40 Iowa 421; *Electric S. B. Co. v. Waterloo, C. F. & N. R. Co.*, 138 Iowa 369; *Minneapolis Selling Co. v. Cowin & Co.*, 153 Iowa 129. The last cited case goes over the ground quite thoroughly, and points out the distinction between this line of cases and *Upton Mfg. Co. v. Huiske*, 69 Iowa 557, and *Aultman v. Theirer*, 34 Iowa 272.

II. Defendant asked instructions along the lines heretofore suggested, which the court refused to give, and also excepted to the instructions because this issue was not submitted to the jury. While the testimony, by reason of the court's rulings, was not strong on this point, we think there was error both in the giving and in the refusal to give the instructions referred to.

III. Some reference is made to the fact that the trial court submitted the case as if there were both an express and an implied warranty, and that this was error. We find no exceptions which properly raise this question, and need give it no further attention than to say that the so-called implied warranty was stated to be practically the same as the express one, so that no prejudice resulted to defendant in any event. Some confusion is found in the argument in the use of terms. It is suggested that an express warranty necessarily means a written one. Of course, this is not true. An express contract of any kind may be

either oral or in writing. An implied one is never in writing, but grows out of the nature of the transaction.

Other matters need not be noticed, as they are not likely to arise on a retrial. For the errors pointed out, the judgment must be, and it is,—*Reversed*.

The foregoing opinion was prepared by Justice Deemer, now deceased, and is adopted as the opinion of the court.

GAYNOR, C. J., LADD, EVANS and PRESTON, JJ., concur.

ARNOLD LIDDLE et al., Appellees, v. MAUD E. SALTER et al.,
Appellants.

WILLS: Validity—Undue Influence—Evidence. Direct evidence
1 of undue influence is not necessary. The condition of decedent's mind, the inequalities of the will, the lack of obligation of deceased to the principal devisee, the former strained relations between the testator and devisee, the precipitate way in which the devisee secured control of testator's property, and other like and attending circumstances, may amply present a jury question on the issue of undue influence.

WILLS: Validity—Undue Influence—Fiduciary Relations. Principle
2 recognized that a presumption of undue influence does not arise from the fact that testator and devisee occupied fiduciary relations.

WILLS: Testamentary Capacity—Evidence—Non-Expert Opinion—
3 **Trivial Facts.** Non-expert opinions as to the sanity of testator, though in part based on apparently trivial circumstances, may be sufficient to create a jury question on the issue of mental competency when aided by the fact that testatrix was feeble, was an epileptic, was afflicted with hysteria, and had, by her conduct, manifested inability to keep control of her property.

WILLS: Testamentary Capacity—Non-Expert Opinions—Detail of
4 **Facts.** Evidence revealing a series of acts by testatrix, some apparently trivial and others concededly out of the ordinary, reviewed, and held to afford proper basis for non-expert opinions on the issue of insanity.

APPEAL AND ERROR: Assignment of Error—Sufficiency. An as-
5 signment of error which, if considered, would force the court to

wander aimlessly through the record in quest of errors, will be wholly disregarded. So held where the assignment was: "The court erred in admitting certain evidence offered by contestants and objected to by proponents as shown by the official reporter's notes."

**WILLS: Validity—Undue Influence—Evidence—Acts and State-
6 ments by One of Several devisees.** Statements made and things done in the presence of a deceased testator, prior to the execution of a will or shortly thereafter, by one who was a devisee under the will, and who was accused of having exercised undue influence over testator in the execution of testator's will, and tending to show dominance over testator or a desire to persuade testator with reference to the disposition of his property, is admissible even though the one making the statements or doing the things is only one of several devisees under the will.

**WITNESSES: Competency—Transaction with Deceased—Showing
7 of Non-Participation by Witness.** Conceding, *arguendo*, that, when an interested witness, within Section 4604, Code, 1897, is asked to detail a conversation had in the presence of a deceased, it should be first affirmatively shown that the witness did not participate in the conversation, yet permitting an answer without such showing is non-prejudicial when the answer revealed the fact that the witness did not participate.

**APPEAL AND ERROR: Harmless Error—Improper Exclusion of
8 Evidence—Subsequent Reception.** Improper rejection of evidence followed by the subsequent reception of substantially the same evidence renders the former error harmless. So held as to the rejection of evidence bearing on the mental competency of a testatrix.

**WILLS: Validity—Undue Influence—Instructions—Confusing Con-
9 trolling and Non-controlling Elements.** Instructions on an issue of undue influence which so confuse controlling and non-controlling elements as to render the instructions misleading and difficult of analysis, are wholly bad, and constitute error.

**APPEAL AND ERROR: Harmless Error—Wills—Misleading In-
10 struction—Affirmative Finding on Issues—Effect.** An affirmative finding by a jury, under adequate evidence, that a will was the product of both mental incompetency and undue influence, may render confusing and misleading instructions harmless on such issue.

TRIAL: Verdict—Special Interrogatories—Non Submission to Counsel—Effect. Special interrogatories properly submitted to the jury by the court on its own motion need not be first submitted to counsel for one of the parties even though counsel for the other party had asked submission of *substantially* the same interrogatories as given by the court. (Section 3727, Code, 1897.)

Appeal from Black Hawk District Court.—C. W. MULLAN, Judge.

TUESDAY, JUNE 26, 1917.

SARAH C. Gracely died testate August 20, 1914. The admission of her will to probate was contested and it set aside. The proponents appeal.—*Affirmed.*

M. J. Butterfield and Mears & Lovejoy, for appellants.

Sager, Sweet & Edwards, for appellees.

LADD, J.—Charles Gracely died January 3, 1914, leaving no issue, but leaving property valued at less than \$7,500. This descended to his wife, Sarah C. Gracely, who died August 20th of the same year. She left personal property and realty, the latter estimated at \$22,000, and in her will devised her home, valued at \$6,000, to Maude E. Salter, an insurance policy on her life to her brother, Arnold Liddle, and directed that her executor reduce all other property to money and, after discharging debts, pay the First Church of Christ in Waterloo \$300, Vance and Myrtle Salter, children of Maude E. Salter, \$200 each, and directed that the residue be divided so as to give a sister of her husband's one third, a sister one third, and one ninth each to a nephew and two nieces of her deceased husband's. Maude E. Salter was designated as executrix. Upon the filing of this will, a brother, sister, and son of a deceased sister's filed objections to its admission to probate on the grounds that the testatrix was of unsound mind at the time of signing the will, and that it was procured through the un-

due influence of Mrs. Salter and her children. Exceptions are taken to 22 rulings on the admissibility of evidence, 2 instructions, the giving of 2 special interrogatories, and overruling a motion to direct a verdict for proponents.

1. **WILLS: validity: undue influence: evidence.** 1. The sufficiency of the evidence to sustain the verdict may as well be disposed of at the outset, and first as to the evidence of undue influence. The record is without direct evidence, as is usual in such cases, but the circumstances were such as to rightly carry this issue to the jury.

Decedent and her husband were without issue, their only child having died in infancy. Besides a brother and sister, mentioned in the will, the son of a deceased sister survived testatrix. Immediately after the death of her husband, her brother insisted that she take up her residence with him, but she could not leave the old home. She invited Mrs. Breynan to live with her, but the latter declined, owing to then having a broken arm. Miss Steinel came from Mrs. Salter's to stay with her a short time. On January 16th, less than two weeks after her husband's death, P. C. Ritz, an attorney, an acquaintance of Mrs. Salter's, was invited by telephone to call at her house. As decedent did not know him, it is fairly to be inferred that the message was from Mrs. Salter. After some talk, decedent directed Ritz to prepare a power of attorney, which he did, and she executed it three days later. It conferred upon Mrs. Salter power:

"(1) To execute to other persons leases on any and all my real properties, which I may from time to time offer for rent.

"(2) To ask, demand, sue for, collect and receive money and personal property for rents now due or which may become due on all leases oral and written, on all my

real property, given by me or my duly appointed agent to other persons.

"(3) To order, purchase and contract for such materials and labor as shall be necessary to make all necessary repairs and improvements on any or all of my real and personal property.

"(4) To guard and protect my interests in any and all of my property, both real and personal.

"(5) To sign checks on my deposits in the Security Savings Bank of Waterloo, Iowa, as follows: 'Mrs. Sarah C. Gracely by Mrs. Maude E. Salter, her Agent,' for amounts due from me for taxes and insurance on my real and personal property, for amounts due on account of repairs and improvements to my real and personal property, for amounts due on account of groceries, meats, clothing and all other necessities ordered by me.

"(6) It shall be the duty of Mrs. Maude E. Salter to deposit in my name all sums of money due me and belonging to me and collected by her from rents and otherwise, in the Security Savings Bank of Waterloo, Iowa. It shall be her further duty to keep all money belonging to me entirely separate from her own money. She must keep and render account of money and personal property received and paid out by her on my account and render an account to me when required. It shall be the further duty of this my agent to keep me posted as to all matters touching upon the premises, giving and granting unto my said attorney full power and authority to do and perform each and every act and thing whatsoever required and necessary to be done in and to the premises as fully as I might do or act, if personally present, reserving the right to revoke this power at my pleasure; and I hereby ratify and confirm all that my said attorney may legally do in the said premises by virtue hereof."

The record does not indicate whether Mrs. Salter had

had business experience to commend the reposing of such confidence. Certainly their previous relations furnish no explanation of what was done. It appears that decedent had been jealous of Mrs. Salter prior to the death of Gracely, at one time directing when he was sick that she be locked out of the house, remarking that all she wanted was "to come and rub Charles' leg for him." In view of this situation, it is hardly to be supposed that decedent, without the exercise of considerable influence, would have placed all her property in Mrs. Salter's control. But the control of the property did not suffice; and in February following, Ritz, as is testified by him, negotiated in decedent's behalf with Mrs. Salter, and, in pursuance of an understanding reached, prepared a lease for decedent's home for one year at a rental of \$30 per month, and also a contract, by the terms of which Mrs. Salter was to give decedent the use of a room therein, the freedom of the premises, care and board and services under the power of an attorney, and in consideration thereof decedent was to pay her \$75 per month. It should be added that Mrs. Salter had previously talked the matter over with decedent. These contracts were signed March 6th, and Mrs. Salter took possession on March 26th. On May 8th, a new lease and a new contract for board and care for a period of five years, though not to extend after the death of either party, were executed. But previous to this, on April 17th, care of property and person had culminated in the execution of the will in controversy. It also was prepared by the attorney selected by Mrs. Salter for the decedent, and he appears to have rewarded one of those witnessing the signing of the will by paying him \$10, and the other, \$5. Calls of the neighbors on Mrs. Gracely became less frequent. There was evidence that, upon leaving the house on several occasions, Mrs. Salter locked decedent in. The record also contains evidence of declarations of Mrs. Sal-

ter's. Mrs. Breynan testified to a conversation with Mrs. Salter, in which she was asked:

"Was there anything said at that time by Mrs. Salter in the presence of Mrs. Gracely about making a will? A. Yes, sir. Q. Go ahead and tell the jury what was said. A. Mrs. Salter said she advised her to make a will, and when she made one, to make it ironclad, and if she had three witnesses, it couldn't be broken. Q. Do you remember any other conversation at that time, in presence of Mrs. Gracely? A. Mrs. Salter told Mrs. Gracely that Mr. Gracely told her that, if he should die first, he would like to come back in a few days and see how Mrs. Gracely's relatives were scrapping for her money trying to get it away from her."

This might well have been construed not only as advising the execution of a will, but as said with the design of prejudicing decedent against her relatives. Again, Mrs. Roebuck testified that she once remarked, "Mrs. Salter, it was very nice of you to go over and take care of Mrs. Gracely," to which the latter responded, "If there hadn't been something in it for me, I never would have come." This answer may have referred to the mere matter of compensation agreed upon, or, in view of the liberal remembrance in the will, to what she expected from other sources, and was for the jury's consideration. The threat of Ritz to keep decedent's brother from the premises by writ of injunction, with Mrs. Salter and decedent standing by without objection, and his services on the several occasions in preparing, if not assisting in procuring, the several instruments, were proper for the jury to consider on the issue of undue influence. In connection with these matters, the condition of decedent's mind is to be considered; also the inequalities of the will, as later discussed, the obligations or lack thereof of decedent to Mrs. Salter, their former relations, the rapidity with which Mrs. Salter acquired con-

trol of decedent's property, the manner of accomplishing this, the care of her person, and the execution of the will with large devise to Mrs. Salter. No little difficulty would be experienced in explaining the course of events on any rational theory other than that Mrs. Salter exercised a dominant influence over decedent from the first. That a

2. WILLS: valid-
ity: undue in-
fluence: fiduci-
ary relations.

fiduciary relation existed between testatrix and the beneficiary did not raise a presumption of undue influence. A statement to the contrary found in *Cash v. Dennis*, 159

Iowa 18, is inaccurate, and may be withdrawn from the opinion without changing the result. Something more is essential to justify that opinion, such as participation in fixing the terms of or drawing the will, and the bestowal therein of something more than a mere remembrance. *Graham v. Courtright*, 180 Iowa 394.

But the relationship of the parties is appropriate for consideration, and that Mrs. Salter had control of decedent's person and property, and that she was in feeble health, with mind impaired, indicated that she was peculiarly susceptible to such influences as might have produced the various instruments mentioned. She was paying for what she received, and as the record is without reasonable explanation of her generosity toward Mrs. Salter and her children, their relationship was a strong circumstance against the voluntary execution of the will. We are of opinion that the evidence as a whole was such as to have justified the submission of the issue of undue influence to the jury.

3. WILLS: testa-
mentary ca-
pacity: evi-
dence: non-
expert opinion:
trivial facts.

II. We next inquire whether there was enough evidence of mental unsoundness to warrant the submission of that issue to the jury. The fact that she turned her

business matters over to Mrs. Salter less than a month after her husband's death is indicative of distrust of her

own competency. The terms of the will also were to be taken into account in connection with other evidence. Her brother, Arnold Liddle, had lost a leg, and was compelled to earn his living, and yet he was given only an insurance policy of \$2,000, payable in installments, of which the record contains no other particulars. Her only sister was remembered to the extent of a third of the residue of the estate, which would be less than the value of the homestead devised to Mrs. Salter, a stranger in blood. That she had a tender affection for this sister and brother was established beyond question.

Counsel for appellants argue that it was but natural that she should have remembered Mrs. Salter thus liberally. Mrs. Salter was being adequately compensated for care and board, and it does not appear that anything else was owing her. Though they had been acquainted for some time, no special intimacy appears to have existed between them. Nor does any reason appear of record why she should have forgotten her own nephew and bestowed gifts on Mrs. Salter's children. The evidence tended to show that the decedent was an epileptic and was afflicted with hysteria. Dr. Porterfield testified to having called during Gracely's lifetime to rent the premises where decedent and her husband lived, and that he went again to measure the rooms for carpets; that decedent started to show him the house, when she began to cry, and said she had lived there for a long time and did not want to be turned out of her house; that thereupon he withdrew; that afterwards, Gracely told him his wife was reconciled, and he called a third time, and when he began measuring the rooms, she had "an emotional spell," and he decided not to disturb her peace of mind; that "she was a rather slender woman, medium size," and "seemed to have a shrinking, backward disposition, extremely nervous, impressionable. She gave me the general impression that she was the sort of woman

without much force, mental force of character," that, "when she had her emotional spell, she wrung her hands and seemed to take the position that I was one of the prime movers in a plot to take her house out from under her.

* * * I made up my mind that Mrs. Gracely was a very pronounced hysteric. * * * A person suffering from hysteria is easily influenced and likely to act upon suggestion." The doctors, with the information possessed, declined to express an opinion as to whether she was of sound mind. Several witnesses described the spells or fits of decedent and testified that she had suffered from them many years. The doctors agreed that, while hysteria is a disease

of the nerves, epilepsy is a disease of the brain, and being afflicted with either did
4. WILLS: testam-
mentary ca-
pacity: non-
expert opinions:
detail of facts. not necessarily indicate inability to trans-
act business. But these facts were proper

to be taken into account by the jury in connection with the evidence of many witnesses who recited incidents and expressed the opinion that she was not of sound mind. Most of the witnesses had been acquainted with decedent for many years, and in this respect differed from those called by the defendant, a few of whom only had enjoyed a long or intimate acquaintance with her. Mr. and Mrs. Roebuck had resided across the street from the Gracelys for 23 years and had seen her practically every day. Mrs. Breynan had known her 33 years, and frequently visited her, and was employed frequently in the home during the last 14 years of decedent's life. Mrs. Digman had known her for 30 years, residing near and visiting her frequently. Mrs. Schenk had known her over 20 years. Miss Gale had met her 20 years prior to her death and had been intimately acquainted with her during the 5 or 6 years prior to the fall of 1913, having a room in her home and assisting and caring for her when not away engaged in nursing. Mrs. Marsh had worked for her 4 months, from about the 1st of October,

1913. These and others were shown to have known her intimately, and, after having recited incidents somewhat out of the ordinary, expressed the opinion that she was of unsound mind. Counsel for appellants contend, however, that the incidents related were of a trivial character, attributable to her afflictions and disabilities, and not such as warranted the opinions given. As a basis for these opinions, there was evidence tending to show that decedent in early life had been engaged in the millinery business and had possessed some business ability; that she had been a good housekeeper, and was interested in her personal appearance and manner of dressing; that, as the years went by, she suffered with epileptic fits; that she became slovenly in her dress; that, after these spells or fits, she would be weaker, and sometimes her mind would be inactive for several days; that she was afflicted with rheumatism so that she could not well dress herself or comb her hair, being unable to lift her hand up to her head; that she was somewhat deaf, and that her vision had become defective so that she couldn't see far; that she would stand out in the yard gazing all around as if looking for something; would wipe her hand over her eyes as if to brush something away; that she was found eating potatoes in the dark in her kitchen, and said in explanation that she did not have a light because she wanted to save the expense to her heirs; that she lay out in the damp grass one morning, it having rained the night before, and, when spoken to, said she was happy because of having such good tenants in her flat; that she would frequently pull the buggy out of the barn and sometimes into the yard and wash it, though it was clean; that she would get angry and go out and try to spade the garden or rake the yard; that she would undertake to chase children away, at one time attempting to pull up a section of the cement walk to throw at them; would become violently angry, and at one time attempted

to strike her husband with a chair, and at another threw a knife across the table at him; would wander about the house at night during a storm, and follow her husband for fear he would be struck by lightning and be killed, for that she wanted to be killed at the same time; that she would throw pillows on the floor and then pick them up and pat them so as to make them soft; that she couldn't carry on a connected conversation; that her eyes had a vacant look, and that she couldn't remember well; had an employee sing her to sleep and sit by her couch while she slept; that she would take a bowl of gravy from the table and eat it without anything else; would have crying spells and refuse to tell what she was crying about; was very forgetful in the matter of cooking; would insist upon her husband's letting her have money although she did not need it, and then would hide it in different places, as in the cupboard, under a rug, in the closet, in bed, in old shoes, and would then forget what she had done with it and have another help her find the different sums; that she would turn water on in the bath room and forget about it until it overflowed; that she doubled her fists and threatened to smash an employee's face; that she insisted that a certain picture was before her on the wall when it was not; and that she became angry at a neighbor and threatened to whip her with a horse whip; and possibly some other similar incidents. Some of these items are trivial, and others are explained so as to be consistent with rational conduct, if the explanation were accepted. Other incidents were so out of the ordinary as to indicate an unbalanced mind. She lived in a narrow sphere. The things she dealt with were not of much general importance. She was, and for years had been, in feeble health. Though the incidents related may have appeared trivial to some, the small things made up her life, and these, though trivial relatively, in the course of such a life may well be regarded as of enough significance to have fur-

nished basis for the opinions expressed. It is not necessary to pick out those which are unusual or out of the ordinary. Enough were recited to warrant taking the opinions.

It may be that, standing alone, the opinions in connection with the recitals would hardly carry the case to the jury, but, when considered in connection with her act in turning all her property over to the management of Mrs. Salter within a month after the death of her husband, and a month and a half later renting her home to the same person, and arranging for her care and board with her for one year and later for five years, and another month later executing the will with the provisions as stated, and all this when but 56 years old, we are inclined to think a case was made out for the jury. It is exceedingly difficult to ascertain with any degree of certainty the condition of the human mind at a specified time, and we are not called upon to do so. All required is that we say whether there was such a showing as to carry the issue of mental soundness to the jury, and, having done so, it is unnecessary to review the evidence adduced by proponents or express our view as to the merits of the case.

III. The appeal was not perfected

5. **APPEAL AND
ERROR: assign-
ment of error:
sufficiency.**

within six months after the entry of judgment, but within that time from the entry of the order overruling the motion for new trial. Several of the rulings challenged by assignments of error are not touched in the motion for new trial, save generally, as: "The court erred in admitting certain evidence offered by contestants and objected to by proponents as shown by the official reporter's notes" and "in refusing to admit certain evidence offered by proponents and objected to by contestants as shown by the official reporter's notes." Neither of these grounds challenged any particular ruling, and the trial court was not required to search the rec-

ord and examine every ruling coming within the classification made. If such generality is to be indulged, the motion might as well be because of errors in all rulings on the trial. The particular ruling complained of should be pointed out as nearly as may be, and when rulings are grouped and objections made to all in a bunch as here, they are to be ignored as not constituting an "error of law occurring at the trial." See Par. 8, Sec. 3755, Code. As the trial court could not well have reviewed the recited rulings, included in the grounds of the motion for new trial, we may not do so on appeal. *Mueller Lumber Co. v. McCaffrey*, 141 Iowa 730; *Powers v. Des Moines City R. Co.*, 143 Iowa 430.

IV. Many of the objections to testimony adduced were on the ground that it was of declarations by devisee, Mrs. Salter, and decisions are relied on, such as *James v. Fairall*, 154 Iowa 252; *Lawless v. Lawless*, 156 Iowa 184; *Fothergill v. Fothergill*, 129 Iowa 93; *In re Ames' Will*, 51 Iowa 596. But these are not controlling, and the objections were rightly overruled, for the reason that such testimony was of what happened in presence of the testatrix, bearing more or less on the relations between the party alleged to have exercised undue influence and the testatrix. How better or more directly establish the fact alleged? If Mrs. Salter did anything for or said anything in the presence of decedent prior to the execution of the will or shortly thereafter, tending to show her dominance over decedent, or to persuade decedent with reference to the disposition of her property, surely evidence thereof was admissible as bearing directly on the issue of undue influence, and not merely of declarations or admissions of a devisee. Counsel for appellants assert that the presence or absence of decedent is immaterial, and it may be conceded that the exertion of undue influence

6. WILLS: validity: undue influence: evidence: acts and statements by one of several devisees.

may and sometimes does occur when the perpetrator and the victim are widely separated. This is not necessarily so, and ordinarily they are in personal touch, and direct proof of what the former does or says to or in the presence of the latter is received as evidence bearing directly on the issue.

7. WITNESSES : competency : transaction with decedent : showing of non-participation by witness.

V. Arnold Liddle, brother of decedent, after testifying that he visited decedent after her husband's death, that he met Mrs. Salter and Ritz, the attorney who subsequently prepared the will, there, was asked this question, "Without relating any transaction between yourself and your sister, tell what was said either by Mrs. Salter or Mr. Ritz or yourself." This was objected to as incompetent under Section 4604 of the Code, it not appearing that the witness did not participate in the conversation, and as calling for declaration on the part of one legatee or devisee not binding on the other beneficiaries of the will. The objection was overruled, and the witness answered :

"When I went into the house, Ritz was standing beside my sister, and Mrs. Salter was standing close by, too, and he says to my sister, 'Mrs. Gracely, we will take care of you, and if they do not keep away from here and from bothering you, I will serve an injunction against him. I guess that will keep him away.' Mr. Ritz said that to Mrs. Gracely. Mr. Ritz was standing close to her, patting her on the back. I think that was in June."

Conceding that the objection might well have been sustained because of there having been no showing that the witness had not participated in the conversation, the answer disclosed that all said was to the testatrix by one not a beneficiary under the will. It appearing that the witness did not participate, this portion of the objection was obviated by the answer. The ruling, then, was without prej-

ndice. As Ritz was addressing testatrix, he could not well have been speaking for her, unless impliedly, for the edification of her brother. If so, then the evidence tended to prove her feeling toward him so short a time after the execution of the will that it was admissible. Other rulings either are covered by what has been said or were such as that they could not have influenced the result.

8. APPEAL AND
ERROR: harm-
less error: im-
proper exclu-
sion of evi-
dence: subse-
quent reception.

VI. J. S. Leeper, in the forepart of February, 1914, took decedent's acknowledgment, and heard her discuss an affidavit with Ritz, being present 10 or 15 minutes, and on April 17th following, he and Dr. Allen were called by Ritz to witness the will. He related what happened on each visit, and, in response to an interrogatory, expressed the opinion that she was of sound mind.

"Q. What would you say as to her being capable of transacting ordinary business and intelligently disposing of her property on April 17, 1914? A. I think she was capable of transacting ordinary business and of disposing of her property as she saw fit."

This answer was stricken as incompetent and immaterial. This was error. *Glass v. Glass*, 127 Iowa 646; *State v. McGruder*, 125 Iowa 741. But the ruling could not have been prejudicial, for on cross-examination he testified that "there was absolutely nothing at the time the will was signed to lead one to suspicion that there was anything at all wrong with Mrs. Gracely. * * * I have all the evidence I need to have a fixed and positive opinion that she was of perfectly sound mind at that time. She seemed to be keen and bright and about the same as anybody of that age would be." Surely, this covered the answer stricken, and no disadvantage could have resulted from the erroneous ruling.

VII. The second instruction finds approval in *Barry v. Walker*, 152 Iowa 154, and cases cited. Another may be set out. The court instructed that:

9. WILLS: validity: undue influence: instructions: confusing, controlling and non-controlling elements.

"Upon the question whether the instrument which purports to be the will of Sarah C. Gracely was obtained or procured through undue influence exerted upon her by Maude E. Salter, you are further instructed that, if a testator is of impaired mind and memory, then, although he may not have legally been incompetent to make a will, yet a will made by such a person ought not to be sustained unless it appears that the disposition of his property has been fairly made, and to have emanated from a free will of the testator, without the interposition of others, and according to the intentions previously expressed or implied from family relations. In this case, if you find from the evidence that the mind and memory of Mrs. Gracely was impaired, then, although you may find that she had sufficient mental capacity legally to make a will, yet, if you find that a disposition of her property has been made, by the instrument which purports to be her will, that is unfair to her legal representatives, and that such disposition did not emanate from a free will of the testatrix, and that it is not in accord with her previous intentions, either express or implied, from family relations, you will be justified in finding that such instrument is not the voluntary and free will of the testatrix, and that it was obtained by undue influence."

A somewhat similar instruction was approved in *In Re Will of Ames*, 51 Iowa 596, condemned in *Webber v. Sullivan*, 58 Iowa 260, and said not to have been erroneous in *Cash v. Dennis*, 159 Iowa 18.

It is confusing and difficult of analysis and not consistent with an accurate statement of the law applicable. No one will pretend that evidence of impairment of intel-

lect is not admissible as bearing on the issue of undue influence, for an impaired intellect is ordinarily more susceptible to influences exerted thereon than a normal one. The will may be valid even though the disposition of the property be unfairly made, or with the interposition of others, or not in accord with previously expressed or implied intentions of the testator. These matters or their converse may be shown, for they have more or less bearing on the issue of undue influence, but seldom, if ever, are essential to a finding either way on that issue. If the jury's attention is to be directed to these matters, let them be enumerated, and the jury told to take into consideration the conditions of the will, whether equitable or otherwise, the condition of testator's intellect, whether impaired or otherwise, any evidence bearing on the intentions of the testator previously entertained, and from these considerations, in connection with all other evidence, to say whether the testament was the product of undue influence, as defined, or the voluntary act of the testator. In other words, it is preferable that the ultimate issue be not confused or incumbered by the exaction of unnecessary findings in connection therewith. The instruction is disapproved, and should not be given in any case. True, it was copied in substance from a case holding that it was not open to the criticism then made, but that was not saying that it was without defect. It is not safe to instruct in the language of opinions nor to adopt instructions appearing therein, for opinions are written with reference to particular exceptions to rulings and instructions, and approved only with reference to the exception urged.

10. **APPEAL AND ERROR:** harmless error: wills' misleading instruction: affirmative finding on issues: effect.

In view of the fact of there having been affirmative answers to two special interrogatories, finding testatrix to have been of unsound mind, as well as that the will was the product of undue influence, we are of the opinion that there was no prejudice.

This is put on the ground, however, that there was sufficient evidence to carry both issues to the jury, as there was. See *In re Estate of Betts*, 113 Iowa 111; *In re Estate of Selleck*, 125 Iowa 678; *In re Estate of Wiltsey*, 135 Iowa 430; *In re Van Houten*, 147 Iowa 729. Though, where the evidence has been held insufficient to support one of the special affirmative findings of undue influence and mental incapacity, some of the above decisions seem to regard the submission of such issue as without prejudice. It is much to be preferred, however, that an issue unsupported by sufficient evidence be withdrawn, as is exacted in other cases, and a finding be not exacted thereon. The point, however, is not involved in this case, as there was sufficient evidence to carry both issues to the jury, and we are content in declaring that there was no prejudice.

IX. Through oversight, special interrogatories asked by contestants were not submitted to counsel before the commencement of argument to the jury. These were not given, but others, in different phraseology, but in substance the same, were submitted to the jury. These and the answers of the jury were:

11. TRIAL: verdict special interrogatories: non-submission to counsel: effect.

"Did Sarah C. Gracely possess testamentary capacity, on the 17th day of April, 1914, and at the time she executed the instrument which purports to be her last will? A. No. Q. Was the devise of what is known as the Gracely home on East First Street, in Waterloo, Iowa, to Maude E. Salter, procured by undue influence exerted by the said Maude E. Salter upon the mind of Sarah C. Gracely, at the time of the execution of the instrument which purports to be the will of the said Sarah C. Gracely? A. Yes."

Assignments of error are predicated on the failure to submit to opposite counsel before argument. The interrogatories submit the two issues in the case. Independent of any request, they were such as the court might well have

submitted without suggestion from either side, and as the court so did, it was not necessary to exhibit them to counsel. *Clark v. Ralls*, 71 Iowa 189; *Briggs v. McEwen*, 77 Iowa 303, 305; *Miles v. Schunk*, 139 Iowa 563. See Code Section 3727. That other similar interrogatories were requested can make no difference, for they were not submitted. That those submitted to the jury were suggested by the ones requested cannot obviate the rule, unless, at least, prejudice appears. There could not have been any here, for the two issues, either one of which, if established, would control the verdict, were submitted. The order of court denying the probate of the will is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

EMMA J. MARTIN, Appellant, v. FARMERS LOAN & TRUST
COMPANY, Appellee.

DESCENT AND DISTRIBUTION: Surviving Husband or Wife—Dower—Waiver by Division of Property—Estoppel. A fair, equitable and executed agreement between husband and wife, preceding a marital separation, for a complete division of property, in such manner as to free the portion of each spouse from all possible dower right of the other, and, therefore, to enable each spouse to thereafter individually handle and dispose of his or her respective portion without regard to the other spouse, estops both parties, immediately upon the execution of such agreement, from thereafter enforcing a claim for dower in the property of the one first deceased. In such case, nothing appearing to indicate a change of purpose, no act of either, subsequent to the execution of the agreement, can work a re-investing of dower right in the other. Sec. 3154, Code, 1897.

PRINCIPLE APPLIED: Just preceding the marital separation of a wife, who was in poor health, and her husband, who was 74 years of age and quite feeble, they determined on a division of their accumulated property, which consisted of 160 acres of land, in the husband's name, and some personal property. The wife was the husband's second wife. The husband had children by both his wives. Both parties sought, by the division of property, to so divide that the portion of each would be

absolutely freed from all future possible dower claims of the other.

To accomplish this division, they *jointly* conveyed the land to a trust company, by two separate deeds covering separate 80-acre tracts. In these deeds, the wife released all "dower, homestead or distributive share." The trust company, in writing, acknowledged that it held one specified 80 solely for the wife and the other solely for the husband, and agreed to handle and dispose of the wife's 80 as she might direct, and the husband's 80 as he might direct. The wife also received, at a nominal rental, a year's lease of the husband's 80, and, later, received all the personal property possessed by the parties. The parties were in debt, and each obtained a loan, secured the same on their respective 80's, and delivered the amount to the trust company, which agreed to pay the debts and divide the surplus equally between the husband and wife. The wife, a few days later, became dissatisfied with the arrangement by which the trust company was to hold her 80, and the deed of her 80 to the bank was cancelled, and a deed to the wife's 80 was made directly to the wife's son. This conveyance was manifestly for the sole benefit of the wife. Two insurance policies existed on the life of the husband. It was arranged, some days after the deeds to the trust company were executed, that one policy should pass to the wife and one to the husband's estate; but, before the wife would agree to the latter, she made further demands to the effect that the husband, at his death, should leave \$1,000 to her own children. The husband acceded to this.

Two weeks after the said deeds were executed, the husband and the trust company, without the wife's being in any manner a party thereto, entered into an agreement by which the trust company agreed: (a) To pay to the husband the net income of his 80; (b) to sell the property if the income was not sufficient to care for the husband; (c) to keep the balance, in case of sale, on interest; and, (d) after the husband's death, and the payment of the funeral expenses, and a reasonable compensation to the trustee, to pay \$1,000 to the wife's children, and the balance to the husband's children by his first wife.

The value of the respective portions received by each does not appear, but the division was concededly fair to the wife and free of any fraud.

Neither party thereafter did anything to undo the division. The husband died some three months later. The wife then claimed dower in the husband's 80.

Held, (a) she was estopped, *when the deeds were executed*, to assert such claim; and (b) neither the acknowledgment of the

trust company that it held the land solely for the husband, nor the subsequent execution of the trust agreement with the husband, had the effect of reinvesting the wife with a dower interest.

Appeal from Plymouth District Court.—WILLIAM HUTCHINSON, Judge.

TUESDAY, JUNE 26, 1917.

THIS is an action in equity, in which plaintiff seeks to have set off to her a distributive share, or dower, in certain land transferred to the defendant by deed in which plaintiff and her deceased husband joined, and in which plaintiff relinquished her dower interest. Defendant asked to have its title quieted as against plaintiff's claim. After a trial on the merits, the trial court held that plaintiff was not entitled to dower, and dismissed her petition and gave defendant a decree. The plaintiff appeals.—*Affirmed.*

C. A. Plank and C. E. Gantt, for appellant.

Shull, Gill, Sammis & Stilwell, and R. H. Burton Smith, for appellee.

DESCENT AND
DISTRIBUTION:
surviving hus-
band or wife—
dower: waiver
by division of
property: es-
toppel.

PRESTON, J.—The general situation, in so far as we think it applicable to points presented, is substantially this, as set out by appellant in her statement of facts:

That the plaintiff was married to Wilson B. Martin, now deceased, 24 years ago; that, at that time, deceased had 5 children by a former marriage, who are still living—one of these is Frank Martin; plaintiff and deceased had 3 children, all now living, one of whom is Dwight. That, at about the time of their marriage, they purchased 80 acres of land, referred to in the record as "the home 80," and also "the west 80;" a year or so afterwards, they purchased another 80 acres, referred to in the record as "the hill 80" and "the east 80;" a part of

the purchase price was taken care of by a mortgage, which was finally paid off by defendant, and under the agreement in which the transfer of the land in suit was made to the defendant. In May, 1909, deceased executed a deed to plaintiff, in which he attempted to convey the 160 acres before described. This was subject to a \$2,000 mortgage on the property, the payment of which plaintiff assumed. At the time of the execution of some of the instruments hereinafter referred to, June 2, 1915, plaintiff had not been well, and did not recover for 4 or 5 weeks thereafter; on that date, June 2, 1915, the plaintiff, with her husband, the deceased, and his son Frank, went to defendant company and made application to obtain a loan on the real estate. At that time, certain papers were signed for the purpose of making a division of the property between plaintiff and her husband. We may state here that there is testimony on behalf of defendant that the division of the property was in contemplation of a separation between plaintiff and her husband. This is denied by the plaintiff, but the evidence is, and the plaintiff herself so testifies, that thereafter they did live apart. The different instruments executed disposed of all the property of the parties, and also made provision for the payment of debts. Continuing the statement of counsel for appellant, they say that, on said 2d of June, deceased was 74 years of age, and had been sick and quite feeble for about 5 years; that he died soon afterwards, that is, the next September; that, under the plan of the division, which was carried out, plaintiff received "the home 80," the personal property, and a lease on "the hill 80" for 1915, her husband receiving "the hill 80." In addition, there were two insurance policies on Mr. Martin's life, one of which, under a subsequent arrangement, was to go to plaintiff, and one to his estate; certain debts were to be taken care of by each of the parties, giving the mortgage of \$2,000 on the 80 received by each, which money

was to be turned over to defendant, to be paid out by it on these debts, and the balance, if any, to be divided equally between plaintiff and deceased. On the date before referred to, June 2, 1915, deeds were given to the defendant as trustee, by plaintiff and deceased. Exhibit 10 was a warranty deed conveying the home '80 to defendant; and on the same date (June 2, 1915), a memorandum was given by defendant to the plaintiff, by which defendant acknowledged that it held the same land in trust for plaintiff, and agreed to manage, control and convey the same as plaintiff should by will or deed direct. Soon after said June 2d, plaintiff employed Mr. Plank to look after the matter of division of property; some changes were made, and some additional papers executed; the deed, Exhibit 10 just referred to, was destroyed, and a new deed of "the home 80" made to Dwight Martin, a son of plaintiff and deceased's. We may say parenthetically here that appellee contends that the effect of this was to prevent plaintiff's husband from receiving dower in the 80 acres which went to her, in case she should predecease her husband. At the same time, June 2d, the deceased, Wilson B. Martin, and his wife, the plaintiff, executed a warranty deed to the defendant to the hill 80. In this deed, both deceased and plaintiff respectively relinquished all contingent rights, including all their right of dower, homestead or distributive share in the land so conveyed. This instrument is known in the record as Exhibit 1. At the same time, defendant gave to the deceased a writing, known in the record as Exhibit 14, which is as follows:

"Sioux City, Iowa, June 2, 1915.

"Wilson B. Martin,

"Westfield, Iowa.

"Dear Sir:

"We hereby acknowledge that we hold in trust for you the following described property, to wit: The East One

Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-six (26), Township Ninety-two (92), Range Forty-nine (49), and agree to manage, control and convey the same as you shall by will or deed direct.

"Very truly yours,

"Farmers Loan & Trust Company.

"By R. H. Burton-Smith, Atty."

About 12 days thereafter, and on June 14, 1915, a trust agreement was entered into between deceased, Wilson B. Martin, and the defendant, in regard to the 80 acres of land deeded to plaintiff's husband, now deceased. This agreement is as follows:

"Trust Agreement.

"This agreement, entered into this 14th day of June, 1915, by and between Wilson B. Martin of Westfield, Plymouth County, Iowa, party of the first part, and the Farmers Loan & Trust Company of Sioux City, Woodbury County, Iowa, party of the second part,

"Witneseth: That whereas the party of the first part has deeded to the party of the second part all his right, title and interest in the following described property to wit: The East One half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-six (26), Township Ninety-two (92), Range Forty-nine (49), situated in Plymouth County, Iowa, in consideration therefor the said second party agrees as follows:

"(a) To pay the net income from said property annually to said first party.

"(b) In case such net income shall not be sufficient to keep said first party in comfortable circumstances, the said second party agrees to sell said property and, from time to time, to pay over to said first party such portion of the net returns from said sale as may be necessary to the comfort of said first party, keeping balances at interest.

"(c) Whatever property or money shall remain in the

hands of the said second party upon the death of said first party, shall first be charged with the expenses of the last illness and funeral of said first party, and with a reasonable charge for the services rendered by said second party, and the said second party agrees to pay one thousand dollars (\$1,000) share and share alike between Dwight Martin, Grace Waterbury Martin and Auriel Marie Martin, children by his present wife, Emma J. Martin, if such a sum shall remain in its hands, and to divide any balance equally, share and share alike, among the five children of said first party by his first wife, Mary Martin, or among their children *per stirpes*.

"Signed the 14th day of June, A. D. 1915.

"Wilson B. Martin,

"Farmers Loan & Trust Company,

"By James F. Toy,

"By F. W. Kammann."

By his will, Wilson B. Martin gave to his wife, this plaintiff, "the home 80," which had theretofore been deeded to her, and provided that such provision in his will was to be in lieu of dower, homestead exemptions and distributive share. Another provision of his will is that he makes no provision for his three children by his second wife, the plaintiff, as he expected her to provide for them out of the property set off to her. There are other provisions in the will, which we shall not set out.

On the last named date, deceased executed a bill of sale to plaintiff of certain personal property,—horses, colts, cows, hogs, machinery, grain, etc.,—being all the personal property. On that same date, the plaintiff and deceased gave to the defendant a paper, reciting that, an application having been made for a loan of \$2,000, the defendant was authorized: First, to pay the usual and necessary expenses; second, to place the remaining proceeds of said loan into a common fund belonging to both of the subscribers;

third, to pay out of said fund all household, medical or professional bills or debts heretofore contracted by either of the parties; and the remainder to be divided equally, one half to plaintiff and one half to her husband. A schedule of notes and claims was given defendant. On the same day, plaintiff executed a written instrument to defendant to execute in blank and deliver to her a deed to "the home 80." On the same date, plaintiff executed to the defendant the following paper:

"The Farmers Loan & Trust Company,

"Sioux City, Iowa.

"Gentlemen:—

"I have executed the assignment herewith delivered to you, being an assignment of policy Number 66537, in the Northwestern Mutual Life Insurance Company, in consideration of an agreement that Wilson B. Martin shall make, execute and deliver to you the last will or deed of trust in which there shall be devised and bequeathed to Dwight Martin, Grace Waterbury Martin and Auriel Marie Martin the sum of one thousand dollars (\$1,000), share and share alike in said sum of one thousand dollars (\$1,000), and, upon delivery to you of said will or deed of trust, you may deliver to Wilson B. Martin, or anyone whom he shall direct, the assignment hereby turned over to you."

And in another paper, she relinquished all her right and interest as beneficiary in said insurance policy. Other papers were executed; but it is perhaps unnecessary to set them out, since appellant contends, and in this appellee seems to acquiesce, that the case turns upon the three exhibits before referred to; that is to say, Exhibit 10, the deed from plaintiff and her husband to the defendant, Exhibit 14, the paper in which defendant acknowledges that it holds "the hill 80" in trust for plaintiff's husband, and Exhibit 15, the trust agreement.

Appellant states that the greater part of the testimo-

ny consists of a review of the actions and consultations of the parties in fixing up a division of property between plaintiff and her husband, and that, while it establishes the fact that such a division was made, it is thought that it has no bearing on the case, which is solely a question as to whether plaintiff is entitled to dower in "the hill 80," conveyed to the defendant; and appellee concedes that the testimony introduced is important, as it bears upon the intention and purposes of the parties. In so far as there may be any conflict in the testimony, we are satisfied with the conclusions of the trial court, and deem it unnecessary to refer to the evidence in detail, in view of the fact that the case seems to turn upon the interpretation of some of the written instruments before referred to.

Appellant's propositions are that, under Section 3366 of the Code,—which provides, in substance, that one third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set off to her if she survive him,—plaintiff's dower interest in the real estate in controversy is not a subject of contract between her and her deceased husband; and that, therefore, her interest in the property in controversy was not divested by the division of the property between them; that such division, being a void contract, cannot be the basis of an estoppel preventing plaintiff from claiming dower in the land. The real basis for plaintiff's claim is that, though plaintiff and her husband, on June 2, 1915, executed to the defendant the warranty deed Exhibit 10, before referred to, wherein she relinquished her dower therein, the paper thereafter and on the same day executed by defendant, or given to deceased by the defendant, acknowledging that it held the land in controversy in trust for plaintiff's husband, re-vested an equit-

able title in deceased which was not divested by the trust agreement thereafter executed by her husband and the defendant, the plaintiff not having joined therein.

Cases are cited by appellant in support of the different propositions, but we think the case is ruled by our holding in the case of *Manatt v. Griffith*, 147 Iowa 707, though, of course, the facts are not precisely the same. Appellant seems to place much reliance upon the case of *In re Estate of Kennedy*, 154 Iowa 460, and prior cases similar thereto. But we think the facts in the instant case are essentially different from those involved in the cases cited by appellant. In the *Kennedy* case, it was held, at page 467, that the fact was that the subject of the contract alleged was her inchoate interest in his real estate. The transaction was based upon an oral agreement between a husband and wife, whereby the wife agreed to abide by the last will and testament of her husband, in consideration of real estate and personal property conveyed to her, and in that case, the court held that, under Section 3134 of the Code, following prior cases, one spouse has no interest in property owned by husband and wife which is the subject of contract between them. In the *Kennedy* case, there was no claim, as in the *Manatt* case or in the instant case, that the transactions involved were entered into for the purpose of making a division of the property of the husband and wife, to enable them to control and dispose of their lands free from any dower right of the other therein, or that the mutual understanding and division had been acted upon by both of them.

The court was justified in finding from the evidence that plaintiff and her husband mutually agreed to a full and complete division of their property, with a view to thereafter living apart, and that they both in good faith undertook to carry out such agreement, and that it was carried out. The parties were competent to contract, and

there was no fraud perpetrated or attempted when the agreement was executed. Appellee contends that, after the deeds to defendant had been executed, on June 2d, plaintiff was trying to so arrange matters that, if plaintiff's husband should be the first to die, as it was thought he would, because of his poor health, plaintiff might claim dower in his 80; while, if she died first, he would be cut off from any interest in her 80. Nothing occurred after June 2d to indicate any change of purpose on the part of either plaintiff or her husband, or that plaintiff had any intention of departing from the original plan of a separation and division of property, as carried out on June 2d. We think that, when plaintiff and her husband, by the two separate deeds executed June 2d, conveyed all their land to defendant, they were each immediately precluded from claiming any interest in the property which it was agreed should belong to the other. The agreement and its execution, at least so far as the land was concerned, were completed when the deeds passed. The contract was fair and equitable to plaintiff. At that time, there could have been no claim that the deeds were invalid. It seems to us that whatever may have been done by either of the parties subsequent to June 2d, with respect to giving instructions or directions to defendant as to the management, control or disposition of the land, could not affect what had previously been agreed upon and executed. After the parties conveyed the lands to the trust company, their rights to their respective properties became fixed, and any arrangement thereafter made would not revest either with a title or interest in the land after they had parted with all their interest therein. This is especially so as to the land, and in all the transactions thereafter, there was no effort made to undo what had been done. Subsequent negotiations had to do more especially with the insurance policies.

It is thought by appellee that deceased could not have

been compelled to give the \$1,000 to her children, since this had not been taken into consideration by either party in the earlier stages of the transaction. It is thought by appellee that, when deceased acceded to plaintiff's demand in regard to this, the question arose as to how the payment of this sum to plaintiff's children at the death of her husband was to be made. It is shown that his will had already been made, and that the parties knew of that fact, and that it did not contain a bequest of this character. True, the will could have been changed, but the parties seem to have provided for the payment of this \$1,000 at Mr. Martin's death by a provision in the trust deed. That there may be a conflict between the will and the trust agreement with reference to the payment of this \$1,000 need not be considered here, we think, because the question is as to plaintiff's right to dower in the land.

We think that the statement by defendant, after the execution of the deeds, to the effect that it held the husband's property in trust for him, did not have the effect of revesting plaintiff with an interest in her husband's land, of which interest she had previously divested herself by the deed. Under the authority of *Manatt v. Griffith*, supra, we think plaintiff is estopped from now asserting any dower interest in the land in controversy.

It follows, therefore, that the decree of the district court must be, and it is,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

MARY A. NOLAN, Appellee, v. WM. H. GLYNN et al., Appellants.

FRAUDULENT CONVEYANCES: Grounds of Invalidity—Consideration—Good-Faith Purchase for Inadequate Price. A creditor may not, even for the sole purpose of protecting himself, buy

the property of his insolvent debtor for less than its fair value, knowing that other creditors will thereby be defeated in collecting their claims. In such case, the conveyance will be deemed without consideration, and therefore fraudulent, to the extent of the difference between what he did pay and the value of the property.

WEAVER and SALINGER, JJ., dissent as to the extent of relief granted.

Appeal from Warren District Court.—W. H. FAHEY, Judge.

FRIDAY, FEBRUARY 18, 1916.

SUPPLEMENTAL OPINION ON REHEARING, TUESDAY, JUNE 26, 1917.

SUIT to subject land or its proceeds to the satisfaction of plaintiff's judgment resulted in a decree against defendant Casady, from which both defendants appeal. Afterwards, plaintiff perfected an appeal.—*Affirmed.*

Berry & Watson and John A. Guiher, for appellants.

Robbins & Smith, A. W. Wilkinson and A. V. Proudfoot, for appellee.

FRAUDULENT
CONVEYANCES:
grounds of in-
validity: con-
sideration:
good-faith pur-
chase for in-
adequate price.

LADD, J.—An action was begun by plaintiff against defendant Glynn for damages consequent upon an alleged breach of promise of marriage, by serving the original notice April 15, 1911, and filing the petition August 23d following. Trial was had, and judgment for \$8,000 entered against Glynn November 20, 1911, from which an appeal was taken. This judgment was reversed September 25, 1913. See 163 Iowa 146. Another trial was had, and judgment entered against Glynn for \$7,500, April 15, 1914. The object of this action is to subject certain lands transferred by Glynn to his codefendant, Casady, to the satisfaction of this judgment. On December 11, 1912, after the entry of the first judgment, and prior to its reversal, Glynn and Casady entered into a written

contract, under the terms of which the latter purchased of the former a farm of about 131 acres in Warren County at \$75 per acre, and a farm of 80 acres in Madison County, at \$80 per acre, the entire consideration, \$16,013.20, to be paid by immediately cancelling a note of Glynn's to Casady for \$1,500, an existing mortgage on the Madison County land of \$2,500, a mortgage on the Warren County land of \$4,000, and a subsequent mortgage of \$3,000 thereon, leaving a balance of \$5,013.20 to be paid upon the delivery of the deeds by cancelling another note of \$1,500 due Casady, and paying \$3,513.20 in cash, Glynn to pay taxes of 1912. And it was "further understood that there is now a judgment against said Glynn in favor of Mary Nolan for \$8,000, and the same is now pending in the Supreme Court of Iowa. If the same is affirmed by said court, the said Casady is then to pay the sum of \$4,000 in to the clerk of court of Warren County, Iowa, being part of the \$5,013.20 due said Glynn, so that the said Glynn may use the same to satisfy said judgment, the balance of said judgment the said Glynn will otherwise care for. In the event the said judgment is not affirmed, then the said Glynn agrees that the said Casady may deduct the sum of \$1,500 and interest which is due him, as above set out, and the balance of the \$5,013.20 is to be paid by said Casady to said Glynn in cash. It being understood that, in the event that the said court should not reach said case in the spring of 1913, and the same should go over to a later date, then the said Glynn agrees also to pay the 1913 taxes and interest on all mortgages to March 1, 1914, and the rent received for the year of 1913 is to go to said Glynn, and said Casady is to be allowed 7 per cent interest on the amount which he is compelled to pay in cash either to the clerk of court or to said Glynn, as the case may be, from the time payment is made until March 1, 1914."

Glynn was to furnish abstract showing merchantable

title, convey by warranty deed, subject only to the three mortgages, "said deed to be made within 30 days from the date hereof, and to be delivered as soon thereafter as said Casady is able to pay said money in the manner as above referred to." The farms were to be turned over in as good condition as at the date of the contract, wear and decay excepted. Separate deeds to the respective tracts of land were signed and acknowledged by Glynn January 15, 1913, and by him given to the recorder and recorded September 27th following, two days after the reversal of the judgment by the Supreme Court, and later delivered to Casady. None but the contracting parties was aware of the transaction at the time. Glynn continued in possession until March 1, 1914, when the second \$1,500 note was cancelled, and Casady paid Glynn the balance of \$3,256.65. Casady was cashier of the Norwalk State Bank, to which the second mortgage of \$3,000 on the 131 acres was executed, after the beginning of the suit, and was part owner of the Cummings Bank, of which Glynn had been cashier for several years, and until 1914. Casady had been a witness for Glynn at both trials, and had been somewhat intimate with him in business matters. Glynn claims to have listed the farms for sale with several agents, about a year before selling to Casady, and in the fall of 1912, to have reduced the price to \$90 per acre for the 80 acres, and \$80 or \$85 for the 131 acres. What his price had been is not disclosed by the record. He first spoke to Casady about selling to him either in August of that year, as stated by Glynn, or 30 to 60 days prior to making the contract, as said by Casady, and was advised by the latter to make further effort to sell to someone else. Glynn testified that his purpose in selling was to dispose of the land so as to avoid having it sold at forced sale, should the (first) judgment be affirmed. This may be true, for the judgment was a lien on one of the farms at least, and counsel for Casady assume in argu-

ment that it was a lien on the other farm also. If so, we fail to perceive on what theory counsel laud Glynn for undertaking to arrange payment of what might in any event be enforced against his property. He had appealed from the judgment, and the criticism of the transaction is not that defendants took into account what Glynn might be compelled to do in event of an affirmance, but that what they undertook in the contract to do, and carried out, was calculated to and did place Glynn's property beyond the reach of Mary Nolan in the collection of any judgment she might recover against him. The price was inadequate, as both of them well knew. Even after Glynn had reduced the price through his agents, that of the 80 acres was \$10 above that named in the contract, and \$5 or \$10 per acre higher on the 131 acres. Within six months thereafter, June 9, 1913, Casady addressed a letter to Glynn, saying that he had concluded to sell the farms, and that he thought Glynn "might have an opportunity to sell them, as they are more handy for you to show than me. I want for the farm near Patterson \$105 per acre, and for the other farm on the county line, I want \$100 per acre, and I will allow you a commission of \$2 per acre if you will furnish me a buyer for either one of these farms. I trust you will get busy, as I would like to dispose of them this season if I can. By the way, you are pretty well acquainted in Winterset and know the real estate men there better than I, and why would it not be a good idea for you to list it with someone there and work in connection with them in selling this farm, and you can make whatever division of the commission you wish? Now I trust you will give this attention and push the matter as I do not care to hold these farms but prefer to convert them into money. Of course I expect to show these farms and sell them myself if I get an opportunity."

Glynn, as directed, listed the farms with several

agents. Witnesses disagree as to the value of the respective farms at the time of the contract, the estimates on the Madison County farm varying from \$80 to \$125 per acre, and on the Warren County farm from \$65 to \$110. In view of the prices put on them by Glynn before, and by both within six months after entering into the contract, and the sale of the Madison County farm in August, 1913, at \$100 per acre, we are of opinion that the finding of the district court that the 80-acre farm was then fairly worth \$100 per acre, and the Warren County land, \$90 per acre, ought not to be disturbed. Glynn at no time had demanded less than \$10 per acre more than named in the contract, and even this was a reduction from the listing price. Both listed each farm shortly thereafter at \$25 per acre in advance of the contract price, though values do not appear to have increased, and one was sold, and all this before the contract was to be performed. When first approached, Casady said he had all the land he desired, but evidently the opportunity to buy the land for less than its value, and thereby secure or collect the two \$1,500 notes and the second mortgage of \$3,000 against the 131 acres owed to the bank of which he was cashier, overcame his objections, and he entered into the contract. Both Casady and Glynn strenuously deny that they entertained any purpose, when entering into the contract, to defraud anyone; and, though there is some evidence to the contrary, we are inclined, in view of the fact that Glynn might well have done what he did with the design to appropriate his property to the payment of Casady and other creditors, and that Casady may have been influenced by the opportunity to collect for himself, to concur with the district court in according them the benefit of the doubt. Conceding, however, that there was no such purpose, yet they purchased this land at \$3,485, at least, less than both seller and purchaser knew it was worth, and with the knowledge on the part of both that

claims of other creditors, including that of plaintiff, would be left unpaid, and the debtor without property to satisfy them. A creditor, even though acting innocently, cannot be permitted to profit in this way to the detriment of unsecured creditors. *Cox v. Collis*, 109 Iowa 270; *Wiltse v. Flack*, 115 Iowa 51; *Griswold v. Szwanek*, (Neb.) 21 L. R. A. (N. S.) 222; *Keeder v. Murphy*, 43 Iowa 413. This is on the theory that the conveyances are fraudulent as to such excess, for to that extent, the insolvent has deeded his property without consideration, to the injury of his unsecured debtors. We have entertained not a little doubt as to whether defendant Casady did not participate in Glynn's effort and Glynn's act to place this property beyond the reach of plaintiff, but have resolved such doubt in favor of the finding of the trial court. We have no hesitancy, however, in reaching the conclusion that Casady ought to account for the difference between the inadequate price paid and the fair value.—*Affirmed*.

GAYNOR, C. J., DEEMER and SALINGER, JJ., concur.

OPINION ON REHEARING.

SALINGER, J.—An opinion was filed in this case on February 18, 1916, which affirmed the action of the trial court. The plaintiff obtained a judgment against Glynn for \$8,000. This judgment was reversed. See 163 Iowa 146. Another trial was had, and judgment entered against Glynn for \$7,500. The object of this action is to subject certain lands transferred by Glynn to his codefendant, Casady, to the satisfaction of this judgment. The trial court declined to give plaintiff the full relief asked, but subjected the land to the extent of the difference between the price claimed to have been paid by Casady and what it found was the value of the land sought to be subjected. As said, we have affirmed this action. A rehearing was granted. We adhere to the foregoing opinion, but some of the members of the court would modify the judgment and decree below by sub-

jecting the lands to the full amount of plaintiff's judgment, with interest and costs.

It would be idle now to state in detail why this conclusion is now reached by some of us. Most of the reasons are found in said opinion last referred to. That sets out many badges of fraud, including the fact that the land was conveyed for a grossly inadequate price. The only thing that these judges add is that, upon what is found in said other opinion, the same did not go far enough. The badges of fraud, including the inadequacy of consideration, seem to them to warrant more than the relief heretofore granted. That is to say, if they justify the relief granted below and affirmed before, they justify as well what these judges would do. It will not be amiss to point out in this connection that the former opinion lays no stress, for one thing, upon the fact that the trial judge, whose action we have heretofore fully affirmed, found that "defendant Glynn by these conveyances was attempting and intending to defraud plaintiff in the collection of her judgment."

They are not holding that there is any direct proof of actual fraud on the part of defendant Casady. The law recognizes that, when there is actual fraud, it will usually be impossible to have direct proof of it. Recognizing this, it raises a conclusive presumption, if sufficient circumstances called badges of fraud are in evidence, that equity requires taking a conveyance out of the way of a creditor. They charge no one with actual guilt, but simply hold that such measure of proof has been furnished as that a court of equity must remove the conveyance as an obstacle to collecting a just debt.

The majority orders that the former opinion be adhered to.—*Affirmed.*

GAYNOR, C. J., EVANS, PRESTON and STEVENS, JJ., concur.

WEAVER and SALINGER, JJ., dissent.

NORTHWESTERN TRADING COMPANY, Appellee, v. WESTERN
LIVE STOCK INSURANCE COMPANY, Appellant.

APPEAL AND ERROR: Decisions Reviewable—Overruling Motion
1 **for More Specific Statement.** An order overruling a motion for more specific statement is appealable; otherwise as to an order overruling a motion for the division of a petition into counts.

APPEAL AND ERROR: Review, Scope of—Challenge to Appeal-
2 **bility of Order.** In passing on a challenge to the appealability of an order overruling a motion for more specific statement, the court will not pass on the merits of such latter motion.

APPEAL AND ERROR: Effect of Appeal—Non-Final Orders—
3 **Staying Trial in Lower Court.** An appeal from an order overruling a motion for more specific statement does not necessarily act as a stay of the trial in the lower court.

Appeal from Polk District Court.—THOS. J. GUTHRIE,
Judge.

TUESDAY, JUNE 26, 1917.

OPINION on motion to strike abstract and dismiss appeal.—*Motion to dismiss denied.*

Stipp, Perry, Bannister & Starzinger, (Thos. J. Graydon of counsel), for appellant.

Dunshee, Haines & Brody, for appellee.

SALINGER, J.—I. The petition alleges
1. **APPEAL AND ERROR: decisions reviewable. overruling motion for more specific statement.** that, on December 28, 1915, the defendant issued to the plaintiff its policy of insurance, whereunder it agreed to insure the plaintiff to the amount of \$120 on each and every animal described in certain schedules thereto attached; that, by the terms of said policy, the insurance was to begin on December 28, 1915, and to cover the said animals until immediately previous to embarkation at sea.

board; that thereafter, and on various days between December 30, 1915, and January 30, 1916, in consideration of the required premium paid, defendant further issued to plaintiff certain riders or supplements to be attached to and form a part of the said policy theretofore issued, by which riders it undertook to insure the plaintiff against loss or damage to the certain animals described in these riders or supplements, in accordance with the terms of the original policy. True copies of the riders are said to be attached, marked Exhibits 2 to 59, inclusive. It suffices to say that finally an aggregate loss of \$31,200 is sought to be recovered for and on account of losses said to be covered by the various instruments to which we have referred.

The defendant moved the court to enter an order requiring the plaintiff to divide this petition into divisions or counts. Defendant further moved the court for an order requiring plaintiff to make this petition more specific in some fourteen specified particulars. Both motions were denied. From these rulings defendant has perfected an appeal, and plaintiff is moving to strike the abstract of appellant and to dismiss said appeal. This last motion asserts that the orders appealed from do not constitute appealable orders.

II. We shall not pass upon whether the overruled motions were in truth well made. That must be reserved for the time when, if ever, we determine the appeal.

Many actions of trial courts from which we must entertain an appeal are affirmed. It follows that the right to appeal does not depend upon whether the appeal is meritorious. It follows in turn that, in passing upon whether there is the right to appeal, we are not at liberty to take into consideration whether, though appeal be allowed, it should on final hearing be not sustained.

III. *Cook & Wheeler v. Chicago, R. I. & P. R. Co.,*

2. APPEAL AND
ERROR: re-
view, scope of:
challenge to
appealability
of order.

75 Iowa 169, holds that no appeal will lie from the granting of a rule to produce books and papers. It grounds its decision upon consideration of specified parts of the statute which do not allow an appeal from such an order. It entirely overlooks Subdivision 3 of the statute, which permits appeal from an order that grants or refuses, continues or modifies a provisional remedy. *Devier v. Economic Life Assn.*, 106 Iowa 682, merely follows the *Cook* case without discovering the error in the *Cook* case. We have held that no appeal will lie from granting or denying change of venue (*Allerton v. Eldridge*, 56 Iowa 709; *Horak v. Horak*, 68 Iowa 49); nor from an order denying default for want of pleading (*Quinn v. Capital Ins. Co.*, 82 Iowa 550); nor from an order of continuance (*Jaffray v. Thompson*, 65 Iowa 323; *Theis v. Chicago & N. W. R. Co.*, 107 Iowa 522); nor from one setting the case down for trial as an equitable action (*First National Bank v. Dutcher*, 128 Iowa 413, at 425); nor from one refusing to strike an application for permission to amend (*Allen v. City of Davenport*, 115 Iowa 20); nor from one refusing to strike a pleading (*Walker v. Pumphrey*, 82 Iowa 487); nor from an order sustaining a motion to set aside the overruling of a demurrer; nor from an order overruling a motion to strike that motion (*Quinn v. Capital Ins. Co.*, 82 Iowa 550). Also held, appeal will lie from overruling a motion which assails material matter and is in effect a demurrer (*Seiffert & Wiese Lbr. Co. v. Hartwell*, 94 Iowa 576, at 578; *Bicklin v. Kendall*, 72 Iowa 490). It will lie from the striking out of material matter (*Mast v. Wells*, 110 Iowa 128; *Haworth v. Crosby*, 120 Iowa 612). We have held that no appeal will lie from striking out immaterial matter or from overruling a motion to strike such matter (*Allen v. Church*, 101 Iowa 116; *Specht v. Spangenberg*, 70 Iowa 488). An appeal will not lie from the suppression of depositions on the ground that they were taken from the clerk's office by plaintiff's attorney contrary

to the provisions of the Code (*Baldwin v. Mayne*, 40 Iowa 687); nor from the admission or exclusion of evidence (*Richards v. Burden*, 31 Iowa 305, 306); nor from an order regulating time of filing answer to interrogatories (*Free v. Western Union Telegraph Co.*, 135 Iowa 69, at 72); nor from one sustaining exceptions to interrogatories (*State v. Arns*, 72 Iowa 555, at 556); nor from admitting evidence after remand (*Garmoe v. Sturgeon*, 67 Iowa 700).

IV. In *Schoenhofen Brewing Co. v. Giffey*, 162 Iowa 204, the test of appealability is said to be whether the question is or will be inherent in the final judgment and may be presented on appeal from that judgment. If the ruling is of such a nature and affects rights in such a manner that they cannot be protected by appeal from the final judgment, then an appeal will lie. But if the question involved will inhere in the final judgment and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal. We say, in *State v. Des Moines City R. Co.*, 135 Iowa 694, at 717:

"Ordinarily every substantial right of the parties can be effectually protected by preserving a proper record, and presenting the questions thus saved, upon appeal from final judgment."

It is in view of this that we declare that it is not the policy of the law to permit either party to a controversy to prolong litigation and embarrass the courts of justice by prosecuting an appeal from every interlocutory ruling of a trial court. We have, however, held in many cases that an error in overruling a motion to make more specific is waived by answering. See *Hurd v. Ladner*, 110 Iowa 263, 264; *Kelly v. Incorporated Town of West Bend*, 101 Iowa 669, 671; *Manatt v. Sharer*, 98 Iowa 353, 356, 357; *Wattels v. Minchen*, 93 Iowa 517; *Ida County v. Woods*, 79 Iowa

148; *Mann v. Taylor*, 78 Iowa 355; *Randolf v. Town of Bloomfield*, 77 Iowa 50; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50 Iowa 656; *Shugart & Lininger v. Pattee*, 37 Iowa 422, 424; *Coakley v. McCarty*, 34 Iowa 105, 107; *Rea v. Flahers*, 31 Iowa 545.

In view of these, it gets nowhere merely to prove that many orders of court are not appealable. That this is so throws no light upon the question whether, if proceeding with the trial or pleading further of necessity works a waiver, and so leaves the party without redress from such ruling, it can then be said that such ruling does not materially affect the final determination, although, by reason of the waiver, no appellate review may be had on appeal from an adverse final judgment. Here, the defendant moves that the petition be made more specific. Assume a case where that is done in good faith. Assume that what is asked for is necessary to an intelligent defense. The application is denied. If the party then answer, any error in the denial is waived--which means that it never can be reviewed. We think this cannot be so. The denial of a sound motion of this kind, of necessity affects the final decision; for, in the supposed case, the unsuccessful movant must make an inadequate defense, which may well affect the merits. It is no answer that many such motions are not well made. As said, that we must determine on final hearing rather than upon a challenge of appealability. We must make a rule which operates upon all such motions. We cannot limit the rule to good motions without turning the question of appealability into a review of the merits of the appeal.

In our opinion, appeal lies from the overruling of a motion to make petition more specific. But we are not determining what effect appeal from such ruling is to have on the trial of the cause. That will

3. APPEAL AND ERROR: effect of appeal: non-final orders: staying trial in lower court.

have to be controlled by the action of the trial court on a determination of whether the motion is frivolous, and it may proceed with the trial unless stayed by order of this court.

The nearest approach which *Barnes v. Century Savings Bank*, 149 Iowa 367, makes to sustaining the position of the appellee is its declaration that a ruling requiring plaintiff to make the allegations of his reply more specific "would not ordinarily be appealable." The distinction seems clear. First, if there be error in requiring the allegations of the reply to be made more specific, the party making reply is not compelled to plead further; and if there be error in requiring the reply to be thus amended, the error can be reviewed if final judgment go against the party who was required to amend. Second, no substantial injury, such as may result from compelling a defense to a petition which is not sufficiently specific, can ever flow from obliging the pleader to make his pleading needlessly specific.

V. But it does not follow that we must make the like determination on overruling a motion demanding that a petition be divided into counts and divisions. While it is true that pleading over waives error in this regard, that is not controlling. To be appealable, pleading over must operate as a waiver. But that does not mean that an order is appealable merely because pleading over will operate as a waiver. There must be something in addition to indicate that something substantial will be lost because of the waiver. We have pointed out that this may result where a motion for more specific statement is overruled. We cannot perceive how the movant can suffer any tangible prejudice by being compelled to go to trial on a petition which should be divided and is not. For, after all, this does not create a handicap upon making proper defense, but at most it makes it more inconvenient to defend. For, though the

petition be not divided, it still advises of all it contains to be defended against.

The appeal from the ruling last referred to will be dismissed. The motion to dismiss the appeal from the first ruling will be denied.

GAYNOR, C. J., LADD, PRESTON and STEVENS, JJ., concur.

PHILIP B. WATROUS et al., Appellees, v. EDWARD L. WATROUS et al., Appellants.

WILLS: Surviving Spouse—Attempt to Disinherit Husband—Right to Compel Election. A surviving husband who has been *wholly ignored* by the wife in the execution of her will, equally with a surviving husband who has been made a substantial devisee under his wife's will, may be put to a *statutory* election whether he will consent to the will, and thereby lose all interest in the wife's estate, or whether he will take his distributive one-third share. Sec. 3376, Code Supp., 1913.

PRINCIPLE APPLIED: A husband and wife, with four children, lived separate and apart. The wife died, and left a will which made no mention of her husband, and which left her entire estate of \$200,000 to two sons and a daughter, except the sum of \$3,000, bequeathed to a son, Edward. The will was filed for probate, and Edward filed a contest thereon. Edward was married, was an invalid, was without property, and there was a feeling among the father and some of the children that an annuity ought to be settled on Edward and his wife. If this was done, Edward was willing to dismiss his appeal. All parties were desirous of avoiding litigation over their family affairs. Talk was had, at times, between the father and some of the children, to the effect that the father owned one third of the wife's estate, and, by reason thereof, might well afford to make provision for the proposed annuity to Edward. The father and Edward, some four weeks after the wife's death, entered into a contract, reciting: (a) The pendency of Edward's contest; (b) that the father owned a one-third interest in the mother's estate; (c) that an amicable adjustment and an avoidance of litigation were desired; (d) that Edward should withdraw his contest and that the will should be probated; (e) that a life annuity was declared in favor of Edward, which should be payable out of and be a lien on the assets of the mother's estate

belonging to the father. In compliance with this contract, Edward immediately dismissed his contest. The will was probated two days later.

Notwithstanding said recitals, the father did not, in truth and fact, intend them to constitute an election, by himself and for himself, of a distributive share in his wife's estate, and he never at any time intended to claim for himself any interest whatever in his wife's estate. He seems to have viewed the contract solely as a means of doing something for Edward, without doing or taking or intending to take anything for himself. After the contract was executed, he seems to have treated it as his own personal obligation, though the contract contained no express statement that he would pay the annuity. Some five months later, two of the devisees under the mother's will served the statutory notice (Sec. 3376, Code Supp., 1913) upon the father, and called upon him to elect whether he would consent to the will; and, on the same day, the father duly executed a statutory election to abide by the will, and fully waived all interest in the estate.

Held: 1. The fact that the husband was ignored in the wife's will did not obviate his statutory duty to elect when said notice was given.

2. The execution of the annuity contract did not constitute an election to take a distributive share out of the wife's estate.

3. Upon the death of the wife, the husband did not *eo instanti* become vested with a distributive share, but was simply placed in the position where he had the right to elect whether he would abide by the will or repudiate it.

WILLS: Surviving Spouse—Will and Distributive Share—Election—

- 2 **Acts not Constituting.** A surviving husband who has been wholly ignored by his deceased wife in the execution of her will does not elect to claim a distributive one-third share in the wife's property *by contracting for a lien on a one-third portion* of the wife's property, to secure a debt owed by him, when he, in truth and in fact, never intended to claim said distributive share for himself, and executed said contract under a misunderstanding as to its effect on the settlement of the wife's estate. Sec. 3376, Code Supp., 1913.

PRINCIPLE APPLIED: See No. 1.

WILLS: Surviving Spouse—Attempt to Disinherit—Nature of Vest-

- 3 **ed Rights.** A surviving husband who has been wholly ignored by the wife in the execution of her will does not, *eo instanti* upon the death of the wife, become vested, by operation of law,

with a distributive one-third share in the estate of the wife, subject to the divesting of the same by a subsequent election by the husband to submit to the terms of the will. His vested right, in such case, is simply to choose whether he will abide by the will or repudiate it and take his statutory distributive share. Sec. 3366, Code, 1897.

PRINCIPLE APPLIED: See No. 1.

COMPROMISE AND SETTLEMENT: Consideration—Settlement
4 of Family Controversy. A contract entered into for the purpose of avoiding litigation, and thereby settling family difficulties growing out of an estate, is supported by a sufficient consideration. So held as to an implied agreement to pay an annuity.

PRINCIPLE APPLIED: See No. 1.

ESTOPPEL: Equitable Estoppel—Opportunity to Avoid Injury—
5 Effect. An estoppel may not be based on alleged misleading conduct of another, when such conduct was fully known to complainant at a time such that he had ample opportunity to resume his former advantageous position, and avoid all injury by reason of such conduct.

CONTRACTS: Validity—Mental Weakness. Something more than
6 mental weakness is necessary in order to overthrow a contract. It must appear that the one seeking to avoid the contract was incapable of reasonably understanding the meaning of the instrument. Evidence reviewed, and held insufficient to avoid a contract for mental incompetency, though the one contracting was aged and infirm.

COMPROMISE AND SETTLEMENT: Consideration—Dismissal of
7 Groundless Suit—Evidence. The dismissal of a groundless suit not brought in good faith is not a sufficient consideration for a contract of compromise and settlement. It follows that admissions by the party instituting a suit, tending to show its groundless nature and his knowledge thereof, are admissible.

APPEAL AND ERROR: Abstracts—Appeal by Both Plaintiff and
8 Defendant—Sufficiency of Abstract. Appeals by two hostile litigants in the same action do not require separate and duplicate abstracts. An abstract by one appellant may, by amendment, be so completed as to cover both appeals.

APPEAL AND ERROR: Right of Review—Waiver—Seeking to
9 Enforce Judgment. An appellant who secured a personal judgment in the lower court for the full amount prayed for, but was

dened a lien on certain property to secure payment of the claim, and appeals, does not waive his appeal by filing his claim, subsequently to the taking of the appeal, against the estate of the one against whom personal judgment had been entered.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

TUESDAY, JUNE 26, 1917.

SUIT in equity by the devisees and executors of the estate of Sophia G. Watrous, deceased, to set aside a contract entered into between C. L. Watrous, now deceased, and Edward L. Watrous, by the terms of which it is claimed that C. L. Watrous, the husband of Sophia G. Watrous, deceased, elected to take a distributive share in the estate of his wife, and to charge an annuity thereon for the benefit of E. L. Watrous and his wife, Agnes. The reasons for setting aside the contract are: (1) Mental incompetency of C. L. Watrous; (2) fraud and undue influence in securing his signature; (3) no consideration for the agreement; (4) no election on the part of C. L. Watrous to take a distributive share in his wife's estate, she leaving a will which failed to mention her husband, or to give him any part of her estate; (5) no agreement on the part of C. L. Watrous to pay Edward L. Watrous anything, and no basis for any agreement to pay him and his wife an annuity. C. L. Watrous intervened and joined with plaintiffs in the relief demanded. Other issues were tendered, which, in so far as material, will be considered during the course of the opinion. The trial court held that the contract did not bind any part of the estate left by Sophia G. Watrous, but rendered judgment against C. L. Watrous personally for the amount of the annuity. The trial court cancelled the contract, in so far as it created a charge upon the lands of which Sophia G. Watrous died seized, but rendered a judgment against C. L. Watrous individually for the promised annuity. Defendants and intervener appeal.—*Affirmed.*

Parker, Parrish, & Miller, for appellants.

Coffin & Rippey and Stipp, Perry, Bannister & Starzinger, for appellees.

STEVENS, J.—Sophia G. Watrous died testate in Des Moines, Iowa, April 30, 1914. She left surviving her husband, C. L. Watrous, who has died since the trial of this case in the court below, and four children, to wit: Philip and Charles A., plaintiffs herein; Mrs. Marion Watrous Angell, a daughter; and Edward L. Watrous, who, with his wife, Agnes, are parties defendant to this action. The following provisions of the will of Mrs. Watrous are material to this controversy:

1. WILLS: surviving spouse: attempt to disinherit husband: right to compel election. "Paragraph I. I direct that my just debts and funeral expenses be first paid.

"Paragraph II. Having heretofore advanced to my son Edward Lacy Watrous, large sums of money, I hereby devise and bequeath to him the sum of \$3,000 to be paid in three annual installments of \$1,000 each, and because of such advancements or loans, I hereby direct that he shall have no further share, part or parcel in my estate.

"Paragraph III. I hereby give and bequeath the rest and residue of my property, personal, real and mixed, to my daughter, Mrs. Marion Watrous Angell, to my son Philip Bernard Watrous, to my son Charles Albert Watrous, share and share alike.

"Paragraph IV. I nominate and appoint to serve as executors of this my will without bond: Philip Bernard Watrous, Charles Albert Watrous."

This will was executed March 12, 1914. On June 4, 1914, this will was duly admitted to probate in Polk County, and the executors named therein were duly appointed and qualified as such.

The estate of the decedent is valued at something over \$200,000. It will be noticed that her husband is not mentioned in the will, and that Edward was given but \$3,000 of the estate, the remainder having been devised to the other three children. The will was filed for probate May 5, 1914, and on May 30th, Simon Casady, of Des Moines, was appointed special administrator. On May 29, 1914, Edward L. Watrous filed objections to the probate of the will. Over date of June 2, 1914, what purports to be a contract between C. L. Watrous and Edward L. Watrous was entered into, and this contract was filed for record with the county recorder on June 3, 1914. This contract is as follows:

"Whereas Sophia G. Watrous, of said city of Des Moines, departed this life on April 30th, A. D. 1914, leaving a last will and testament, which was filed in the office of the clerk of the district court of the state of Iowa, in and for Polk County, on May 5th, A. D. 1914, by the terms of which she gives and bequeaths to said Edward L. Watrous the sum of \$3,000 in cash, and divided the remainder of her property equally among her other children, viz.: Marion Watrous Angell, Philip B. Watrous and Charles A. Watrous, share and share alike; and

"Whereas, said Edward L. Watrous, on May 29, A. D. 1914, filed objections to the probate of said will, and a contest thereof is thereby created and now pending; and

"Whereas, on May 30, A. D. 1914, Simon Casady, Esquire, of the city of Des Moines, Polk County, Iowa, was duly appointed special administrator of the estate of said Sophia G. Watrous by said Polk district court, in the cause entitled, 'In re Estate of Sophia G. Watrous, deceased,' No. 8693 Probate, and is now qualified and acting as such special administrator; and

"Whereas, the said Charles L. Watrous, as surviving husband of said Sophia G. Watrous, under the laws of

the state of Iowa, notwithstanding the provisions of said last will and testament, is the owner of an undivided one-third interest in and to all of the property, both real and personal, and mixed, of which said Sophia G. Watrous died seized and possessed; and

"Whereas, both of the parties hereto desire to prevent a further contest of said will, and to settle and adjust all differences between the surviving children of said decedent, with reference to said will and said estate, in an amicable and friendly manner: Now therefore, it is agreed as follows, to wit:

"1st. That the objections of said Edward L. Watrous to said will be forthwith withdrawn and dismissed, and that, so far as said Edward L. Watrous is concerned, said instrument may and shall be admitted to probate as the last will and testament of said Sophia G. Watrous, deceased, and shall never again be questioned, controverted or contested by him.

"2nd. That the said Charles L. Watrous agrees to and does hereby raise, create, establish and declare an annuity of \$1,800 per annum in favor of said Edward L. Watrous, payable in installments of \$150 per month, on or before the 10th day of each month, commencing with the month of May, A. D. 1914, and continuing so long as said Edward L. Watrous shall live. In the event of the death of said Edward L. Watrous, leaving a widow him surviving, then and in that event, said annuity shall be reduced one half, and shall be payable to such widow in monthly installments of \$75 each, so long as such surviving widow shall live, or until her remarriage.

"Said annuity shall be payable in the city of Des Moines, Iowa, at the German Savings Bank, or at such other bank as said annuitant may direct, to the credit of said annuitant, out of and from the assets of the estate of said Sophia G. Watrous, deceased, belonging to said

Charles L. Watrous, and, upon failure to pay any installment thereof, the same shall bear interest at the rate of 8 per cent per annum from date of default, and may be enforced and collected, along with the costs and attorneys fees.

"3rd. In order to secure the annuity, interest and costs aforesaid, said Charles L. Watrous agrees to and does hereby make the same a charge and lien upon his individual interest, and upon the income and proceeds of sales of his interest in the estate of said Sophia G. Watrous, deceased.

"Done at the city of Des Moines, Polk County, Iowa, on this the 2nd day of June, A. D. 1914.

"(Signed) Charles L. Watrous,

"Edward L. Watrous.

"In the presence of

"Joseph C. Picken,

"James C. Hume."

On November 18, 1914, Philip and Charles A. Watrous served a notice upon Charles L. Watrous, requiring him to elect as to whether he would accept and consent to the terms of the will; and on the same day, Charles L. Watrous filed with the clerk of the court, and had entered of record, his election to accept and be bound by the terms of the will. From this we quote the following:

"I hereby elect to accept and to be bound by the terms and provisions of said will, and waive all my rights, interests and claims as surviving husband of said Sophia Glover Watrous, deceased, and hereby assign, set over, transfer, and convey any and all of my rights, titles, interests, liens, and claims in and upon and to said estate absolutely and in fee simple to said Marion Watrous Angell, Philip Bernard Watrous, Charles Albert Watrous, share and share alike as provided in said will."

This action was commenced shortly thereafter by the

two sons, Philip and Charles A., against Edward L. and his wife Agnes, to set aside and cancel the contract between the said defendants and Charles L. Watrous, for the reasons: First, that Charles L. Watrous never acquired any interest in the estate of his wife, or any such interest as that he could create a lien or charge thereon; that he elected to accept and be bound by the terms of her will, as by statute provided, and never acquired any interest in his wife's estate. Second, that, at the time of the making of the contract with his son Edward and his wife, Charles L. was mentally incompetent to make such a contract as is here involved. Third, that said contract was obtained from him when he was ill and suffering from great physical and mental pain, and was under the influence of medicines, by fraud and undue influence, and that he signed the same through a mistaken belief as to the contents thereof. The relief prayed was the cancellation of the contract, and a decree quieting plaintiff's title to the property.

Defendants, Edward L. and his wife, Agnes, appeared and filed answer, denying, both generally and specifically, most of the allegations of the petition, and also pleading that the contract between them and Charles L. Watrous was upon a good consideration, to wit, the dismissal of their contest of the will of the deceased; that it was knowingly and intentionally entered into by Charles L. Watrous with the consent of, or upon the suggestion of, their sister, Marion W. Angell; and that their rights therein are superior to any of the claims of plaintiffs. They also aver that Charles L. Watrous elected to take a distributive share of the estate, rather than to abide by the will; and that his subsequent election to abide by and consent to the will is of no validity, fraudulent and void.

Charles L. Watrous intervened in the action, and filed a petition, which substantially adopted the allegations of

plaintiff's petition regarding the making of the contract and his capacity to enter into the same, and he joined in asking the relief prayed by plaintiffs. Defendants then filed a pleading in answer to the petition of intervention, and a cross-petition against Charles L. Watrous, in which they asked the following relief:

"That his petition of intervention be dismissed upon its merits; that said annuity contract, Exhibit 2, above set forth, be found and decreed to be, in all respects, valid and binding, and to create a lien for the annuity thereby raised and created upon one third in value of all the legal and equitable estates in real property, and one third in value of all personal property, not necessary for the payments of debts, of which Sophia G. Watrous, wife of the said Charles L. Watrous, on April 30, 1914, died seized and possessed; that said Edward L. Watrous have judgment against said Charles L. Watrous for the amount now due and owing to him as above set forth, with legal attorneys' fees and costs, and that defendants have such other and further relief as they may be entitled to in equity."

The amount asked by way of a money judgment was for eight monthly installments of the annuity of \$150 each.

Upon the issues joined, the case was tried to the court, resulting in a decree for plaintiffs and a judgment for defendants against the intervener for the amount of the annuity then due. The decree as entered makes the following findings of fact:

"That the contract made and entered into between Edward L. Watrous and Charles L. Watrous, dated June 2, 1914, as between the parties thereto, and also in so far as it is made for the benefit of the defendant, Agnes B. Watrous, is a valid and subsisting contract, except as hereinafter found and determined, for which Edward L.

Watrous parted with a valuable consideration in dismissing his contest to the will of Sophia G. Watrous, deceased, which consideration cannot be returned to him.

"That the evidence is insufficient to find that any fraud, misrepresentation, duress or undue influence was practiced or exercised in obtaining said contract.

"That Charles L. Watrous, at the time said contract was made, did not understand that he was making said annuity payable out of the estate of Sophia G. Watrous, deceased, or was creating a lien upon the interest in the estate of Sophia G. Watrous, deceased, which might accrue to him as her surviving husband, but as to each and all the other provisions of said contract, said Charles L. Watrous had sufficient understanding.

"That prior to making the contract with Edward L. Watrous, which contract is dated June 2, 1914, Charles L. Watrous had verbally elected to be bound by the terms of the last will and testament of Sophia G. Watrous, deceased, and subsequently elected by a written election filed in this court on November 18, 1914, and recorded in Probate Journal 61, page 469 of its records.

"That the contract of June 2, 1914, between Edward L. Watrous and Charles L. Watrous, did not and does not constitute an election on the part of Charles L. Watrous to claim his survivor's third, nor any part thereof, in the estate of Sophia G. Watrous, deceased.

"That Philip B. Watrous and Charles A. Watrous, plaintiffs in this action and proponents of the will of Sophia G. Watrous, deceased, are not estopped from objecting to the contract of June 2, 1914, between Edward L. Watrous and Charles L. Watrous, nor are they estopped from maintaining this action.

"That, upon the death of Sophia G. Watrous, the right of Charles L. Watrous in her estate was not a vested interest, but a mere personal option or privilege, and was

not such an interest as could be made subject to a lien, or transferred or conveyed by Charles L. Watrous."

We shall first treat the case as if there were no issue of mental incapacity, fraud, mistake or undue influence, and determine whether or not the contract made between Charles L. Watrous and his son, Edward L., and his said son's wife, is of any validity. This depends primarily upon whether or not the surviving husband took anything in the estate of his deceased wife which he could encumber by contract. On this issue, the case must be determined under the provisions of the statute law of the state. Section 3270 of the Code, so far as material, reads as follows:

"Any person of full age and sound mind may dispose by will of all his property, subject to the rights of homestead and exemption created by law, and the distributive share in his estate given by law to the surviving spouse, except sufficient to pay his debts and expenses of administration; but where the survivor is named as a devisee therein, it shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead and exemptions."

Section 3366, Code, reads as follows:

"One third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him. The same share of the real estate of a deceased wife shall be set apart to the surviving husband."

Section 3376, Supplement to the Code, 1913, provides:

"The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate, and

notice that such survivor is required to elect whether consent thereto will be given, which consent, when given, shall be in open court, or by a writing filed therein, which shall be entered on the proper records thereof; but if at the expiration of six months no such election has been made, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder."

Section 3369, Code, reads as follows:

"The survivor's share may be set off by the mutual consent of all parties in interest, or by referees appointed by the court or the judge thereof, the application therefor to be made in writing, after twenty days from the death of the intestate and within ten years, which application must describe the land in which the share is claimed, and pray the appointment of referees to set it off."

It will be noticed that part of the first section quoted is inapplicable, as the surviving husband, Charles L. Watrous, is not named as a devisee in the will, and there is no presumption arising from a devise in his favor that this was in lieu of the distributive share allowed a husband by law. That section does provide, however, that every disposition of property by will of a husband or wife is subject to the distributive share given by law to the survivor. Section 3366 thus defines that share:

"One third in value of all the legal or equitable estates in real property possessed by testator [or testatrix] at any time during the marriage * * * shall be set apart as her [or his] property in fee simple, if she [or he] survive him [or her]."

Section 3369 provides for the setting off of this share, and that application therefor shall be made within ten years from testator's or testatrix's death.

Section 3376 has reference to the effect of a will upon the distributive share, and says, in substance, that the

share cannot be affected by any will of the spouse, unless consent thereto is given within six months after a copy of the will has been served upon the survivor, and that the consent, when given, shall be in open court, or by writing filed therein, which shall be entered upon the proper records thereof. It also provides that if, at the expiration of six months after notice is given, no election has been made, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder. The election which the surviving spouse is, by the above statutes, required to make, is: (a) To consent to the provisions of the will; or (b) to refuse to consent thereto. If such survivor elects to consent to the provisions of the will, such election, when made, is inconsistent with and bars his or her right to take the distributive share of the estate of the deceased spouse. On the other hand, if the survivor elects not to consent to the provisions of the will, the effect of such election is to render any provision made by the will for the benefit of such survivor inoperative, and the survivor will take the distributive share provided by law. If, however, the survivor neglects or refuses to elect to consent to or reject the provisions of the will within six months after receiving the statutory notice, the law conclusively presumes an election to consent to the provisions of the will.

In the case at bar, testatrix made no provision in her will for her surviving spouse, who is the intervener herein, but this fact in no wise renders inapplicable the statute requiring him, upon receiving the notice provided by statute, to elect whether or not he will consent to the provisions of the will. The statute is designed not only for the purpose of preventing the husband or wife from disposing of his or her property in such a way as to deprive the survivor of one third in value thereof without the consent of such survivor, but also to facilitate the settlement of

estates, and to fix and settle the title to property belonging thereto. The surviving spouse has the absolute right to elect not to consent to the provisions of the will, the effect of which is to give such survivor absolutely an undivided one-third interest in value of all the property, real and personal, of which the deceased spouse died seized.

There would seem to be no valid reason why the survivor may not be required to elect whether or not he or she consents to the provisions of a will which disposes of the whole estate of the deceased spouse to persons other than such survivor, as well as in a case in which some provision is made by the will for the surviving spouse. As above stated, the election required presents to the survivor the option of consenting to or rejecting the provisions of the will and the disposition made thereby of the property of the deceased spouse. The effect of such election may be to deprive the survivor of his or her distributive share, or of any interest whatever in the estate of such deceased spouse; but, except in so far as the beneficial results of such election may tend to influence the decision of the survivor, same is merely incidental to the question of election. Whether the survivor elects to consent to or reject the provisions of the will of a deceased spouse depends entirely upon the voluntary action of the survivor, who is given a period of six months after the service of notice in which to reach a conclusion. The statute contemplates that such survivor shall have a reasonable time in which to determine whether to elect to consent to the disposition of the property made by the will of the deceased spouse or to insist upon the share which he or she is entitled to under the statute, if the election is to refuse to consent to the provisions of the will. If the will of the deceased spouse makes some provision for the benefit of the survivor, then the effect of the election to consent to the provisions of the will entitles such survivor, as a devisee under the

will, to take whatever is given him or her thereby, but neither the right nor duty to elect is in any sense dependent upon the generosity, or the lack thereof, on the part of the deceased spouse toward the survivor.

II. As before stated, on November 18, 1914, Charles L. Watrous elected in writing to consent to the provisions of the will. It is, however, contended by appellants Edward L. and Agnes B. Watrous that: (a)

2. WILLS: surviving spouse: will and distributive share: election: acts not constituting.

By the execution of the contract of June 2, 1914, he elected not to consent to the provisions of the will; (b) on the death of his wife, he became vested with an undivided one-third interest in her property, subject to be divested thereof by an election to consent to the terms of the will.

It was held in *Arnold v. Livingston*, 157 Iowa 677, that the fact of an election by the survivor might be proved by other evidence than the record of the court, and that such election could be thus made without waiting for the service of notice to elect. In *Berry v. Donald*, 168 Iowa 744, the court held that the evidence of such election to take under the will, in lieu of distributive share, must be clear and satisfactory.

Intervener and his wife had lived apart for a number of years, and both were possessed of property of considerable value. Shortly after the death of testatrix, an effort was made by some of her children to settle and adjust all controversies with Edward L. amicably. To this end, one of the legatees named in the will caused a contract to be prepared, providing that, from the net income of the estate, Marion Watrous Angell, daughter, and Philip Bernard and Charles Albert Watrous, sons, should each first receive \$150 a month, and Edward L., out of the remaining net income, an annuity of \$150 a month; and after his death, if survived by his wife, Agnes B. Watrous, she should receive \$75 a month so long as she lived and did

not remarry, Edward L. to release the bequest made to him in his mother's will and make no further objection to its admission to probate.

Edward L. testified that he submitted this contract to his father and talked it over with him, as the result of which an attorney was employed to prepare a contract embodying different terms. After Edward L. had filed objections to the admission of his mother's will to probate, a second contract was submitted to him by one of the plaintiffs, embodying substantially the same provisions as the former, except that the objections to the admission of the will to probate were to be withdrawn.

Mrs. Angell visited her father upon different occasions before and during his illness, and urged that some arrangement be made by which an annuity would be provided for Edward L. out of his interest in his wife's estate. The latter also talked to his father about it, urging that he was the owner of one third of the estate, and that he had a right to make provision therefrom for an annuity.

The contract finally executed was the result of the negotiations had between the parties last above named. Charles L. testified, in effect, that he desired that some provision be made for the maintenance and support of Edward L. and Agnes B. Watrous. He further testified, in part:

"I felt what I did I wanted to do myself when I was able to think more. I said what I did I wanted to do myself and not interfere with anything my wife had done.
* * * At the time I signed the contract, there was no thought or purpose in my mind that I was interfering in any way with Mrs. Watrous' will, and the first I have any recollection of any lien being mentioned was when I read this contract, and I didn't at the time understand or comprehend what it meant. * * * Mr. Hume, Edward and a stranger was there. I don't recall anybody else. The

conversation was very short. When they came in there, I seen the paper. I made no objection except to the lien. That disturbed me. I hadn't heard of it before and I was afraid that was not right, and I asked Mr. Hume. I knew he was an attorney and ought to know, and I knew I was not fit to know, and I asked and he answered, and I relied entirely upon what he said. I knew he ought to know. He said it would not affect the handling of the rest of the property; that I had so much that was mine and I had a right to do it, and as far as I know—now I don't remember other conversations at all. Q. Well, did you realize or understand that you would have to make a claim adverse to Mrs. Watrous' will in order to carry out that contract? A. No, I did not."

He further testified that, shortly after the death of his wife, he met Edward L. on the street in Des Moines, who asked him if he had seen his mother's will, to which he replied:

"No, I hadn't seen anything about it; and he said, wouldn't I like to? and I said it was nothing to me; that she had done what she wanted."

Referring to the time when the contract was executed, he further testified:

"My recollection of that is very dreamy. And then at the end of the document, there was that matter of the lien, and I had not heard anything of that before from either of my children, and it was something new and disturbed me; and I asked Mr. Hume—this is my recollection—as a lawyer whether that would affect the handling of the rest of the property in settling it up, and I understood him to say, 'No.' Just how I inquired and just how he answered, I am not certain; but I am certain that what he said satisfied me, and I rolled over on my left side and wrote my name. * * * I heard from two of the children that they were talking about allowing Edward some al-

lowance in the way of an annuity, and I didn't understand that there was any objection on anybody's part to that, except that they said Philip refused to sign anything. I don't know what they talked about among themselves. * * * I understood that he, Edward, was willing to give up everything, provided he had an annuity; but I didn't understand that I in any wise contracted with him to do anything, except that I contracted to surrender a certain share of my wife's property, which I was told I had a right to do, and that was all that I knew of it."

Questioned as a witness, regarding the election of November 18th, he testified:

"I thought I understood it when I signed it, and I believe I understand it now. *It is an election in accordance with my intent and purpose and wishes all the time.*"

Later, when he had recovered from his illness, he wrote to his son Edward as follows:

"As to the lien on your mother's property, I did not realize that what I did was giving any such thing, and now that I am to see that, out of my own property, if not otherwise, you get the \$1,800 a year, I wish you would authorize me to get some lawyer to make a proper renunciation on your part of that lien. It will bring you no further dollar than my contract, for you know I am able; but a good lawyer here says that it will hinder handling the property in order to exchange or improve it so as to get the best results out of it. Now, since you are to get your \$1,800, which you want, will you not do that for me? Then I shall be freed from a feeling that I have burdened them unnecessarily."

It is quite apparent, from the foregoing statements of his purpose, intention and understanding of the transactions here involved, that, at the time the contract was executed, he was under the impression that he had a right to incumber any interest which he might have in his wife's

estate for the payment of an annuity to Edward L., and he was willing to take such part thereof as was necessary to pay the annuity. It is equally apparent that he at no time intended to take a full distributive share in his wife's estate. He did not want to interfere with, or in any way prevent, the carrying out of the terms of her will, nor to take any part of the estate for himself, but evidently was induced to believe that he could provide for the payment of an annuity out of the share he had a right to take, without doing that which would amount to an election, or estop him from subsequently electing to consent to the provisions of the will. In this he was mistaken. The reference in the contract to his legal interest in his wife's estate is a mere statement of the interest to which, under the law, he was entitled, and not a declaration of an intention to elect to take same. The evidence falls far short of establishing an election on his part, prior to the election in writing filed in the office of the clerk of the district court.

The next proposition of appellant is

3. WILLS: surviving spouse: attempt to disinherit: nature of vested right. that the husband became seized, immediately upon the death of testatrix, of an undivided one-third interest in her real estate; and that, at the time of the execution of the contract, he had a perfect right to incumber the same; and that the subsequent written election did not affect the lien.

"It is not correct to say that, immediately upon the death of the wife, the surviving husband becomes vested by operation of law with an absolute title to a one-third interest in the land of which she dies seized. He does become vested with a right to choose whether he will take such share, or, in lieu thereof, will claim and hold a homestead right in the property, and when such choice is made, it doubtless relates back to the date of the death of his wife." *Piekenbrock & Sons v. Knoer*, 136 Iowa 534.

"It is not correct to say that, upon the death of the

wife, title to a one-third interest in her estate vests, *eo instanti*, in the surviving husband. See *Shields v. Keys*, 24 Iowa 298, and second paragraph of opinion in *Piekenbrock v. Knoer*, 136 Iowa 540. The right which he becomes vested with is the right of choice between what the law offers him and the increased or other benefits offered him by the will." *Robertson v. Schard*, 142 Iowa 500.

Several cases are cited by appellants to sustain their contention that title vested in Charles L. immediately upon the death of his wife, among which cases are *In re Estate of Smith*, 165 Iowa 614, and *Bosworth v. Blaine*, 170 Iowa 296. In the former of the above cases, the language used was to state the concession of counsel, whereas in the latter, the question under discussion related to a claimed election to take the homestead, under Section 3377, and the question as to whether the title vested in the survivor was not involved. The remaining cases cited are not in conflict with our conclusion, and need not be further considered. In *Waterloo, C. F. & N. R. Co. v. Harris*, 180 Iowa 149, the above cases are cited as holding that the wife's title vests upon the death of her husband, but the citation is without discussion or distinction, and the point here being considered was not before the court.

The settled rule of this state is undoubtedly that expressed in *Robertson v. Schard*, *supra*, and *Piekenbrock & Sons v. Knoer*, *supra*. Following the holding of these cases, it is our conclusion that the election of November 18th related back to the date of his wife's death, and the attempt to create a lien upon or the payment of an annuity out of her estate failed, and the court rightly cancelled the pretended lien provided for in the contract above referred to.

4. COMPROMISE
AND SETTLE-
MENT: consid-
eration: settle-
ment of family
controversy.

III. The court below held that intervenor was personally liable on the contract to the defendants for the payment of the annuity. Intervener contended that the contract was without consideration. We have set out extracts from his testimony regarding the execution of the contract, from which we think the inference should be drawn that he desired to be bound personally rather than attempt to interfere with the interests of the legatees named in the will. He so expressed himself in the above extract from the letter written to his son. While it is true that Edward L. did not renounce the attempt to place a lien upon a part of his mother's estate, the statement contained in his father's letter, together with the other matters referred to, tend strongly to indicate that Charles L. intended to personally make provision for his son's support. Referring to the contract, Charles L. testified to a conversation with Edward L. in part as follows:

"Q. You did agree, then, he was to dismiss his contest and you were to put this agreement in writing—is that so?
A. I don't remember that there was anything about dismissing the contest to be put in writing. I think he wanted me to fix this annuity, and I told him I would. Q. To drop everything and have no more fuss? A. He said if I did that, everything would be dropped."

Referring to another conversation between the same parties, he said:

"I didn't want to have any litigation such as we are having now. I have always been willing to do almost anything rather than have litigation, and he said if he had this kind of an agreement that there would not be any."

While the father obtained no pecuniary consideration from said contract, the situation and relation of the respective parties at the time the same was executed must be taken into account. The estate of testatrix was a large

one; intervener was also well fixed; the sum given Edward L. by his mother's will was much less than that given to each of his brothers and sister. He had instituted proceedings to contest the probate of her will, which were pending at the time of the execution of the contract. The son was without means, in bad health, and compelled to reside in a climate suitable to his condition. The relation between the father, Mrs. Angell and Edward L. appears to have been very friendly, and it may be assumed that intervener possessed the solicitude common to parents for the welfare of an invalid son and his wife, and, as stated by him, he was interested in having the pending litigation between the respective members of his family terminated and the consequent expenses attendant thereon avoided. In accordance with the provisions of the contract, Edward L. dismissed the objections he had filed to the admission of the will to probate. We think, therefore, that there was a consideration which was sufficient to sustain the contract, and that Charles L. must be held to have bound himself personally to the payment of the annuity.

"Compromises for the settlement of family difficulties or family controversies, if at all reasonable, are especially favored, both in equity and in law; and in such cases, the court will go further to sustain the same than they would under ordinary circumstances. The termination of such controversies is considered a valid and sufficient consideration for the agreement." 8 Cyc. 504; *Adams v. Adams*, 70 Iowa 253; *Stoddard v. Mix*, 14 Conn. 11; *Moon v. Martin*, (Ind.) 23 N. E. 668.

IV. It is contended by appellants Edward L. and Agnes B. Watrous that the plaintiffs are estopped from asserting the invalidity of the lien above referred to, for the reason that, at the time the will of Sophia Glover Watrous was admitted to probate, they had

5. ESTOPPEL:
equitable estop-
pel: opportunity
to avoid in-
jury. effect.

constructive notice of the annuity contract, by reason of the filing thereof in the office of the clerk of the district court of Polk County, and also actual notice of the dismissal by appellant of the proceedings instituted by him for the purpose of contesting the will of his mother. It is asserted that a substantial benefit accrued to appellees by reason of the dismissal of said proceedings, and that, on account thereof, it was their duty to inform appellants that they would not be bound by the attempted creation of a lien by intervener upon the property in question, thereby giving to the said Edward L. Watrous the opportunity of prosecuting the will contest.

This position of appellants' cannot be sustained. The record wholly fails to show any act on the part of appellees which misled appellant or which induced him to enter into the annuity contract with intervener, or to dismiss the contest proceedings. The contract was made after negotiations with the other heirs for a settlement on the basis of a contract embodying many of the same provisions failed entirely. Surely, it cannot be said that their silence, after constructive or even actual notice of the execution of the contract and of the dismissal of the contest proceedings, would operate to create the estoppel contended for. No inequitable conduct on the part of appellees is shown. Mrs. Angell, who asked her father to make provision for the annuity, is not a party to this suit. Furthermore, at the time of the institution of this suit, Edward L. Watrous could have maintained an action for the purpose of having the probate of his mother's will set aside, in which proceedings every substantial legal right which he possessed before the probate of the will could have been urged.

Appellees were not, therefore, estopped to prosecute this action.

V. The remaining questions affecting the validity of the annuity contract will be discussed together.

6. CONTRACTS :
validity : mental
weakness.

It appears without conflict in the evidence that, at the time of the execution of said contract, intervenor was ill and confined to his bed, and the evidence on his part shows that he was very weak, and under the constant care of a nurse and physician. He was examined as a witness in his own behalf, and testified fully regarding the transaction and conversations leading up to the consummation of the contract in question. While his recollection as to many of the details and some of the important matters in connection therewith is apparently uncertain and indistinct, yet, upon the whole record, we are not convinced that he signed the contract without so understanding its terms and conditions as to make the same invalid upon that ground. Intervenor was, at the time, about 77 years old. In early life, he was admitted to the bar, and for several years practiced his profession, and appears to have been a man of rugged mental capabilities and large business experience. He appears to have grasped the significance of the contract and to have understood its terms, except that he maintains that he did not understand the full effect of the provision which sought to create a lien upon the property which he might receive from his wife's estate. The contract is in no sense an unnatural or unreasonable one, but, in view of the condition of his son's health and the probable impecunious condition of his wife that would follow the death of her husband, if she survived him, his consideration for them may well have induced the father to execute the contract in question.

This court has held that, in order to avoid a contract on the ground of mental incompetency, more than mere weakness of the mind or unsoundness to some degree must be shown. It must appear that he was incapable of under-

standing or comprehending the meaning, to a reasonable extent, of the instrument executed. The evidence failed to show that the mental faculties of intervener were so far impaired, either by disease or bodily weakness, as to render him incapable of reasonably comprehending and understanding the transaction in question, at the time of making the contract. *Elicood v. O'Brien*, 105 Iowa 239; *Brockway v. Harrington*, 82 Iowa 23.

Without setting out the evidence in detail, which would unduly extend this opinion, suffice it to say that we have carefully read the record, and are satisfied that intervener was not, at the time of the execution of said annuity contract, of unsound mind to such an extent as to render said contract void. The attorney and notary who were present when the contract was signed and acknowledged, testified at length regarding the transaction, and their testimony, together with the understanding and recollection of Charles L. Watrous as to what was said and done at the time the contract was signed, removes all doubt as to his mental condition. In our opinion, the evidence does not show that intervener was induced to make the annuity contract by fraud, duress or undue influence.

7. COMPROMISE
AND SETTLE-
MENT: consid-
eration: dis-
missal of
groundless
suit: evidence.

VI. Appellant intervener attempted to offer in evidence the testimony of Philip Watrous to the effect that Edward L. Watrous stated to him that he knew that the charges set forth in his objections to the probate of

the will were not true, but that he understood that it was necessary to put something of record in order to prevent the probate of the will; that he was not after Philip at all, but his brother Charlie. This evidence, upon objections, was excluded by the court. Counsel, however, made their offer of record, and we assume that the offer embraced all of the material matters to which the witness would have testified. We think this evidence was clearly admissible, as

bearing upon the individual liability of Charles L. Watrous.

The rule seems to be that a compromise of a suit for which there was no ground, and which was not brought in good faith, is no consideration for a contract of settlement. *Sullivan v. Collins*, 18 Iowa 228; *Tucker v. Ronk*, 43 Iowa 80; *Potts v. Polk County*, 80 Iowa 401. We have, however, reached the conclusion, from all the facts and circumstances before us, that there was a sufficient consideration to support the contract, and that, giving the same effect to the statement of counsel as would be required if the evidence had been received, the same is insufficient to change the result, and we will not, therefore, reverse the case because of the exclusion of this testimony.

8. APPEAL AND
ERROR: ab-
stracts: appeal
by both plain-
tiff and de-
fendant: suffi-
ciency of ab-
stract.

VII. The defendants have filed a motion to dismiss the appeal of intervener upon the ground that he failed to cause an abstract to be filed within the time required by the rules. Notice of appeal was served by the defendants on the 7th, and by intervener on the 26th day of June, 1915. Within the time required, defendants filed their abstract, failing, however, to include therein the record of intervener's appeal, whereupon intervener filed an amendment to appellants' abstract, in which the record of his appeal was shown.

We think the motion should be overruled. It could serve no good purpose for appellants to file duplicate abstracts, and no prejudice is shown to have resulted to anyone from the failure of intervener to file a separate abstract.

Plaintiffs have also filed a motion to dismiss the appeal of defendants on the ground that, after the decree was entered finding Charles L. Watrous personally liable for the annuity, and a personal judgment was rendered against him, Edward L., after the death

9. APPEAL AND
ERROR: right of
review: wai-
ver: seeking to
enforce judg-
ment.

of intervener, filed a claim therefor against his estate. He did not thereby waive his right to prosecute this appeal, and this motion is also overruled.

For the reasons pointed out, this cause is, both upon defendants' and intervener's appeal,—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

R. BUCHAN, Appellee, v. GERMAN AMERICAN LAND CO. et al.,
Appellants.

JUDGMENT: Conclusiveness of Adjudication—Persons Concluded

1 —**Unborn Children.** The contingent interest of unborn children in real estate may be validly cut off by a judgment in a good-faith action to quiet title. For instance, if all living children who are interested in the property are brought before the court, and they have identically the same interest which an after-born child would have, then a decree that the living children have no interest is binding on unborn children, on the necessary theory that, in said action, the living children represent the unborn. So held where the issue in an action to quiet title was whether a devisee took a fee simple title or whether he took a life estate with remainder to his *surviving* children.

VENDOR AND PURCHASER: Performance of Contract—Title and

2 **Estate of Vendor—Marketable Title.** A title which is good as a matter of *law* is not rendered unmarketable by the *possibility* that vexatious litigation might be instituted in relation thereto, nor by the fact that attorneys had advised against accepting the land as security for a loan.

VENDOR AND PURCHASER: Forfeiture of Contract—Notice, etc.

3 Record reviewed, and held to justify the forfeiture, under Section 4299, Code, 1897, of a contract of sale of real estate.

Appeal from Palo Alto District Court.—N. J. LEE, Judge.

THURSDAY, SEPTEMBER 20, 1917.

RAYMOND BUCHAN died testate March 23, 1907, in Champaign County, Illinois. The material portions of his will are as follows:

"* * * To my wife M. J. Buchan I give all of my household goods of every description and one third of net income from all my lands during her life. * * * My son, Raymond. I give the East half of Sec. 23 and NW $\frac{1}{4}$ Sec. 23 and the North 120 acres of the West $\frac{1}{2}$ of the West $\frac{1}{2}$ of Sec. 24 all in Vernon Township, Palo Alto County, Iowa, * * * This instrument I write October 16, 1906, hereby revoking my former will. * * * Each and all of them shall keep and improve these lands subject to my wife's dower interest during their lives, at their deaths it shall go to their children from their own bodies, in case no child from their own, then it shall go to the nearest heirs of my body and my personal property after Jay and Collin all of my teams and agricultural implements and my shares in Elevator and Threshing Companies, then my wife, Mary, Jay and Collin shall get all of the other property. Nothing to be collected from Raymond. James shall pay Collin \$1,500 to be put in improvements on his Palo lands and he shall see that it is done. * * *

Separate tracts were given to each of his sons and to his daughter, Mary. The foregoing will was admitted to probate in the county court of Champaign County, Illinois, and subsequently, October 17, 1908, as a foreign will, in Iowa. On August 27, 1913, appellee entered into a contract in writing, by the terms of which he agreed to furnish abstract showing a good, merchantable title to the above described real estate, March 1, 1914, and convey the same to the German American Land Company, Incorporated, appellant herein, for a consideration of \$57,000, to be paid: \$1,000 cash at the time of the execution of the contract; \$9,000, April 1, 1914, with interest at 5 $\frac{1}{2}$ per cent; and \$7,000, March 1, 1916, with interest at 6 per cent; the payment of the balance to be arranged by the purchaser's obtaining a loan upon the premises in a sum not less than \$18,000 and executing a second mortgage thereon to plain-

tiff to secure the payment of the balance on or before March 1, 1924.

Plaintiff brings this action to cancel the contract and quiet title to the real estate against the German American Land Company, Incorporated, and the other defendants named, who had become interested therein as purchasers through the land company. Plaintiff alleged in his petition that the defendant failed to make payments as provided by the contract, and to otherwise carry out its terms. The defendants, except the land company, filed disclaimers. The land company filed answer alleging its readiness and ability to carry out the contract had appellee furnished an abstract showing good, merchantable title and complied with the terms of the contract upon his part.

More than thirty days before this suit was brought, appellee served a notice upon each of the defendants of his intention and purpose to forfeit the contract, and declaring same forfeited under the provisions of Sections 4299-4301 of the Code. Decree was entered in favor of plaintiff as prayed. The defendant land company appeals.—*Affirmed.*

A. C. Johnston and C. W. Piersol, for appellant.

E. A. and W. H. Morling, for appellee.

1. JUDGMENT:
conclusiveness
of adjudica-
tion: persons
concluded: un-
born children.

STEVENS, J.—1. The argument of appellant is that the will of Raymond Buchan devised to plaintiff a life estate only, and that, when the time arrived for consummating the sale, he was not possessed of a merchantable title. On the other hand, appellee construes the will in question as giving him the land absolutely, in fee.

On or about September 26, 1908, Raymond Buchan, appellee herein, filed a petition in the office of the clerk of the district court of Palo Alto County, making each of his

brothers who were married, their wives, their children, two brothers who were unmarried, his unmarried sister, the surviving widow of testator, and plaintiff's wife and children. parties defendant. All were personally served with original notice of the suit, and in due time a guardian *ad litem* was appointed by the court and filed answer for all of the defendants who were minors.

Upon final hearing, the court in its decree found that plaintiff was, by said will, devised an absolute fee, subject only to the right of M. J. Buchan, the surviving widow of testator, to receive one third of the net income derived from said premises so long as she should live, and quieted title in plaintiff against all of said defendants in accordance with said finding. The decree entered in this suit is dated October 7, 1908. No appeal was taken therefrom, and subsequently M. J. Buchan quitclaimed her interest to plaintiff.

From the foregoing statement, it will be observed that the court, at the time of rendering said decree, had jurisdiction of all living persons who, by any possibility, could have any interest in said real estate. The judgment therein rendered is, of course, binding, in the absence of fraud, upon all adult defendants and all minors represented by guardian *ad litem*. *Bingman v. Clark*, 178 Iowa 1129; *Bickel v. Erskine*, 43 Iowa 213; *Harris v. Bigley*, 136 Iowa 307.

Counsel for appellants do not contend that the decree is not binding upon all adult parties thereto, but insist that there is yet time for some of the defendants who were minors to involve the title in litigation upon the ground of fraud in obtaining the decree; but it is not claimed by them that there was fraud or anything upon which even a suspicion thereof can be predicated. It is also the contention of appellant that children may hereafter be born to plaintiff and his brothers and sister, and that such possi-

bility clouds the title to said real estate, and may subsequently involve the same in litigation.

The general rule that only parties and those in privity with them are bound by a judgment is not without some exceptions, one of which is that where, without fraud or collusion, all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, its judgment is conclusive as to the title, and binds all contingent interests in the real estate. Persons not *in esse* at the time of the rendition of the decree in question, but who, upon coming into being, might have some possible contingent interest in said property, would necessarily be of the same class as some of the defendants named in said suit, and the judgment entered therein was binding, not alone upon the living parties thereto, but as well upon all those who might thereafter come into being. Whether this rule has been previously recognized or applied in this state or not, it prevails in every other jurisdiction where the question has been presented. This rule and the reasons therefor are well stated in the following cases.

"Conceding, without so deciding, that the deed in question vested in Mrs. Gorman only a life estate in the lot, and created a contingent remainder, as plaintiff claims, still the district court had power to acquire jurisdiction over all parties interested in the contingent remainder, and by its decree determine their rights. This conclusion necessarily follows from the equity doctrine that the general rule that only those who are parties to a suit are affected by the decree is subject to the exception that, where the subject matter of the action is the determination of the title to real estate, if all parties are brought before the court that can be brought before it, and it acts on the property according to the rights that appear, there being no fraud or collusion, its decision is conclusive as to the state of the title,

and binds all contingent interests in the real estate. In such a case it is sufficient to bring before the court the first tenant in tail in being, and, if there be none, the first person entitled to the inheritance, and, if there be none, then the tenant for life; for all other parties who may at any time claim a contingent remainder or other contingent estate are bound, upon the principle of representation, by the decree adjudging the title. The rule is based upon necessity, for it would be intolerable injustice if the owner of real estate could not have his title quieted where there was a claim of an outstanding contingent remainder which might possibly vest in persons not then in being." *Mathews v. Lightner*, (Minn.) 88 N. W. 992.

"But the question is whether the court has the power, by its decree, to alienate the contingent titles of unborn remaindermen, who, from the nature of things, cannot be made parties, or be represented in the proceedings before the court, or to alienate the contingent title of persons who, though *in esse*, are resident in other states or in foreign lands, whose residences and even whose names are unknown. To say that the court could not, under circumstances like these, convey away the fee, would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community. Thus to shackle estates without the power of relief unless every person having a contingent and possible interest could be brought before the court, would be to sacrifice the rights and interests of the present generation to those of posterity, and of citizens to aliens. If the whole property of the country were thus situated, it is obvious that all improvement and advance would be completely checked." *Hale v. Hale*, (Ill.) 33 N. E. 858.

See, also, *Hopkins v. Patton*, (Ill.) 100 N. E. 992; *Kent v. Church*, (N. Y.) 32 N. E. 704; *Perkins v. Burlington*

Land & Improvement Co., (Wis.) 88 N. W. 648; *Hermann v. Parsons*, (Ky.) 78 S. W. 125; *Evans v. Wall*, (Mass.) 34 N. E. 183; *Doremus v. Dunham*, (N. J.) 37 Atl. 62; *Hunt v. Gower*, (S. C.) 128 Am. St. Rep. 862 (61 S. E. 218); *Coquilliard v. Coquilliard*, (Ind.) 113 N. E. 481; *Freeman v. Freeman*, 65 Tenn. 301; *Miller v. Texas & Pac. R. Co.*, 132 U. S. 662; *Glover v. Bradley*, 233 Fed. 721; *Ridley v. Halliday*, (Tenn.) 61 S. W. 1025; *Los Angeles County v. Winans*, (Calif.) 109 Pac. 640; *Letcher v. Allen*, (Ala.) 60 So. 828; 3 Devlin, Real Estate (3d Ed.), Sec. 1494; *Harrison v. Wallton's Ear.*, (Va.) 30 S. E. 372; *Love v. Lindstedt*, (Ore.) Ann. Cases 1917A, 898, and note; *Rutledge v. Fishburne*, (S. C.) 97 Am. St. Rep. 757, and note.

In view of what is said above, it is wholly unnecessary for us to undertake a construction of the will in question, further than to say that it quite clearly was not the intention of testator to devise to plaintiff a life estate in the property; and, in view of the binding character of the decree to quiet title, it is immaterial whether the estate granted is an absolute or defeasible fee.

II. It appears to be conceded that the application of appellant for a loan upon the premises in question was declined by some one or more loan companies upon the ground that the title was unmerchantable.

The only objections now urged to the title arise out of the construction of the will. It is urged by counsel for appellant that the title is subject to vexatious and hazardous future litigation, and that appellee has, on account thereof, wholly failed to comply with his agreement to furnish an abstract showing a good, merchantable title.

To be unmerchantable upon the objection that the title is subject to future litigation, some defect must exist in the record title, or there must be some known fact

2. VENDOR AND
PURCHASER:
performance of
contract: title
and estate of
vendor: market-
able title.

which casts doubt thereon. The definition of merchantable title, as adopted in this state, is stated in *Billick v. Davenport*, 164 Iowa 105, as follows:

"Such a title is said to be one which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as security for a loan of money.
* * * The test is whether a reasonably prudent man, familiar with the facts and apprised of the question of law involved, would accept such a title in the ordinary course of business."

See, also, *Fagan v. Hook*, 134 Iowa 381.

It has been held that a title which exposes the party holding it to litigation is not marketable. *Swayne v. Lyon*, 67 Pa. 436; *Miller v. Bronson*, (R. I.) 58 Atl. 257. While the law does not compel a purchaser to accept a doubtful title, there must be something more than a mere possibility that the title is defective. *Miller v. Cramer*, (S. C.) 26 S. E. 657. A threat or even a possibility of a contest will not be sufficient. *Gill v. Wells*, 59 Md. 492. In the following cases, which present a considerable variety of alleged defects in titles, the titles were, nevertheless, held marketable: *Singleton v. Close*, (Ga.) 61 S. E. 722; *White v. Bates*, (Ill.) 84 N. E. 906; *Ditchey v. Lee*, (Ind.) 78 N. E. 972; *Prichard v. Mulhall*, 140 Iowa 1; *Archer v. Jacobs*, 125 Iowa 467; *Kendall v. Crawford*, (Ky.) 77 S. W. 364; *Mathews v. Lightner*, supra; *Zelman v. Kaufherr*, (N. J.) 73 Atl. 1048; *Reece v. Haymaker*, (Pa.) 30 Atl. 404.

It was held in *Mathews v. Lightner*, supra, that a title is not unmarketable where no question of fact is involved and it is good as a matter of law. No specific objection to the title in question appears to have been made by appellant, but it is claimed that its application for a loan had been denied upon the ground that the title was defective in the particulars heretofore discussed. Attorneys who examined the abstract expressed doubt concerning the mer-

chantability of the title and advised against accepting the same as security for a loan. No question of fact or of the record title is involved, but only questions of law. The conveyance by the surviving widow of her interest to plaintiff, together with the decree quieting title in him, removed every cloud from his title. *Archer v. Jacobs*, *supra*. The title had been perfected in plaintiff, and must be held merchantable, under the definition of that term heretofore adopted by this court.

III. Finally, it is contended by counsel for appellant that plaintiff is not in position to insist upon a default, and that he has failed to comply with his contract and furnish an abstract showing a merchantable title, and that, therefore, the court erred in quieting title against it. Notice of the election of appellee to forfeit the contract under the statute was served upon all persons concerned, as required thereby. The provisions of the contract in this respect were strictly followed. The court ruled against the contention of appellant in *Ashford v. Meyer*, (Iowa) 125 N. W. 194 (not officially reported), which is controlling in this case.

Some other questions are discussed by counsel, but, in view of what has been said above, it will not be profitable to discuss them in this opinion.

The finding and decree of the trial court were right, and should be and are—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

F. A. BURLINGAME, Appellant, v. HARDIN COUNTY, Appellee.

PAYMENTS: Recovery of Payments—Voluntary Payments—Agreement for Return. Funds which legally belong to a public officer, but which are by him turned over to the public treasury on demand of the managing authorities, on the claim that such funds

belong to the public, may be recovered by the officer making the deposit, when the deposit was made with the express or implied agreement that they should be returned to the officer in the event that the holding of the court as to the ownership of the funds was in the officer's favor.

PAYMENTS: Recovery of Payments—Voluntary Payments—Strict
2 Construction of Rule. Principle recognized that the rule that "voluntary payments made under a mistake of law may not be recovered," will not be stringently applied except in cases coming clearly within the scope of the rule, nor will it be applied in those cases where to so do would clearly work inequitable results.

OFFICERS: Compensation and Fees—Non-Official Fees—Clerk of
3 Court as Referee in Probate. Compensation received by a public officer for the performance of duties which are in no wise imposed upon him as a part of his official duties, belongs solely to the officer, and not to the public. So held as to fees received by the clerk of the district court as referee in probate under Sec. 3393, Code, 1897, even though the order of appointment specified the appointee as "clerk of the district court."

EXECUTORS AND ADMINISTRATORS: Account and Settlement
4 —Appointment of Referees. The appointment of referees in probate under Sec. 3393, Code, 1897, for the purpose of examining probate reports, etc., need not be a separate appointment for each and every report presented, but may be in the form of a standing order for all reports.

Appeal from Hardin District Court.—R. M. WRIGHT, Judge.

THURSDAY, SEPTEMBER 20, 1917.

The opinion sufficiently states the case.—*Reversed.*
Lundy, Peisen & Soper, for appellant.

H. M. Havner, Attorney General, *H. H. Carter*, Assistant Attorney General, and *C. A. Bryson*, for appellee.

WEAVER, J.—The facts material to the
 1. **PAYMENTS:** disposition of this case are undisputed.
 recovery of
 payments: vol- The plaintiff was the duly elected, quali-
 untary pay- fied and acting clerk of the district court
 ments: agree- of Hardin County for two or more terms.
 ment for return.

During the period of such service, acting under the order or appointment of the district court, he at different times performed the duties of referee for examination of reports made to said court by executors, administrators and guardians, for which services he was allowed compensation in the form of fees taxed and allowed as costs in the several cases so examined and reported upon by him. In the aggregate, the compensation so earned and received by plaintiff amounted to \$1,615. The county, by or through its proper officers, claimed that the moneys so received were a part of the emoluments of the clerk's office, to be accounted for and paid over to the county treasurer, though the clerk held them on the theory and in the belief that they belonged to him individually, and not as an officer of the county. Demand being made upon him to make such payment and accounting to the county treasurer, plaintiff delivered or paid to or deposited with the treasurer the sum of \$615 in money, and his demand promissory note for \$1,000, accompanied by a written statement that such payment or deposit was for the amount he had received for his services as referee, which he had withheld under the belief that such collections belonged to him personally, and that, in case said moneys should thereafter be found to properly belong to him, he would expect the same to be returned. The payment or deposit so made was accepted, and the amount has been retained by the county or its treasurer. Thereafter, plaintiff instituted this action at law to recover said amount, alleging in his petition that said moneys were received from him by the treasurer, with the understanding that the right thereto was to be determined thereafter, in a proper proceeding for that purpose.

To the petition setting up the foregoing facts, the defendant demurred, on grounds as follows:

1. That, by the statutes of the state, any officer

wilfully taking higher or other fees than are allowed by law is guilty of a misdemeanor; that it is also provided that the clerk shall report to the board of supervisors all fees received by him and pay the same to the county treasurer; and that the salary of \$1,400 in counties of the class in which Hardin County is included, shall be received as full annual compensation for all services.

2. That the order of the district court under which the services were performed by the clerk was without authority of law, and therefore void and of no effect.

3. That the money was paid voluntarily and under a mistake of law, and therefore is not recoverable in this action.

4. That the court has no jurisdiction of the subject matter of the controversy, as the matter of the clerk's salary is fixed by statute.

The demurrer was sustained generally, and, the plaintiff electing to stand without further pleading, judgment was entered against him for costs.

I. The appellee makes no argument in support of the proposition that the court was without jurisdiction of the subject matter of the controversy, and the point so made is evidently without merit.

It is argued, however, that the money sought to be recovered was paid by mistake of law only, and the defendant is not liable for its repayment. While the petition is not drawn with technical nicety, we think that, as amended, it is not open to this objection. Read as a whole, the declaration made in the petition is fairly open to the construction that there was a difference in opinion between the clerk and the board of supervisors or county treasurer upon the question of the right of the former to retain as his own the compensation paid him as referee, and that plaintiff paid over in money and note the amount demanded from him, with the understanding or agreement that if,

in a proper proceeding, his legal right to such compensation was determined in his favor, the payment or deposit so made should be returned to him. This does not bring the case within the general rule that voluntary payments of illegal demands are not recoverable by the payer, but rather within the principle applied by this court in *Carter v. Riggs*, 112 Iowa 245, and *Lyman v. Lauderbaugh*, 75 Iowa 481. See also *Harvey v. President, etc., of Olney*, 42 Ill. 336. In the *Lyman* case, it was held that, where the defendant in an action voluntarily paid the plaintiff's demand for the purpose of releasing an attachment, but under a promise that plaintiff would repay the money if defendant would show that he did not owe the debt, such payment did not come within the rule above mentioned, but that the promise to return the payment was supported by sufficient consideration, and defendant could maintain a suit for the recovery of the payment. In the *Carter* case, Riggs demanded from Carter a full year's rent for certain leased property. Carter admitted owing rent for a shorter period only, and instructed his bank to pay such sum. Riggs persisted in his demand, and the bank, to facilitate its client's business, paid the full sum demanded, but accompanied it with a letter saying that it would leave the dispute as to the right of the matter "to be adjusted later." Carter having brought suit to recover the difference or overpayment, we held that Riggs received the money subject to the reserved right of Carter to maintain such action, saying:

"We know of no reason why such an understanding may not be had, and the rights reserved enforced. * * * The clause, 'leaving difference to be adjusted later,' has none of the elements of a protest. The wording of the letter clearly indicates that a voluntary payment was not intended."

See *Juneau v. Stunkle*, 40 Kans. 756. There is no

good reason why the same rule should not be recognized in this case. The plaintiff was a public officer, who had presumably given an official bond which he was bound to protect; the legal question between him and the county was one of some intricacy and importance, and had not been directly passed upon or expressly settled either by statute or the decision of this court. To refuse the demand made upon him was to invite possible charges of a criminal character against himself and civil suit against his sureties. An adjustment by which he could place the money or security in the hands of the treasurer, subject to repayment if he should succeed in establishing his personal right thereto, was both honest and fair, and the court should be slow to declare it of no effect. There is no reason in law or good morals why the county should, under such circumstances, be permitted to retain the money if, as a matter of law, it had no legal right to demand or exact it. The payment made, with the reservation of the right to try out the question in a civil action, protected the county perfectly, and at the same time gave plaintiff an opportunity to save himself from loss, in case his title to the money should finally be upheld.

Even in the absence of such reservation.

2. PAYMENTS: recovery of payments: voluntary payments: strict construction of rule. it is not at all certain that the mistake, if one was made, was so clearly one of law and not of fact as to bring it within the rule for which appellee contends. *Varnum v. Town of Highgate*, 65 Vt. 416. Courts are not inclined to apply the rule stringently except in cases coming clearly within its scope and effect, nor to so extend its application as to work clearly inequitable results. *Ward v. Ward*, 12 O. Cir. 59; *Pitcher v. Turin*, 10 Barb. (N. Y.) 436. Bearing very directly upon the phase of the case being here considered, see also *United States v. Lawson*, 101 U. S. 164 (25

L. Ed. 860) ; *United States v. Ellsworth*, 101 U. S. 170 (25 L. Ed. 862).

II. The principal question argued by
 3. OFFICERS :
 compensation
 and fees : non-
 official fees :
 clerk of court
 as referee in
 probate.
 counsel goes directly to the merits of plaintiff's claim that the services for which he received the moneys in controversy were not rendered by him in his official capacity, and he is therefore not rightfully subject to defendant's demand for accounting and payment of such sums to the county treasurer. It is true, as the defendant claims, that, under the statutes of this state, the clerk of the district court is paid a stated salary, and that all fees received by him for his official services belong to the county, and are to be accounted for and paid over by him to the county treasurer. Code Supplement, 1913, Section 296. The right of the county to demand and recover money received by the clerk depends solely upon the question whether such money has been received by him in his official capacity. A county officer does not contract to give all his time to the public service in any such sense that all the money he may earn or receive from any and every source during his term of office must be accounted for to the county.

"His duties are fixed by statute, and when these are performed, he is not required to do more." *Polk County v. Parker*, 178 Iowa 936.

If, for example, he receives payment or fees as a witness in a civil action, or for service as one of a board of arbitrators, or as clerk of an election board, or as laborer in the harvest field, or indulges in literary work for which he receives more or less in royalties, or, being a merchant or banker or mechanic, wins profits wholly disconnected with the duties placed upon him by statute, no one would soberly contend that the county or any of its officers could rightfully lay claim to any part of the income or earnings so accruing. In each and every case cited and

relied upon by the appellee, the right of the county to compel an accounting by the clerk has been exercised solely upon the admitted or proved fact that the moneys in question were received by him in his official capacity. In *Moore v. Mahaska County*, 61 Iowa 177, the fees earned by the clerk for serving upon the Commissioners of Insanity were held to come within this description, because the statute expressly imposed that duty upon him in his official capacity. In *Rhea v. Brewster*, 130 Iowa 729, it was held that interest upon moneys deposited with the clerk did not belong to him individually—a very self-evident proposition. In *Board v. Dickey*, 90 N. W. 775, a Minnesota case, the fees sought to be retained by the clerk were statutory, and therefore to be accounted for by him, and it was held that the furnishing of copies and certified statements by him from his records were services rendered “in his official capacity.” Such also is the effect of *Finley v. Territory ex rel. Keys*, (Okla.) 73 Pac. 273, where the fees claimed by a county judge were for the performance of duties imposed upon him by statute. In *State v. Kelley*, 46 N. W. 714, the Nebraska court held that the clerk, being empowered by statute to perform certain acts, could not evade its effect by doing those acts as a notary public. In *Mulcrery v. City and County of San Francisco*, 231 U. S. 669, under a statute requiring the clerk to account for and pay over “all moneys coming into his hands as such officer, no matter from what source derived,” he was held not entitled to retain fees received in naturalization cases, because such fees were received “in compensation for official acts, not personal acts.” Indeed, that conclusion is so manifestly right and unavoidable that it is a source of surprise that the contention there asserted in behalf of the clerk should ever have been raised. Other cases cited to this end and not here specifically mentioned all

fall within the same class, and announce no other or different rule.

We have, then, still to consider whether, in performing services as referee under the appointment of the district court, the plaintiff was acting in his official capacity as clerk. By statute. Code Section 3393, it is provided that:

4. EXECUTORS AND ADMINISTRATORS: account and settlement: appointment of referees.

"In matters of accounts of executors and administrators, the court may appoint one or more referees, who shall have the powers and perform all the duties therein of referees appointed by the court in a civil action."

It is argued for the defense, among other things, that the appointment of the plaintiff in this case was in the form of a standing order, signed by the several judges of the district, and sought to be made applicable in all probate cases, when in truth, as counsel contended, the statute confers such authority on the court only, and not on the judges thereof, and it is to be exercised, if at all in probate cases, severally and not collectively. From this premise it is said that the referee's fees in question were exacted wrongfully and without authority, and because thereof plaintiff cannot recover. In our judgment, there can be no question of the validity of the order of appointment. The probate court is always open for the transaction of business not requiring notice, and the usual, if not necessary, manner of making orders in probate, except those made in term time, is reducing them to writing, attesting them by the judicial signature, and filing the same with the clerk; and such appears to be what was done in this case. Nor do we think it any undue extension of the authority given by the statute for the court to provide that all reports of administrators and executors should be submitted to the examination of the referee so named. The enactment of the statute was doubtless prompted by the

fact, well known to lawyers and trial courts generally, that the time available for such purposes in open court is entirely inadequate for the careful and thorough examination required to insure proper and intelligent action upon such reports, and that, without the aid of a master or referee, much injustice is likely to be done, and grave abuses may escape detection and correction. These conditions can be best met only by the selection of competent persons to give each and all reports of such trusts the time and attention which they reasonably require; and, so far as we have observed, the district courts of the state have construed and acted upon the statute referred to as authorizing orders substantially such as was made in the instant case. That construction appears to be reasonable, and we are disposed to give it our approval.

It is further argued that, as the order in question appoints the clerk of the court referee, mentioning his official station only, and not naming him individually, it follows that whatever he received as referee under such appointment was earned in his official capacity. But this does not follow. The court could add nothing to the duties of the clerk, as such, over or beyond that for which the statute expressly or impliedly provided. If, for example, the parties to a litigation should report to the court their desire to have their case referred, and their agreement that the clerk should be named the referee, and thereupon the court should enter an order, saying in substance, "By agreement of the parties, this cause is referred to the clerk of this court to hear, try and determine the issues joined, and report his findings of fact and conclusions of law thereon,"—would the fact that the court's order designates the referee solely as clerk, and not by his proper or individual name, have the effect to render him liable to the county for whatever fee or compensation he might receive for the service so performed? We are

very clear that such a conclusion would be wholly unwarranted. The words, "clerk of the district court," in such cases would be merely *descriptio personae*, and have no other or different effect than would follow had the name of his office not been mentioned, and he had been described by his proper name. The statute nowhere imposes upon the clerk the duty to examine and pass upon probate reports. That is a judicial function with which he is not clothed; and, while it is doubtless within the authority of the district court to clothe him with such authority by naming him as referee, the authority is derived from such appointment, and not from his official character as clerk. This being true, we think it follows of necessity that fees or compensation so earned are not chargeable to him as fees or emoluments of his office. Quite in point is *St. Louis Union Trust Co. v. Texas Southern R. Co.*, (Tex.) 126 S. W. 296, where the court named the clerk as custodian of property and to perform other services not required of him by law as clerk, and it was held that he was entitled to receive individually the compensation so earned. To the same effect see *Alcorn v. State*, 57 Miss. 273. There is a Federal statute, U. S. Rev. Stat., Sections 1763 to 1765, inclusive, prohibiting the allowance of additional pay or compensation to public officers. It has been held that a clerk who has performed services as a United States commissioner may charge and receive payment therefor without violating such statute, as the duties of the two positions or employments are not incompatible. *Erwin v. United States*, 37 Fed. 470. The same general question has been quite elaborately considered by the Indiana court in *State v. Flynn*, (Ind.) 69 N. E. 159. There the clerk had received payment for services rendered in preparing copy for the ordinary term docket for the convenience of the court and bar, and it was sought to compel him to account for and repay to the county the moneys so received. The claim was

held to be without merit, on the theory that, even though such service was ordered or authorized by the court, it was not a service made incumbent on the clerk by law, and that, in performing the same, he was not acting officially, and the compensation received therefor could not be considered fees or emoluments of his office. It is there said (page 162) :

"The court, under the circumstances, has as much power to have employed any competent attorney at law or other person to this work as it had to employ Flynn. * * * If immediate necessity had arisen for the repair of the elevator to the court room, and the court had employed him to make the necessary repairs, and allowed him therefor a reasonable compensation out of the county treasury, in reason it could not be asserted that he rendered official services in making such repairs, and must account to and pay over the money so received to the county, by reason of the mere fact that, at the time he performed the work. * * * he was the incumbent of the office of clerk. * * * We are of the opinion that the court, if the necessity arose, had the power to employ Flynn unofficially to prepare and arrange the hand dockets for the use and purposes of the court, and had the authority, therefore, to allow him a reasonable compensation for such services out of the county treasury, as court expenses. Consequently, the money allowed him under such circumstances would be his own, and he would not be required to turn it over to the county."

See also, from the same court, *State v. Shutts*, (Ind.) 69 N. E. 397. Mr. Mechem, in his work on Public Offices and Officers, Section 863, lays down the general rule that the incumbent of an office is not rendered legally incompetent to discharge duties clearly extra-official, or outside of the scope of his official duty. The mayor of a city, being a lawyer, and employed to defend the city in a law suit, has been held entitled to recover reasonable compen-

sation, notwithstanding his official relation to such city. *Mayor v. Muzzy*, 33 Mich. 61. The court there says:

"He was no more required, in consequence of his official position, to employ his time and talents as a counselor at law in conducting a suit brought against the city, than he was to pay the debts of the city out of his own private funds."

Indeed, we think this question is fairly ruled by the principle in our own recent case, *Polk County v. Parker*, supra. We find no apparent confusion in the precedents upon the proposition that, while the duty of a clerk to account for the fees and emoluments of his office extends to and includes every item of compensation received by him for services rendered in his official capacity, he is under no requirement to account for or pay over any compensation received by him for services performed otherwise than in his official character. The statute prescribes the nature and extent of his official service and the fees which may be demanded therefor; and, if the law imposes upon him any particular duty for which no fee or compensation is provided, he is bound to perform the same without fee or charge. But he is not by law disqualified from performing extra-official service and receiving payment therefor in his individual right, so long as the thing done by him is not incompatible with the duties which he assumed in taking the office.

The ultimate and decisive question is, therefore, whether the money in controversy was received by plaintiff in his official capacity as clerk of the district court. Upon the facts admitted by the demurrer, and under the statutes and precedents which we have cited, this question must be answered in the negative. The statute neither expressly nor by implication imposes upon the clerk the duty of referee. The authority to appoint a referee is by statute conferred without restriction upon the district court. The court is at liberty to appoint any competent person for

that purpose, and the power of appointment implies power to provide for reasonable compensation to the person accepting it and performing its duties. In the absence of statute authorizing or requiring it, the court is without power to make service as referee an official duty of the clerk, to be performed by him without compensation. There is no statute forbidding the clerk's appointment to such position, nor does there appear to be anything inhering in the situation which renders such appointment improper. The appointment was made, the service performed, and the compensation fixed by the court has been paid. Money so earned is not within the terms of the statute which requires the clerk to account for the fees of his office and pay the same over to the county, and, upon the record as made, the plaintiff is entitled to a recovery.

The ruling and judgment of the trial court upon the demurrer are therefore reversed, and the cause remanded for further proceedings in harmony with this opinion.—*Reversed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ. concur.

G. M. MANNING, Appellee, v. B. V. MEADE, Appellant.

LIBEL AND SLANDER: Actions—Evidence—Sufficiency. Evidence reviewed, and held sufficient to support a verdict for plaintiff.

LIBEL AND SLANDER: Actions—Instructions—Imputation of Theft. A defendant in an action for slander is adequately protected by an instruction to the effect that, even though he spoke the words charged, no recovery could be had if he did not intend to impute the crime charged by the pleadings.

EVIDENCE: Similar Facts and Transactions—Malice, etc. In an action for slander based on an imputation of theft, the matter covered by the files and pleadings in a former civil action by defendant against plaintiff, having no relation to the subject

matter of the slander action, is too remote to have any proper bearing on the issue of malice.

LIBEL AND SLANDER: Damages—\$2,500—Excessiveness. The legal presumption that damages follow the speaking of words which impute a charge of theft will not, *alone and of itself*, sustain a verdict of \$2,500.

Appeal from Wright District Court.—H. E. Fry, Judge.

THURSDAY, SEPTEMBER 20, 1917.

ACTION at law to recover damages for an alleged slander. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed on condition.*

Birdsall & Birdsall and Eugene Schaffter, for appellant.

Robert Healy, for appellee.

1. LIBEL AND SLANDER: actions: evidence: sufficiency. WEAVER, J.—I. The petition is in three counts, each alleging that the defendant, speaking to a third person of and concerning plaintiff, used language which, in substance, charged the latter with stealing corn belonging to the defendant. The defendant answered, denying the petition generally and specifically. Trial was had to a jury, which returned a verdict for plaintiff for \$2,500.

The evidence tended to show that plaintiff was formerly a tenant on the farm of the defendant; that their relations were unpleasant; and that litigation occurred between them over matters connected with the tenancy. One Hunt succeeded plaintiff as the tenant of defendant, and when Hunt came to shell the corn raised by him on the farm, plaintiff appears to have been employed to assist in hauling it to the elevator, where it was stored for Hunt and the defendant. Defendant admits that he believed and said that the amount stored to his credit was short, but whether he charged plaintiff with stealing or wrongfully

appropriating any part of it is the subject of dispute. His own statement is that he never thought or said to anyone that plaintiff had stolen or taken the corn, but he did believe and say that the shortage was due to the mistake or wrong of the persons operating the elevator. The case made by the plaintiff tends to show as follows: The witness Evers says that defendant said to him:

"When Hunt and I shelled our corn, several loads of corn came up missing, and in tracing it out, it was found that Manning had taken the corn, and, upon inquiry for the same at the elevator, it was traced to Manning's place."

This alleged statement is the basis of the first count of the petition. The second count relates to a statement made to one Moseley. This witness says that defendant said to him:

"When I shelled my corn, I was short about three loads, and it looked very suspicious on Manning's part."

The third count is supported by the testimony of one Nelson, who says:

"Mr. Meade came up to me and asked if I had heard the dirty trick about Manning and the corn. I said, 'No.' Mr. Meade told me he was two or three loads short. He said Manning had that corn, and Manning had to come and settle for it; and said it was worse than stealing in the nighttime, and he could put him behind the bars for doing it."

If the jury believed these witnesses, it is quite clear that the verdict finding that defendant did, in substance and effect, charge the plaintiff with larceny of the corn, is not without support in the record.

In each instance, the court charged the jury that, if the speaking of the alleged offensive words by defendant had not been established, or if established, and the jury did not find that he thereby intended to im-

2. LIBEL AND
SLANDER: ac-
tions, instruc-
tions: imputa-
tion of theft.

pute to the plaintiff the crime of theft, then no recovery could be had, and the verdict should be for the defendant. This charge fairly protected the rights of the defendant in this respect.

II. The plaintiff offered, and the court admitted in evidence over the defendant's objection, the petition filed by the defendant in an action brought by him against plaintiff, a year or more before the date of the alleged slander. The pleading mentioned was a petition at law, setting up claims for recovery from Manning upon numerous items of alleged debt due from the latter, and for damages because of his failure to adhere to the terms of his lease. In our judgment, the matter was so remote and so clearly without bearing upon the question of defendant's alleged malice at the time of the alleged slander that the objection to its introduction in evidence should have been sustained. No other exceptions to the rulings of the court on questions of evidence appear to be well taken. The conclusions already announced render unnecessary special consideration of the exceptions preserved with reference to the instructions to the jury.

As the case has been tried twice, with substantially the same result, we should hesitate to reverse if the erroneous ruling upon the introduction of testimony were the only just criticism to be made upon the record. We are, however, strongly impressed that the verdict is radically excessive, not to say oppressive. It is but right that one who wantonly or viciously attacks the good name and character of his neighbor should be rebuked by an assessment of ample compensatory damages, and if thereto the jury adds a reasonable sum by way of exemplary damages, he cannot justly complain. But this discretion should not be abused. One may be technically guilty of slander with-

3. EVIDENCE:
similar facts
and transac-
tions: malice,
etc.

4. LABEL AND
SLANDER: dam-
ages: \$2,500:
excessiveness.

out becoming an outlaw, and the cases are rare which will justify a verdict so large as to be ruinous to a man in ordinary or moderate financial circumstances. In this case, there was no serious claim or proof that plaintiff had suffered material special damage or injury from the defamatory language attributed to the defendant. Indeed, if we may read anything between the lines of the record and the disclosed history of this litigation, plaintiff has the benefit of the sympathy and confidence of his neighbors, undiminished by the charge made against him. The only mention by him in testimony of any actual injury sustained is a statement that the publication of the slander worried him and caused him mental pain and made him sick, though the nature and extent of the sickness are left entirely to conjecture. The question of actual damages was therefore left to the jury solely upon the legal presumption that such damages do follow a publication which is slanderous *per se*. It was a showing which justified the assessment of a reasonable sum as actual damages, increased by another reasonable sum as exemplary damages; but there was no showing calling for or justifying an extraordinary and highly burdensome recovery, either compensatory or exemplary. The verdict as returned cannot, therefore, be permitted to stand, except upon condition that the appellee shall, within 30 days from the filing of this opinion, elect to remit all of the recovery in his favor in excess of \$1,000. Should such remission be made, the judgment as thus modified will be affirmed; otherwise, the cause will be remanded to the district court for new trial.

It is suggested for the appellant that the verdict of the jury is so evidently the product of passion and prejudice that it ought not to be sustained even in part, and that the order for new trial should be absolute. Considering, however, that we hold that the evidence for plaintiff is sufficient to take the case to the jury, and remembering the result of

two successive trials, we doubt whether the ordering of a third trial would be a blessing for which defendant can wisely pray. It is to the interest of the parties, as well as of the public, that litigation be not unduly protracted.

The costs of this appeal will be taxed to the plaintiff. Other costs are subject to taxation in the trial court.—*Affirmed on condition.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

C. S. PEET, Appellant, v. F. W. LEINBAUGH, Mayor, et al.,
Appellees.

MUNICIPAL CORPORATIONS: Contracts—Services by Officers—

- 1 **Recovery.** A city or town officer may not perform services for the municipality outside his official duties and legally recover therefor, even though, in performing such services, he acted in the utmost good faith. Sec. 879-q, Code Supp., 1913.

MUNICIPAL CORPORATIONS: Fiscal Management—Reimbursing

- 2 **Officer—Criminal Acts.** The discretionary power of the governing body of a municipal corporation to reimburse its officers for expenses incurred while such officers were lawfully and in good faith acting in the interest of the municipality does not embrace the power to reimburse one of its officers for expenses incurred in attempting, in a civil action, to retain money unlawfully and criminally obtained from the municipality, even though the officer, in the original receipt of the money, personally acted in good faith, and did not realize that he was committing a crime.

Appeal from Jones District Court.—JOHN T. MORRIS, Judge.

THURSDAY, SEPTEMBER 20, 1917.

G. L. EATON, while mayor of the town of Martelle, rendered services as a laborer, for which he was paid \$7.90. During his term of office, factional differences arose between him and certain members of the council, including appellant herein, and for a time the orderly administration of the town's business was considerably disturbed. Bills

were contracted, but, on account of existing differences of opinion, were not promptly paid. The total amount of said bills, including the item of \$7.90 above referred to, was \$177.92. Apparently without authority of the council, the mayor and city clerk issued warrants upon the treasurer of said town in payment of the several bills making up the above aggregate amount. Eaton resigned from office in January, 1913, and sometime thereafter, a motion was made by one of the council to commence a suit in the name of the town against Eaton for the recovery of the above amount; but the mayor presiding declared the motion out of order. At another meeting of the council, a motion was passed by a tie vote of the council, Mayor Caffee voting in favor thereof, approving all bills paid and not approved during the Eaton administration. On April 22, 1913, appellant brought an action in his name, in his own behalf and that of others similarly situated, against the said Eaton and the town of Martelle, alleging in his petition that he was a taxpayer of said town, and that the said \$177.92 had been wrongfully paid out on the order of said Eaton, and praying judgment against him thereon in favor of the said town. The defendant Eaton appeared and filed answer, alleging, among other things, that the expenditure of all of said funds was necessary and was made in good faith for the benefit of the said town. The defendant town of Martelle made no appearance, and judgment was entered against the said defendant Eaton in favor of the town for \$8.39, being for the above item of \$7.92, with interest thereon, together with costs amounting to \$73.45. It appears from the record that the said Eaton incurred expenses in the sum of \$40 for the services of an attorney in the above litigation. Thereafter the town council passed a resolution to pay the costs and attorney's fees taxed against Eaton and incurred on his behalf in the above cause; whereupon C. S. Peet, appellant herein, brought a suit against appel-

lees herein to restrain the payment thereof. A temporary injunction was issued, restraining appellees from paying said costs and attorney's fees; but, upon the trial of said cause upon its merits, the temporary injunction was dissolved, and plaintiff's petition dismissed. This appeal is from the judgment dismissing said petition and taxing the costs to the plaintiff.—*Reversed.*

Clifford B. Paul, for appellant.

B. E. Rhinehart and *E. A. Johnson*, for appellees.

1. MUNICIPAL CORPORATIONS: contracts: services by officers: recovery.

STEVENS, J.—There are many charges in argument of bad faith against each of the opposing parties in interest, and evidently the factional differences above referred to have resulted in much bitterness of feeling between the respective litigants. The contention of appellees is that the labor performed by the mayor was necessary; that the town received the benefit thereof; that same was rendered in good faith and should be paid for; that said Peet, in prosecuting said suit, was not acting in good faith; that, in the suit brought by him against Eaton for the benefit of the town, he claimed \$177.92, whereas judgment was rendered for but \$7.90 and costs; and that the town council, in the exercise of its discretion, had authority to pay the costs taxed against Eaton, and also the expenses incurred by him for an attorney in defending against said suit.

Section 879-q, Supplement to the Code, 1913, prohibits officers from being interested, directly or indirectly, in any services to be performed or material furnished for the town or city, and a violation thereof is made a misdemeanor. Under the foregoing statute, the city or town council was without authority to pay, and the said Eaton violated the statute when he received pay for the services rendered as a

laborer to the said town. It is immaterial that the services may have been rendered in good faith. *Bay v. Davidson*, 133 Iowa 688; *State v. York*, 135 Iowa 529; *Harrison County v. Ogden*, 133 Iowa 677; *James v. City of Hamburg*, 174 Iowa 301. The town council declined to pay the item of \$7.90 for labor rendered by the mayor, and the same was paid without its authority. The Supreme Court of Wisconsin, in *Chippewa Bridge Co. v. City of Durand*, 99 N. W. 603, uses the following pertinent language:

"The learned trial court found that the parties concerned in making the contracts in question acted in the utmost good faith. In one aspect of the matter, that is probably correct. The officers doubtless had no other motive than to secure for their city a bridge as cheaply as possible. In that sense, a public officer may act in good faith and yet be a willful lawbreaker, and guilty of a fraudulent appropriation of the people's money. If such officers knowingly or willfully use such money contrary to law, but otherwise to accomplish a legitimate purpose in a legal sense, they are guilty of acting in bad faith, and of an actionable misappropriation of such money, regardless of their good intentions. It will not do to allow such officers to escape responsibility in such cases because, though they broke the law, they acted in good faith. The law does not permit that, yet such species of good faith is one of the most common defenses insisted upon in cases of this kind."

Authorities are cited by appellees to sustain their contention that the officers of a municipal corporation may, in the exercise of their discretion, appropriate money from the funds of such corporation to employ an attorney for, and even to pay a judgment against, an officer of such corporation, where the same was incurred in good faith and for the benefit of the corporation. Among the cases cited are *Gormly v. Town of Mt. Vernon*, 134

2. MUNICIPAL
CORPORATIONS:
fiscal manage-
ment: reim-
bursing officer:
criminal acts.

Iowa 394; *State ex rel. Crow v. City of St. Louis*, (Mo.) 73 S. W. 623. The cases cited and the doctrine established thereby are not applicable to a case where the officer knowingly and wilfully makes himself liable to a municipal corporation, in violation of the prohibitions of the statute. The Supreme Court of Wisconsin so held in the case cited *supra*.

The statutes prohibiting officers from dealing with the city in the manner provided are based upon sound public policy. As was said by this court in *Weitz v. Independent District*, 78 Iowa 37:

"In our opinion, it would be most unwise and contrary to public policy to permit a board of directors to contract with one of its members in the name of the district. Such an agreement would in fact be between a portion of the members of the board on the one side, and a director as contractor on the other, and the contract might be determined by his own vote. Such a practice would give opportunity for the grossest frauds. Secret understandings might be entered into between a majority of the members of the board, by virtue of which different contracts might be parceled among them to the prejudice of the district. * * * Nor do we think the resident taxpayer should be compelled to show actual fraud in the contract in order to have it annulled. To require that would be to impose an obligation which would make the obtaining of relief impossible in most cases, however gross the fraud might in fact be."

In *Bay v. Davidson*, *supra*, this court, after referring to the case above cited, said:

"This court is committed to the doctrine that, the contract being invalid, it cannot be rendered valid so as to support an action for recovery by invoking the doctrine of estoppel."

The proposition of the town council was to appropri-

ate \$103 of the public's money for the benefit of the former mayor of said town in the payment of costs and attorney's fees incurred by him in defending against a claim of \$7.90 unlawfully paid to and appropriated by him out of the town's funds. As before stated, while the town council is clothed with some discretionary powers in the matter of incurring expense on behalf of its officers who, while acting lawfully and in good faith, and in the interest of the corporation, incur some liability, such discretion cannot be carried to the extent of permitting the use of the funds of the corporation to pay costs and attorney's fees incurred by a former officer in an attempt to retain a sum of money unlawfully obtained by him from such corporation while an officer thereof. The discretionary powers of such officers, if permitted to be exercised in this manner, would wholly circumvent and defeat the purpose of the statute, and, instead of protecting the corporation against the unlawful appropriation of its funds, would allow the expenditure of many times the amount unlawfully appropriated in aiding the party at fault to retain the same.

It is true, as contended by counsel for appellees, that the court found in favor of the defendant as to a large part of the money claimed, but the costs taxed by the court were permitted to stand, and it does not appear that a motion was made to retax the same, or that any part thereof was improperly taxed to the defendant. We are of the opinion that the court should not have dissolved the temporary injunction and dismissed plaintiff's petition, but, on the contrary, should have made the injunction permanent.

For the reasons pointed out, the cause is reversed and remanded to the district court, with directions that a decree permanently enjoining the defendants from paying any part of the costs and attorney's fees above referred to be entered, and that the costs of this proceeding be taxed to the defendant.—*Reversed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

C. W. SOESBE, Appellant, v. H. C. LINES, Appellee.

ATTACHMENT: Wrongful Attachment—Exemplary Damages—Excessive Verdict. A jury will not be permitted to exercise unbridled license in assessing exemplary damages. Some reasonable ratio ought to exist between such damages and the actual damages suffered. A recovery of \$5 actual damages, with no evidence of harsh treatment, will not support an allowance of \$125 exemplary damages and \$65 added as attorneys' fees.

Appeal from Floyd District Court.—JOSEPH J. CLARK,
Judge.

THURSDAY, SEPTEMBER 20, 1917.

ACTION at law, originally brought on a contract for commission for the sale of real estate. In the main action, an attachment was issued, and defendant filed a counterclaim to recover damages on the attachment bond. The case was tried to a jury, resulting in a verdict for the defendant in the main case, and for \$5 actual damages and \$125 exemplary damages on the counterclaim. Judgment was rendered against plaintiff for these amounts, and the court taxed to plaintiff an additional sum of \$65 as attorneys' fees to defendant's attorneys. The plaintiff appeals.—*Reversed and remanded.*

J. G. Mitchell and C. M. Greene, for appellant.

M. Hartness and Frank Lingenfelder, Jr., for appellee.

PRESTON, J.—The entire record seems to have been brought here, including the pleadings, evidence and instructions on the trial of the main action, as well as the counterclaim. The abstract contains 155 pages.

But appellant states in argument that a reversal of the judgment entered against him upon the defendant's coun-

terclaim is sought because, as he claims, no levy of attachment was in fact made, because the defendant's interest in the land was only an equitable interest, the legal title being in one Greene, and the levy and return, and the entry upon the encumbrance book, did not show that the levy was upon an equitable interest, as provided in Section 3899 of the Code; second, if a levy was made, defendant's possession and enjoyment of his property were undisturbed; third, the court erred in admitting over plaintiff's objection an item of expense in bringing abstract down to date, for the reason that there was no pleading in the counterclaim covering such alleged item of special damages, and because, without laying sufficient foundation, a carbon copy was offered instead of the original; and, as to the other item of alleged special damage relating to the value of time spent by defendant in consultation with his attorney with reference to the release of the attachment, that the evidence is uncertain as to the amount of time spent and the value thereof; and that, giving the evidence in the case all the weight it is entitled to, still, as a matter of law, there is no adequate support for the verdict. Some other considerations are also referred to—that the award of exemplary damages is disproportionate and excessive, and that the damage sustained by defendant, if any, was caused by his own misfeasance, etc. From this it will be seen that no question is presented in this court as to the trial of the main case on the contract, but that it relates solely to the counterclaim.

The court, by its instructions, authorized the jury to find damage on the following items: (1) Reasonable value of the loss of time and services, if any, in procuring the release of the attachment levy, and the delay, if any, in completing the sale of said property; (2) reasonable value and expense, if any, paid to complete the abstract of title. The court also instructed the jury that the defendant could not

recover anything for attorneys' fees, as these are fixed by the court.

The allegation of the counterclaim for which damages are claimed are: The sum of \$100 paid for attorneys' fees for defending against said attachment proceedings, and the further sum of \$100 for loss of time and expenses incurred in defending against said attachment proceedings; the sum of \$100 paid for attorneys' fees for prosecuting his cause of action on the attachment bond, and \$200 as damages resulting directly from the levy of said writ upon said property, thereby depriving defendant of the use thereof, etc.

It is quite evident, from the finding of the jury in so small an amount as \$5 actual damages, that nothing was allowed for delay in completing the sale of the property, so that the recovery of actual damages must have been either for the expense of the abstract or loss of time by defendant in consulting his attorney, or perhaps something for both these items, and the evidence was such that the total recovery of \$5 could have been for the expense of the abstract alone. The evidence on this one item of the abstract varies from \$3 to \$8. There is no merit in appellant's claim that a carbon copy of the abstract was introduced in evidence, instead of the original, because the question was how much defendant expended for the abstract. He could have shown this without producing either the original or the copy. Appellee concedes in argument that these items are special damages. Appellant contends that these items are not pleaded as special damages, and that it is necessary to do so. So that, if they are not pleaded, and the jury allowed the \$5 actual damages for the abstract, it would not authorize recovery for that, or if the \$5 was partly for the abstract, it would have the same effect to that extent. As said, it may have been all for that item. We have no means of knowing. This leaves, then, the only other item for which a recovery could have been had, as

special damages, was defendant's time. In the opinion of the writer, it is doubtful, to say the least, whether this item, as an item of special damage, is covered by the pleading before set out. But the court is divided on this, some being of the opinion that the pleading is sufficient, in the absence of a motion for a more specific statement. We do not determine the question, since a reversal must be had on another point. The pleadings can be readily amended on a retrial. However, appellant urges that, even though the pleading is sufficient as to this item, the value placed upon defendant's time is speculative and without proper foundation, and, further, that the necessity of the alleged consultations with defendant's attorney is not shown. As we understand the record, under the evidence, the jury could not have allowed more than \$1.50 for such time, and, as said, they may not have allowed anything for it. Appellant claims only \$2 for this item, as we understand it. The evidence on this point, stated as briefly as may be, is substantially this:

Defendant testified that he was living near Rockford, 12 or 13 miles from Greene, on the date he returned to Greene to complete the business, and that he spent three fourths of a day; that the trip was made to Greene on March 10th for the settlement, but that that had nothing to do with the attachment; that the next trip to Greene was on March 11th; its purpose was to make the final settlement with the Worths. He says:

"It was on the 11th of March that I consulted counsel with reference to the attachment; I made no special trip for that purpose; that was the day we were supposed to settle it; that was the date on which the petition in attachment was filed. I gave a bond for the discharge of the attachment on the same date, and the attachment was released that day; March 11th was when I consulted him on the other; maybe I did consult with him with reference to

the suit on the contract—I am not positive. I don't know as to the length of time that was occupied by me in consultation with counsel on the attachment proceedings.”

He was then asked:

“Q. Now what was the reasonable value of your services, per day, for your time, the last day you went down to Greene from your place to close up that deal? (Plaintiff objected because asking for a conclusion, no proper foundation as to his knowledge, and no foundation laid as to his earning capacity or the reasonable value of his services or his time. The objection was overruled, and the witness answered.) A. Well, sir, a couple dollars a day, I suppose. Q. What would be the value of your services on the 11th of March, the time you spent consulting your attorney in regard to the discharge of your attachment? (Over the same objection, witness answered.) A. I should think that would be about as much as the other. It was about the same time of year.”

He also said that the length of time the first day was about three fourths of a day, and the length of time as to the 11th of March is not given. In fact, from his testimony before given, it is not certain that he consulted counsel at all on that day on this subject. So that, at the most, all that defendant can claim as proved as special damages is \$1.50, even if the jury allowed anything on this item. In *Lord, Owen & Co. v. Wood*, 120 Iowa 303, 310, we said:

“It seems to us that, if plaintiff is liable at all, the measure of damages for loss of time must be limited to the value of his time in the particular business in which he was engaged. Such damages cannot be measured by what he might have earned by working for someone else, or at some other place. The question is not what he was capable of earning, but what has he lost?”

Conceding, for the purpose of argument, that this item was pleaded, and that the jury allowed therefor, and that

the evidence was admissible, still, as we said in *Second Nat. Bank v. Lanin*, 164 Iowa 512, 516, the proof of time spent was uncertain and speculative. We are agreed that the allowance of exemplary damages is so excessive as to indicate passion and prejudice, and that it would be an injustice to permit it to stand. It is true that there is, and can be, no definite rule, and ordinarily the allowance is for the jury, which has a wide discretion. The record does not show any brutal or harsh treatment of the defendant, as is the fact in some of the cases where the recovery of exemplary damages was much less, in proportion to the actual damages, than in the instant case. In *Union Mill Co. v. Prenzler*, 100 Iowa 540, 545, the actual damages allowed were \$770, and the exemplary damages were \$5,000. In that case, the exemplary damages were a little more than 6 times the amount of the actual damages. In *International Harvester Co. v. Iowa Hardware Co.*, 146 Iowa 172, the proportion was about 13 times. In *Ahrens v. Fenton*, 138 Iowa 559, 561, the exemplary damages were about 21 times the amount of actual damages, and it was held that the allowance was so excessive and unreasonable as to show passion and prejudice. In the instant case, the allowance of exemplary damages is 25 times the amount of the actual damages, or, if we add the allowance of \$65 attorneys' fees, it is 38 times the amount of the actual damages allowed. In other words, the plaintiff is compelled to pay \$190 for these two items in order that defendant may recover \$5 damages actually suffered by him.

It is not intended by this discussion to lay down a rule for measuring the amount of exemplary damages, but only by way of comparison with other cases where the recovery was held to be excessive, and in others, where it was held that they were not excessive.

This proposition decides the case, and renders it unnecessary to consider the other points presented. The judg-

ment is, therefore, reversed and the cause remanded.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

C. L. WYKOFF, Appellee, v. W. L. STEWART, Appellee, and
NATIONAL SURETY COMPANY, Appellant.

DRAINS: Construction—Contract, Breach of—Insolvency of Con-

1 **tractor—Withholding Payment of Estimates.** A contractor for a public drainage improvement arms the public authorities with legal right (1) to withhold payment of estimates *as provided in the contract*, (2) to forfeit the contract, and (3) to relet the work, when said contractor (a) becomes insolvent subsequent to entering into the contract, (b) fails to pay just and valid bills for labor and materials, as required by the contract, and permits claims therefor to be filed with the county auditor, and (c) abandons the contract. (See Sec. 1989-a10, Code Supp., 1913.)

PRINCIPAL AND SURETY: Release of Surety—Drainage Bond—

2 **Withholding Payment of Estimates—Effect.** Withholding payment of estimates, as provided in a drainage improvement bond, because of the insolvency of the contractor and breach of contract by him, does not release the surety on the bond.

DRAINS: Construction—Contract, Forfeiture of—Reletting. It will,

8 in the absence of evidence to the contrary, be presumed that a contract relet after proper forfeiture was relet at a reasonable price, when such reletting was on proper advertisement, and on notice to the defaulting contractor and surety, and without objection from them.

Appeal from Humboldt District Court.—N. J. LEE, Judge.

THURSDAY, SEPTEMBER 20, 1917.

THIS is an appeal from a decree rendered against the defendant surety company and in favor of Drainage District No. 2 of Humboldt County. A number of cases were consolidated and tried together. Other claimants inter-

vened. The cases were tried in equity. The surety company appeals.—*Affirmed.*

McGrath & Archerd, for appellant.

John Cunningham and W. L. Stewart, for appellees.

PRESTON, J.—The plaintiff, Wykoff, in the case entitled as above, first brought suit against defendant W. L. Stewart, contractor, and the surety company. Two other parties, Lehigh Sewer Pipe & Tile Company, and Lehigh Clay Products Company, brought separate actions. Five or six others filed petitions of intervention. Other defendants are the board of supervisors and its chairman, the county auditor, the drainage district, and other claimants. As said, on the hearing of the main case of the drainage district against the contractor and surety company, the several cases of parties who had filed claims and asked for liens were all consolidated. The court decreed that the claims as filed, which appellants are claiming were not liens, be established, and judgment was rendered. Judgment was rendered against the surety company in favor of the county for the use and benefit of the drainage district and some other 8 or 10 claimants, in the sum of \$744.22, and preference was given as against the funds. Appellant concedes that, as to the labor and material bills, no complaint is made, and from the holding of the trial court as to these items, there has been no appeal. Appellant concedes also that the expenses reasonably necessary in completing the job were proper items to pay from the district funds, but says that the district must show that it performed its part of the contract, and that it has not done so because it withheld a part of the estimates, and did not show that it relet the work at a reasonable price. These matters will be referred to later.

1. DRAINS: construction contract, breach of; insolvency of contractor; withholding payment of estimates.

The issues presented are those arising in the cross-bill of the surety company and the cross-bill of the drainage district, and the answers of each to the pleadings of the other. The county, the board of supervisors, the auditor and the drainage district are referred to in the argument as "the drainage district." Briefly, the cross-petition of the drainage district alleges the letting of the contract to W. L. Stewart, on February 16, 1912, to construct Drainage Ditch No. 2 for \$34,018.10; the execution and delivery of a bond by the contractor, with defendant surety company as security; the failure of the contractor to construct the ditch; the forfeiture of the contract or abandonment of the work; the subsequent reletting of the work, its completion, and the commencement of actions by laborers and materialmen; that all proceedings in reletting the work were in accordance with law. It asked that it be given a preference to the funds remaining against the contractor and the surety company on their bond for the shortage. The surety company alleges that, under the contract, the contractor was entitled to 80 per cent of each estimate as soon as it was filed; that the district refused to pay said 80 per cent, and because of such failure it was impossible for him to complete his contract with the district; that the district had no right to withhold the money; that the district has collected large sums of money on account of the construction of said improvement, and has failed to properly account therefor; that the surety company is entitled to a judgment granting it a preference to the funds in the hands of the drainage district; that, because the drainage district prevented the completion of the contract by the contractor, the surety company is released, and is not liable to the district on its bond because of the wrongful conduct of said district. The drainage district contends that the contractor abandoned the work; that the contract was relet and the work completed; and that it rightfully withheld the 80

per cent under the law and provisions of the contract and bond; and that no part of this money was withheld until after the contractor had abandoned the work, and until after liens or claims were filed. Among other provisions of the contract are the following:

"Failure to Prosecute Work.

"If the second party shall fail to prosecute the work according to the work specified, or shall fail or refuse to prosecute the work after commencing the same, and damage to the ditch or district results therefrom, the second party shall be liable therefor, and the first party may recover such damage by an action on the bond of the second party; or the said party of the first part may retain from the amount otherwise due the parties of the second part, from time to time, such sum as shall reimburse the parties of the first part for such damage, or enable them to repair the same.

"Abandoning Work.

"In case the party of the second part shall abandon the work or fail to make satisfactory progress on said work, said first parties may cause said work to be completed, and the parties of the second part, and also the sureties on the bond herein referred to, shall be jointly and severally liable to the parties of the first part for any and all loss and damage resulting from such default, either from the greater expense of so completing said work, or from any other cause.

"Subletting.

"It is further agreed by the said parties of the second part that it will give its personal attention to the faithful prosecution of said work, and will not assign or sublet the same or any part thereof, without the previous written consent of the parties of the first part, subject to such conditions for its own protection as it may see fit to impose.

"Revoking Contract.

"The parties of the first part may stop the work or revoke this contract, or both, if the party of the second part or its employees shall willfully refuse to comply with any of the terms and requirements hereof, in which event the party of the second part shall forfeit to the parties of the first part all payments due or to become due on said work, as liquidated damages for such breach of contract, and shall be liable for any further damages by reason thereof, and the parties of the first part shall be in no manner liable for stopping the work or revoking the contract.

"Party of the second part will, in a good workmanlike manner, at its own expense, furnish and pay for all labor and material and perform all the work necessary for the excavation and construction of the ditches of the said district."

The bond provides:

"Now, therefore, if the said W. L. Stewart shall well and faithfully perform and carry out all the terms, agreements, conditions and covenants contained in said contract, and shall pay, as they become due, all just claims for work, tools, machinery, skill and material used in the completion of said contract, in accordance with its terms, and if the said W. L. Stewart will save the said county of Humboldt and state of Iowa harmless from all costs and charges that may accrue on account of the doing of the work specified in said contract, then this obligation shall be void; otherwise to remain in full force and effect."

The specifications for the contract provide, among other things:

"All plans, specifications and reports in the possession of the engineer, and all laws enacted by the general assembly of Iowa which may apply to the legal construction of tile drains, shall be considered as part of these general specifications."

Payments were to be made as provided by law. The contractor began work in September or October, 1912. After he began work, the authorities at first delivered warrants on estimates, but later, materialmen filed liens or statements of their accounts with the county auditor, and thereafter, the drainage district and the auditor refused to deliver any more warrants until the contractor had these bills settled. The drainage district contends that, when the contractor allowed laborers and materialmen to file liens, and when he failed to pay such bills at the time they became due, this worked a violation of the terms of both the contract and the bond, and that the officers having in charge funds which had been collected had no right to pay out such funds after liens were filed, and that it was their duty to withhold payment. This seems to be the point most argued and relied upon.

The points relied upon by the appellant for reversal are that the court erred in holding that withholding payments of 80 per cent of the estimates, which appellant says was unlawful and wrongful, did not release the surety company from liability on the bond, and in holding that the contract with the contractor was legally terminated by the district; in holding that the acts of the district in reletting the work were proper; in holding that the funds of the district had been properly accounted for; and they contend that the evidence fails to show that the work was relet at a reasonable price. The last three propositions are argued together. The further point is made that the court erred in holding that the district was entitled to a preference.

It will be necessary to set out some of the evidence bearing upon these different propositions. The contractor, W. L. Stewart, testifies in part:

"Well, I wanted to go ahead with it and tried to make an arrangement to go ahead with it, but we couldn't get the payments arranged. They would not issue me any more

warrants on what I had estimates on. I gave the county auditor orders to pay each of these liens a certain amount on my estimates, and he refused to do it. I could have, and I said the tile company wanted payment along. He said he would not pay anything until there was enough accumulated to pay all at once, and I said that the tile company wanted payments every month. There were claims filed with the auditor. I don't remember the amount of them. I had estimates. I don't remember the amount now, but I did not have the 80 per cent. There was some \$2,000 or \$3,000 back, if I remember right, and I wanted the auditor to distribute the amount of those unpaid estimates upon the amount of the liens, as I directed from time to time, and the county auditor insisted on having all of these liens cleared off before he would disburse any of the money. The tile company told me that, if they could get a partial payment every month on the liens, that they would go ahead and fulfill the contract in shipping the tile. When I was doing the work in the fall of 1913, I was in a position to continue the work if they would have issued the estimates to me and the warrants thereon as they were due for this work. I had an arrangement with the tile people by which they could have continued to have shipped me the tile if payments had been made monthly on the estimates I was entitled to."

He claims that the failure to issue warrants on the estimates was the reason he was unable to complete the work, but there is other evidence and there are some other circumstances bearing upon this question which show that the contractor was unable to finish the work, and that he abandoned it and otherwise violated his contract, which justified the district, under the provisions of the contract, to cause the work to be completed in case of abandonment. The contractor also testified:

"I sublet various branches in the latter part of June,

1913. Things was such that I couldn't see my way clear to go ahead with my work. I intended to shut the work down until I could see my way out. * * * Later on, I resumed work after the first action by the board was set aside. I was out from Illinois three times after I shut the work down the last of June. I came out the latter part of August and made arrangements to go ahead with the work along about the first of September, and I made a contract with Mr. Wykoff to go ahead with the main line and two branches. I did not hire a foreman or gang of men at that time. I stayed about 14 days. I next came back to Iowa about October 27 and stayed 7 or 8 days. I came back the third time January 5th, and was here a little better than a week. I sublet the entire work to Mr. Wykoff except those branches that went into the open ditch below where the main line emptied in at the head of the open ditch."

June 29, 1913, Stewart, the contractor, sent word to his foreman from Sadorus, Illinois, as follows: "Stop work: also subcontractors until you see me." June 28, 1913, he wrote the foreman from Urbana, Illinois, as follows:

"I presume you think it strange when you received my message. I have gone to the wall and I am taking the bankrupt law. Do not issue any more checks, return check book, and also the stub which you have of the other book. Figure out the list of checks that you have issued to be paid July 10th. What checks you boys are holding, mail them to the Urbana Banking Company at Urbana, Ill., and they will send you checks for the amount. If you can find out who holds the check that has been sold of the last three weeks' time, let me know. Also send me list. Tell George not to be scared. He will get his money. I am in bad health—a general breakdown. I presume the bond com-

pany will finish the contract. You probably can sublet it. They will want to sublet it.

"Yours truly,

"W. L. Stewart.

"Keep this noise down as best you can."

Immediately after the receipt of these letters, all parties who had anything coming to them from the contractor filed their claims. It seems that, after the district had declared the contract forfeited, it was reinstated for a time before the reletting of the work to other parties. It is contended by appellees that the surety company had knowledge of the proceedings, and were assuming charge and directing the work, at least up to about the time that the contract was finally terminated and relet. As bearing on this, the traveling adjuster of the surety company testifies that he reported to his superior at Minneapolis his various attempts to adjust the matters growing out of this Stewart bond, and that his superior went into it with him, and thought the adjuster had perhaps made a mistake in joining with the contractor in a request upon the tile company that it continue furnishing the tile; that he had authority to and did sign the company's name; and that he employed attorneys for the surety company. He refers to notices and letters signed by these attorneys, demanding that the tile company deliver instalments of tile as the surety company should demand from time to time. These written exhibits are identified by the witness and referred to in the record, but they are not set out in the abstract, and no additional abstract has been filed by appellee. They are set out in appellee's argument, and appellant makes no objection thereto. But aside from these documents themselves, we think the testimony of the traveling auditor shows their connection with the contractor in the matter.

Soon after February 13, 1914, the contractor received from defendants the following notice and demand:

"Dakota City, Iowa, February 13, 1914.

"In Re Bond No. 300366, W. L. Stewart, Principal National Surety Company, Surety.

"To W. L. Stewart, Urbana, Illinois, Contractor on Drainage District No. 2, Humboldt County, Iowa, and National Surety Company of New York, Surety on the Bond of said Stewart in said re Drainage District No. 2.

"You and each of you are hereby notified that unless tile are on the ground along the line of the uncompleted ditches and drains in Drainage District No. 2, Humboldt County, Iowa, on or before the 27th day of February, 1914, that being the date of the next meeting of the board of supervisors of said county, the said board of supervisors will declare a forfeiture of said contract in the matter of Drainage District No. 2 and authorize an action sounding in damages to be instituted against the said Stewart and the said National Surety Company. Of the above you and each of you are to take notice and govern yourselves accordingly.

"J. G. Devine, County Auditor."

Prior to this, and on July 22, 1913, the surety company was notified of the default of the contractor and of the filing of liens and of the prior or first termination of the contract. The contractor testifies that, after the receipt of the notice of February 13, 1914, before set out, he did not come to Humboldt; that he did not come to look to see if the branches had an outlet; that he was trying to get the tile company to make shipments of tile; that he then owed the tile companies about \$8,000; that he did not think the tile companies would keep on shipping tile unless they got their money; that they did not keep on shipping; that, when he got the notice of the first reletting, he did not come to Humboldt to see about it.

The contract was finally relet July 2, 1914, to Berkland.

Appellant concedes that the usual advertising which precedes the letting was had. The bid of Berkland was in excess of the price at which the work was originally let to Stewart. The county auditor testified:

"The reason that I didn't feel like issuing warrants for this work that was done subsequent to the time of filing of these liens, on estimates that were filed with me subsequent to the reinstatement of the contract, was I felt that I didn't have the right under the statute in view of the liens. That is the only reason I held them up. I acted entirely upon the belief that I couldn't legally pay them out while liens were on file against this drainage fund. When I speak of the liens, I mean the statements that have been filed for the purpose of creating a preference as to the funds in the hands of the drainage district, the statements filed by the materialmen, tile companies and the laborers. These are the claims that have been introduced in the progress of the trial.

"*Redirect Examination.* Mr. Simcock [the adjuster for the surety company] wanted me to issue warrants for all the estimates, and told me that the surety company was behind me, and he couldn't see where I would be taking any chances in issuing the warrants, in view of the fact that the surety company was back of me. I told him that, if the surety company wanted to put that in writing, or satisfied me that they would save me safe from harm because of issuing these warrants, that I would be willing under these conditions to go ahead and issue the warrants; that the only thing I wanted was to escape liability myself. No writing ever came. That was in October, 1913.

"*Recross-examination.* In that same conversation, he said that the surety company's position was that I was not required under the law to hold these up, and that they couldn't file anything to make a valid lien, and that that would be their contention."

The work on said contract was actually stopped in June, 1913, and before any liens were filed or any refusal on the part of the county auditor to pay on estimates. The auditor testifies further:

"If I remember right, he first stopped work about June, 1913. I got my news from the foreman. The forfeiture was made because he abandoned the work. As I remember it, it was forfeited within thirty days after work ceased. I heard nothing from Mr. Stewart up to that time, except what I heard indirectly through the foreman, Mr. Dunn. At the time of the forfeiture, our information was that he was insolvent. * * * No warrants have been issued in payment of any claims that were filed about the time of the first abandonment. Since June, 1913, there has been some tile put in, but no tile furnished that I know of."

1. As to the withholding payments,
2. **PRINCIPAL AND SURETY: release of surety: drainage bond: withholding payment of estimates: effect.** appellant contends that the contract provides that the payments were to be made on the contract as by law provided, and that the law required a payment of 80 per cent upon each estimate for labor and material filed by the engineer in charge of the work, and that this means that no time was allowed after the filing with which to make the payment, and that therefore it was the duty of the drainage district and the contractor to issue the warrants for 80 per cent of the amount of the estimates upon their being filed; that it had not reserved the right in its contract with the contractor to withhold the payments which the law required it to make upon the filing of the estimates. Appellant cites mechanics' lien cases, and perhaps some others, to the point that, in such cases, a subcontractor is bound by the terms of the contract between his principal and the owner, and that one has a right to pay in accordance with the terms of his contract (citing *Epeneter v. Montgomery County*, 98 Iowa 159, and cases).

The question therein presented was whether the payments by the owner, made in good faith, without notice, and in strict accordance with the contract, would protect the owner from again paying to the subcontractors the amounts of their respective liens. They also cite *Modern Steel Structural Co. v. Van Buren County*, 126 Iowa 607, where a county paid the contractor for building bridges in accordance with the contract. In those cases, the money was paid by the counties to the contractor. In the instant case, the money was not paid to the contractor, so that we are not called upon to determine whether, had the contractor been paid, the drainage district would have been liable to the subcontractors. In the instant case, though it is not argued, it seems to us that an important matter to be taken into consideration is the fact that the claims of materialmen and laborers were filed; and the refusal of the drainage district to pay the contractor the estimates was based upon the fact that such claims were filed, and the further fact that such claims were, upon the trial of the interventions or otherwise in this case, shown to have been just and their claims allowed, and no complaint is now made thereof, because no appeal has been taken therefrom. The contractor has thus received the benefit. In other words, as we understand it, instead of the drainage district's paying the contractor, and his paying these liens and claims, the liens were established, so that the funds in the hands of the authorities have satisfied or will satisfy such claims. The *Epeneter* case was distinguished in *Simonson Bros. v. Citizens St. Bank*, 105 Iowa 264, 268, where it was said that the payments under the contract in that case were to be made at fixed times, and the holding was that the owner may pay at such times, regardless of his knowledge of subcontractors and their claims, so long as a lien is not filed and he served with notice thereof, and that the rule was based upon the particular wording of the contract and

of the statute under which the case arose. See also *Green Bay Lumber Co. v. Thomas*, 106 Iowa 154, 156; *Iowa Brick Co. v. City of Des Moines*, 111 Iowa 272, 276; *Beach & Weld v. Wakefield*, 107 Iowa 567, 592. We shall not review these cases or go into detail to show why they are not in point in the instant case. Some of the reasons have been already given. Perhaps the strongest reason is that the contractor, Stewart, had violated and abandoned his contract and liens had been filed and the drainage district had declared the contract forfeited before the payment of any of the estimates had been withheld. Under the evidence, the contractor had not performed his part of the contract, while the other parties had done so, and the officers of the drainage district acted within their rights in declaring a forfeiture of the contract and reletting the work. The drainage ditch law, Section 1989-a10, Code Supplement, 1913, provides substantially that, if the contractor fails to perform the work according to the terms specified in his contract, recovery may be had in an action on the bond by the county for the benefit of the district for damages sustained, and the work may be relet; or the board may cause the uncompleted work to be done, paying therefor with the balance of the contract price not theretofore paid over to the contractor, and, if the expenses of so completing the work exceed such balance, action may be brought for the recovery of such excess from the contractor and his bondsmen. It is said by appellant that, if the drainage district had no right to pay to laborers or materialmen the money due the contractor under his estimates, then there was no advantage to be gained or right to be protected by withholding the payments; but it appears that the contractor was insolvent, and, had the drainage district paid the contractor after the laborers and materialmen had filed their liens, there would have been at least the question arising whether the drainage district would be

liable to the laborers and materialmen had the contractor failed to satisfy their claims. Furthermore, as already suggested, such claims were shown on the trial to be just, and the contractor got the benefit of their claims' being established against the fund. This insured to the benefit of the surety company.

2. Appellant contends further that the laborers and materialmen had no liens on the funds due Stewart, the contractor, under Section 3102 of the Code. They rely on the case of *Iowa Pipe & Tile Co. v. Parks & Gerber*, 169 Iowa 438, the syllabus of which they quote as follows:

"A materialman furnishing material to the principal contractor engaged in constructing a drainage improvement under Chapter 2-A, Title X, Supp. Code, 1913, is not entitled to a so-called mechanic's lien under Sec. 3102 of the Code, against the county whose board of supervisors enter into a contract on behalf of the drainage district for the construction of such improvement."

But the facts in that case are very different from the case at bar. That was a case brought against the county to recover for money due laborers and materialmen, and there was no showing that any money was due or owing by the county or by the drainage district, to Parks & Gerber. The plaintiff in that case sought to prove his case within the holding in *Humboldt County v. Ward Bros.*, 163 Iowa 510, where laborers and materialmen whose labor and material had entered into previous estimates upon which the contractor had drawn 80 per cent of the amount of the contract, were asking that they might be adjudged to have a claim against the remaining 20 per cent. It was held that they were equitably entitled to such relief, regardless of such statute, and that the rights of the surety were no greater at this point than those of the contractor, whose performance it insured. But in the *Parks & Gerber* case, it was held that the facts presented did not warrant equit-

able relief independent of the statute. In the instant case, there was money earned, and in the hands of the officers of the drainage district, and appellees contend that the board of supervisors had a right to pay for the completion of the contract of Stewart out of the funds in their hands, which was represented by assessment for that particular work. The authorities did not pay the contractor, but, as said, these claims were established in the trial of this case. In the *Parks & Gerber* case, the claims of laborers and materialmen were filed in 1911, before the new law giving the right to a lien for laborers and materialmen was passed. That law took effect July 4, 1913, and is Chapter 155 of the Acts of the Thirty-fifth General Assembly. This was before the time of filing the claims in the case at bar. Appellees contend that this new statute is a remedial law and refers only to the remedy; and the fact that, in the instant case, the contract between Stewart and the drainage district was entered into before the enactment of this statute would not make any difference in the remedy that might be applied, and that, therefore, the county auditor was justified in withholding payment from the contractor by reason of the fact that said liens were filed, and that, in any event, if this be not true, the acts of the county auditor, if unauthorized, ought not to prejudice the rights of the taxpayers of the drainage district, because the contractor had a remedy against the auditor for refusing to pay the estimates after claims were filed, if he was acting illegally.

On the question as to the statute providing for liens in drainage districts' being remedial, appellees cite *Haskel v. City of Burlington*, 30 Iowa 232. The question there was whether a statute conferred upon the city of Burlington authority to sell lots for taxes delinquent at the time of its passage, and it was held that the statute was remedial in its nature. To the same point, they cite *Cosson v.*

Bradshaw, 160 Iowa 296, and other cases. We are inclined to appellee's view of this question, but deem it unnecessary to determine the point. As already stated, the contractor had abandoned and in other ways violated his contract, and it appears that he was insolvent. There was no premature payment of labor and material claims, as in some of the cases cited by appellant. The claims were not paid at all, but, as already suggested, the drainage district simply withheld estimates after the contractor had abandoned his contract, and these claims were established in the trial of this case, and no complaint is made thereof upon this appeal. By the decree of the trial court in establishing such claims, the funds withheld were ordered paid, upon the very claims which appellant now says were not liens. The funds will pay obligations of the contractor which he was required to pay to the parties having claims and filing statements. For these and other reasons before stated, it seems to us that the drainage district had a right, under the contract and under the law, to do just what it did do, and that the district has properly accounted for the funds, and that, therefore, there was no change in the contract and no prejudice to the surety company such as would release it. Having failed to complete the contract and to perform his part of the agreement, the contractor could not maintain an action for the recovery of the retained percentages.

3. DRAINAGE: construction: contract, forfeiture of: reletting.

3. As stated, appellant concedes that the expenses reasonably necessary in completing the work were proper items to pay from the district funds, and that this was a right which it had under the contract and under the law. It is objected, however, at this point by appellants that the drainage district did not show that the price at which the contract to finish the work that the contractor had agreed to do was relet, was the reasonable price. This question seems not to have been raised in the

trial court, and we are perhaps not called upon to determine the point. However, it appears that there were re-advertisements for the reletting to complete the Stewart contract. The contractor and the surety company were notified of the reletting. The testimony shows that the work described in the contract of reletting is the unfinished portion of the same work that Mr. Stewart had contracted to complete. Neither the contractor nor the surety company made any objection. The contract was relet to Berkland when there were two other bids. There is no evidence in the record that it was not relet at a reasonable price. Appellees contend that it is a proper inference and fair to assume that, when work is advertised at three different times, and is let at a competitive bid, it should be considered let at a fair and reasonable price, unless there is evidence to indicate to the contrary.

4. It is next contended that the drainage district was not entitled to a preference. No authorities are cited, and the appellant's contention is that, as a surety on the bond, it was not liable to the district because of its violation of the contract and terms of the bond. This matter has been considered in discussing the other questions. Some other minor matters are argued, but those we have discussed are the ones most seriously argued and relied upon, and are controlling. It is our conclusion that the decree of the district court was right, and it is, therefore,—*Affirmed.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

CEDAR RAPIDS NATIONAL BANK, Appellant, v. PETER WEBER
et al., Appellees (14 cases).

BILLS AND NOTES: Instruments Negotiable—Certainty as to Time
1 of Payment—Indefinite Extensions. The element of certainty is

time of payment of a promissory note (otherwise negotiable) is destroyed by language therein which imposes a *binding obligation* upon the payee or holder to consent to indefinite extensions of time of payment. *Held*, the following clause rendered a note non-negotiable: "All parties to this note * * * hereby severally * * * consent to extensions of time on this note."

TRIAL: Instructions—Form, Requisites and Sufficiency—Failure to
2 Define Fraud. Failure to define fraud and to state the elements thereof is not reversible error when the instructions clearly and accurately stated the law applicable to the facts; and this is true though complainant objected to said omission but *presented no instruction covering the point*.

Appeal from Mitchell District Court.—C. H. KELLEY, Judge.

SATURDAY, SEPTEMBER 22, 1917.

APPELLANT brought separate suits in justice of the peace court in Linn County against each of the following named parties: Peter Weber, Fred H. Towner, Nick Wagner, M. C. Lewis, A. F. Balsley, Mrs. F. Blonigan, Geo. W. Godfrey, Ben Colton, F. A. Bush, Geo. W. Hill, Berte Boughton, and L. W. Andrews, upon the separate note of each. The trial thereof was transferred to Mitchell County, upon the application of defendants, on the ground that there was fraud in the inception of the notes. Action was brought against the defendants Elmo Vining and M. J. Simpson in the district court of Linn County, which was likewise transferred to Mitchell County. The several notes executed by the respective defendants vary to some extent in date and amount, but the form, payee, and place of payment are identical. The portion of the notes material for our consideration upon this appeal is as follows:

"All parties to this note, including sureties, endorsers and guarantors hereby severally waive presentment for payment, notice of non-payment and protest, and consent to extensions of time on this note."

The payee named in the notes is the Cedar Rapids Acetylene Company. They are all made payable at the

Cedar Rapids National Bank, Cedar Rapids, Iowa, and on the back bear the following indorsement:

"For value received I hereby guarantee the payment of the within note at maturity or at any time thereafter, together with a legal attorney fee if suit be instituted hereon, waiving demand, notice of non-payment and protest.

"Cedar Rapids Acetylene Co.,
"Pr. L. S. Wagner."

The defenses urged to each of said notes were: (a) That the same are in form non-negotiable; (b) that their execution was induced by fraud.

The court instructed the jury that each of the notes, except the H. W. Clay note, was non-negotiable, and submitted to the jury the question of fraud in the inception of the notes. The H. W. Clay note was in form negotiable. The jury returned a verdict in favor of all of the defendants except Clay, the verdict being in favor of plaintiff and against him, but was rendered in his favor against the cross-defendants. The cross-defendants were the acetylene gas company and L. S. Wagner, who was the sole proprietor thereof, and who indorsed the notes to appellant. Judgment was rendered in accordance with the verdict of the jury. Plaintiff appeals.—*Affirmed.*

J. F. Clyde and Tourtellott & Donnelly, for appellant.

F. C. Bush, for cross-defendants.

W. H. Salisbury and J. C. Campbell, for appellees.

STEVENS, J.—The question of fraud in the inception of the notes is not argued by counsel for appellant, and reliance is placed upon the following propositions for reversal: (1) That the notes in controversy are negotiable; (2) that there was not sufficient evidence to justify the submission to the jury of the question whether appellant was an innocent holder of said notes; (3) that the defendants

Towner and Hill waived their rights to rescind their contract, and the defenses urged to their notes, by the continued use of their gas machines after their right of trial for one year had lapsed; (4) that the court committed error in giving and refusing instructions.

1. **BILLS AND NOTES:** instruments negotiable: certainty as to time of payment: in default extension.

I. We will first dispose of the question of the negotiability of the notes. So far as material to the question presented, our negotiable instrument law is as follows:

"Section 3060-a1. An instrument to be negotiable must conform to the following requirements: * * *

"3. Must be payable on demand or at a fixed or determinable future time.

"Section 3060-a4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

"1. At a fixed period after date or sight; or

"2. On or before a fixed or determinable future time specified therein; or

"3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

It is asserted by appellee that the quoted extract from the notes renders the time of payment thereof uncertain, and therefore destroys the negotiability of the notes. Each of the notes contains the promise to pay the sum named one year after date, so that, in the absence of the provision referred to, the time of payment would be indefinite. There is apparently some confusion and want of harmony in the decisions in different jurisdictions as to the effect of identical or similar clauses in notes. The attempt to have a

uniform negotiable instrument law throughout the states has not met, apparently, with complete success. The following language, "The makers and indorsers of this obligation further expressly agree that the payee, or his assignee, may extend the time of payment thereof from time to time indefinitely as he or they may see fit," was held, in *Woodbury v. Roberts*, 59 Iowa 348, to render the time of payment uncertain, and the note non-negotiable.

In *Farmer v. Bank of Graettinger*, 130 Iowa 469, it was held that a note containing the following provision was negotiable:

"Sureties hereby consent that time of payment may be extended from time to time without notice thereof."

In *State Bank of Halstad v. Bilstad*, 162 Iowa 433, notes containing the following language, "It is agreed that if crop on Secs. 25 and 26, Twp. 145-48, is below 8 bushels per acre (for 1905 as to one and 1907 as to the other), this note shall be extended one year," were negotiable. In the latter case, the court said:

"We have given this question a good deal of time and study, and have examined a great many cases bearing upon the question involved, and we have not found a single case, nor have we been cited to one, where it is held that an agreement to extend the time of payment to a certain date destroys the negotiability of the instrument. There are many cases holding that an agreement to extend the time indefinitely renders the note non-negotiable, but they are not applicable to the facts here. On the other hand, there are a number of cases holding to the contrary doctrine"—citing *First Nat. Bank v. Buttery*, (N. D.) 116 N. W. 341, and *Randolph on Commercial Paper*, Sections 111, 112 and 113.

In *Farmer v. Bank of Graettinger*, *supra*, the court said:

"There was no uncertainty as to the payee, the amount.

or the time of payment. We may concede that in the case of an instrument providing in terms for extension of time of payment indefinitely, there is such uncertainty as to make the same non-negotiable. And such are the cases of *Miller v. Poage*, 56 Iowa 96, and *Woodbury v. Roberts*, 59 Iowa 348, cited and relied upon by counsel. But in the notes before us, we have a distinct and unqualified agreement on the part of the makers to pay on a certain date. And we perceive no good reason for holding that the negotiable character thereof is destroyed because of a clause embodied therein providing that a surety, if such there shall be, will not claim a release from his collateral liability on the instrument, if, forsooth, an extension of time shall be granted the makers without notice to him."

We will now examine a few decisions from other jurisdictions. In the following cases the language quoted was held to render the time of payment uncertain and the notes non-negotiable:

"The payee or his assigns may extend the time of payment thereof from time to time, indefinitely, as he * * * may see fit." *Glidden v. Henry*, (Ind.) 1 N. E. 369.

"Without notice, the payee or holder may extend the time of payment of the principal." *Rosenthal v. Rambo*, (Ind.) 76 N. E. 404.

"This note is given for advancements, and it is the understanding it will be renewed at maturity." *Citizens' Nat. Bank v. Piollet*, (Pa.) 17 Atl. 603.

"The payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties, and indorsers, and each of them, parties hereto, at any time when the same may be due and payable." *Second Nat. Bank v. Wheeler*, (Mich.) 42 N. W.

An agreement to extend the time of payment to a time certain has been held not to affect the negotiability of the note. *Anniston Loan & Trust Co. v. Stickney*, (Ala.) 19 So. 63, and *State Bank of Halstad v. Bilstad*, supra.

In the following cases, the time of payment was held uncertain because of the consent of the drawers and indorsers that the holder might extend the time of payment without notice, and the notes, therefore, non-negotiable: *Matchett v. Anderson Foundry & Machine Works*, (Ind.) 64 N. E. 229; *Merchants' & Mechanics' Sav. Bank v. Frazee*, (Ind.) 36 N. E. 378; *Evans v. Odem*, (Ind.) 65 N. E. 755; *Oyler v. McMurray*, (Ind.) 34 N. E. 1004.

In the following cases, in which the language employed was similar, the notes were held negotiable: *First Nat. Bank v. Buttery*, (N. Dak.) 116 N. W. 341; *Stitzel v. Miller*, (Ill.) 95 N. E. 53; *First National Bank v. Baldwin*, (Neb.) 158 N. W. 371; *City National Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *National Bank of Commerce v. Kenney*, (Tex.) 83 S. W. 368; *Jacobs v. Gibson*, 77 Mo. App. 244; *Longmont Nat. Bank v. Loukonen*, (Colo.) 127 Pac. 947; *Missouri-Lincoln Trust Co. v. Long*, (Okla.) 120 Pac. 291.

The decisions in the various cases seem to turn, however, upon the construction given the peculiar wording in each of the several instruments. The only question presented in each of the cases was whether the language used, in effect, rendered the time of payment uncertain. In several of the above cases, the argument of the court supports the holding in the case at bar. We quote the following from *Longmont Nat. Bank v. Loukonen*, supra:

"Does a clause in a promissory note, otherwise clearly negotiable, wherein the makers and indorsers consent to any extensions of time of payment and partial payments before, at or after maturity, render the time of payment indefinite and uncertain, and thus make it nonnegotiable.

because in conflict with the provisions of the negotiable instrument act, that time of payment must be on demand, or at a fixed or determinable future time? * * * In the recent case of *Pomeroy First National Bank v. Buttery*, 116 N. W. 341, construing a provision essentially like the one under consideration, it was said: 'This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word "makers" is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable thereon under certain contingencies as makers. * * * This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of the time renders the instrument nonnegotiable.' The provision under consideration does not mean that the holder can arbitrarily extend the time of payment of the note as he may see fit, over objection by the maker, nor can the latter make an extension without the consent of the holder."

The Supreme Court of New Mexico, in *First National Bank v. Storer*, (N. M.) 155 Pac. 905, having under consideration a clause quite like the one in the case at bar, held the note negotiable. The court, however, appears to admit that the interpretation adopted does violence to the naked letter of the contract, but on the whole concludes that it was not the intention of the parties to render the time of payment uncertain, and that the note should be held negotiable.

We gather from the great weight of authority that.

where the provision of the note amounts to an agreement by the parties to the note for an extension to an indefinite time, the negotiability of the instrument is thereby destroyed. The language of the note in suit contains a provision by which the maker, payee, sureties, indorsers, and guarantors consent to an extension of time of payment. This language is binding upon the payee, the holder, and the maker. If the maker demands an extension of time, by the terms of the instrument the payee has consented thereto. The failure of the parties to fix a time to which the payment might be extended renders the same uncertain. The language used is not susceptible of any other interpretation. Certainty is required by the negotiable instrument law and by the exigencies and usages of commercial business. While the rule adopted by the Supreme Court of New Mexico, and possibly in some other jurisdictions, although none of the other cases cited *supra* so hold, is *contra*, we believe that the language and spirit of the statute can be applied in the case at bar only by holding the instruments in question uncertain as to the time of payment, and non-negotiable.

The conflict in the holdings of the several courts in the several cases cited is more apparent than real. In most of them in which the note was held negotiable, it was quite apparent that the language used was not sufficient to make out a binding obligation upon the payee or holder to grant an extension. The Iowa cases holding that the language used rendered the note negotiable are distinguished from the holding in the other cases by the difference in the effect of the language used. Where the provision of the instrument bound the payee to grant an extension, the note was held non-negotiable; but in the cases, as in *Farmer v. Bank of Graettinger*, *supra*, where the language used clearly did not impose any obligation upon the payee to grant an extension of time of payment, the notes were held negotiable.

II. As before stated, it is unnecessary for us to consider the question of fraud in the inception of the notes. The evidence was ample to take the case to the jury. But it is insisted by counsel for appellant that, under the evidence, there should have been a verdict directed in plaintiff's favor against the defendants Hill and Towner, for the reason that they had used the lighting plant after the expiration of the year allowed for trial, and thereby waived their right to rescind the contract. We think, however, that this question was properly submitted to the jury, and that its finding is conclusive.

III. Complaint is also made of the failure of the court to define fraud and to give the elements thereof. Fraud is rather hard to define. The court did, however, in its instructions, clearly and correctly state the law applicable to the facts presented. While exceptions were taken to the failure of the court in its instructions to define fraud and state the elements thereof, no instruction covering the omission complained of was presented by counsel with the request that same be given to the jury.

On the whole, we think plaintiff had a fair trial, and that the judgment of the lower court should be—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

N. R. COLEMAN, Appellee, v. MARY BOSWORTH et al., Appellees, JOHN M. BLAINE, Appellant.

HOMESTEAD: Surviving Spouse—Distributive Share Embracing

- 1 **Homestead—Exemption.** A surviving spouse who takes as his or her distributive share that part of the homestead which includes the ordinary dwelling house, takes the said part exempt from execution sale, as in case of any other homestead, *provided there has been no abandonment of the homestead right and possession since the death of the owner.*

JUDGMENT: Conclusiveness—Persons Concluded—Interested Non-

- 3 Party Aiding Defense.** One is not bound, by the judgment in an action to which he is not a party, by the fact that he (a) actively interests himself in such action on behalf of one of the parties thereto, and (b) is directly interested in a property way in the litigated subject matter.

PRINCIPLE APPLIED: A wife and mother died seized of certain lands, part of which was a homestead. Later, a judgment was obtained against the surviving husband and father. Execution levy was made on the father's interest in the estate. The children brought injunction to restrain the sale. These children contended that the father had elected to take the homestead occupancy right, and that, as a consequence, they alone owned the land. The judgment creditor contended that the father had elected to take his absolute distributive share, and prayed that his judgment be decreed a lien thereon. But the judgment plaintiff failed to make the father a party to his cross-action. Prior to the commencement of the injunction suit, the father, with some of the children, consulted an attorney with reference thereto. Some of the children were made party plaintiffs without previous consultation. On the trial, the father was present, sat near the attorneys for the children, frequently consulted with them, and was a witness in their behalf. He offered no evidence in his own behalf, and, of course, had no right or opportunity to examine or cross-examine witnesses or to appeal. The court decreed that the father had elected to take his distributive share, and *that the judgment was a lien on said share.*

Later, the father brought action against the children to have his distributive share set off to him, and made said judgment plaintiff a party defendant, and asked that said judgment be decreed no lien on such share. *Held*, the father was not bound by the decree entered in the action by the children, and not estopped to deny that said judgment was a lien on said share.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

SATURDAY, SEPTEMBER 22, 1917.

ADELIA COLEMAN, in January, 1904, died seized of a tract of 116 acres of land in Linn County, Iowa, survived by N. R. Coleman, her husband, and several sons and daughters. Judgment was entered against N. R. Coleman, October 2, 1913, in favor of John M. Blaine, appellant herein.

and execution was levied upon the interest of N. R. Coleman in her estate, and the same advertised for sale to satisfy the judgment in favor of appellant; whereupon, Mary Bosworth and the remaining heirs at law of Adelia Coleman brought suit in which a writ temporarily restraining execution sale thereof was issued. Plaintiffs alleged that they were the absolute owners of all of said real estate, subject only to the homestead right of N. R. Coleman. The defendant Blaine, in answer, denied plaintiffs' ownership, and alleged that N. R. Coleman had elected to take his distributive share in the estate of his deceased wife in lieu of homestead, and that the judgment above referred to was in fact a lien upon his undivided interest in said real estate, and prayed for general equitable relief. The cause was tried upon the merits, resulting in the dismissal of plaintiffs' petition, upon the ground that N. R. Coleman had elected to take his distributive share in the estate of his deceased wife, and that plaintiffs had not such interest in the subject matter as that they could maintain said suit; and decreeing said judgment a lien upon said real estate. Upon appeal, the judgment was affirmed. *Bosworth v. Blaine*, 170 Iowa 296. Thereafter, N. R. Coleman, appellee herein, brought this suit against appellant to quiet title to said real estate against the pretended lien of the Blaine judgment, and against the heirs at law of his deceased wife to have his distributive share set off to him. 30 acres of the 116-acre tract were accordingly set off to appellee out of the homestead 40, so as to include the dwelling house and other improvements thereon, and decree rendered quieting title thereto in plaintiff against the lien of said judgment.—*Affirmed*.

Randall, Courtney & Harding, for appellant.

Deacon, Good, Sargent & Spangler and *Lewis Heins*, for appellee.

STEVENS, J.—I. Appellant contends:

1. HOMESTEAD: surviving spouse: distributive share embracing homestead: exemption. (a) That the setting off to plaintiff of his distributive share is, under the statute, a disposal of the homestead, and that the tract set apart to him is not exempt from execution, but subject thereto; and (b) that plaintiff, though not a party of record, was privy to the judgment in *Bosworth v. Blaine*, supra, and bound thereby, and is therefore estopped to deny the lien of said judgment.

Plaintiff and his deceased wife, for years prior to her death, occupied the premises in question as their homestead, and plaintiff has continuously since the death of his wife resided thereon. Shortly after the death of Adelia Coleman, a new house was erected near the old one, plaintiff and his family occupying the former, and Leslie Coleman, a married son, the latter. Some of the children have at all times resided with plaintiff, and at the time of the trial, a daughter kept house for him. Leslie Coleman had charge of the farm, paying plaintiff some grain rent therefor.

We will first dispose of appellant's contention that the distributive share set off to appellee is subject to execution. In *Briggs v. Briggs*, 45 Iowa 318, the distributive share of the surviving widow was set off to include the buildings and part of the original homestead. The court, in discussing the question of its exemption from execution, said:

"Before that, she had the right to possess and occupy and enjoy the rents and profits of 40 acres. After that, her estate was extended as to duration, but was circumscribed as to territorial extent. She acquired a right in fee, but it was limited in extent to $26\frac{2}{3}$ acres. The $26\frac{2}{3}$ acres, however, continued to be her homestead, and so continue as long as she occupies it as such with her family. * * * The Singer Manufacturing Company have in no way been

prejudiced by this act. She had a right to possess the entire 40 acres, during her life, as a homestead. If she had done so, she could not have had any portion of the 80 acres set off to her in fee, because she would have been in possession of more than one third of its value. If, then, she had continued to occupy the 40 as a homestead, she would have had no interest in the 80 which could have been subjected to the judgment of the manufacturing company. They are placed in no worse condition than they were in before, if their right to this lien is denied. And we are of the opinion that, as the dwelling house and $26\frac{2}{3}$ acres, set apart to plaintiff, have never been divested of their homestead character, no good reason can be given for permitting the judgment in question to become a lien upon them."

In *Nye v. Walliker*, 46 Iowa 306, the wife's dower was set off so as to include a portion of her husband's estate occupied by her as a homestead before and after his death. The court held that a judgment recovered against the wife after the death of the husband was not a lien thereon.

In *Knox v. Hanlon*, 48 Iowa 252, the court said:

"But even if it should be conceded that the whole of the debt to defendant was contracted prior to the setting apart of this property to Catherine Hanlon as her distributive share, it did not, upon being so set apart, become liable for this debt. The property in question was the homestead of Catherine Hanlon and her husband. Upon the death of her husband, the homestead became hers. The same property that constituted the homestead was afterwards set apart to her as her distributive share, in fee simple. In *Briggs v. Briggs*, 45 Iowa 318, we held that, where a wife had her distributive share in her husband's estate assigned to her in fee, including a part of the homestead, it did not become liable for a judgment existing against her at the time."

As bearing upon the question above discussed, see *Wilson v. Hardesty*, 48 Iowa 515, and *In re Estate of Lund*, 107 Iowa 264.

In *Hornbeck v. Brown*, 91 Iowa 316, in which the interest of the survivor was held liable to execution, it appeared that the surviving spouse, who was the judgment debtor, had not and did not intend to occupy his former homestead, but had abandoned the same.

Peebles v. Bunting, 103 Iowa 489, was a suit brought by the heirs of the deceased husband of the judgment debtor to quiet title to certain lands against the purported liens of judgments rendered against the surviving widow. The widow did not occupy the premises at the time of the commencement of the suit, and had not for about two years, and did not live thereon for a period of seven years at another time. The court held that she had not elected to take the homestead in lieu of dower, and that her distributive share was subject to execution. The court, however, said:

"There is no claim that the land is exempt under the provision of Section 2441 of the Code [1873]." (This section corresponds to Section 3367, Code of 1897.)

In *Benjamin & Askwith v. Doerscher*, 105 Iowa 391, the court said:

"It appears conclusively from this answer that there is no purpose to further occupy the homestead left by the husband, but it clearly appears that appellant's intention is to take her distributive share in her husband's estate, and with it make a new home. There is no purpose to preserve the homestead right, instead of taking a distributive share, but the intention is to take the distributive share, which, of itself, defeats the homestead right; and then the claim is that she takes her share of the proceeds of the homestead exempt from liability for her prior debts, because it is her purpose to use that, with the remainder of her distributive share of the estate, to make a new home.

The law gives to the surviving wife or husband no such right. No such a claim could be reasonably urged, except on the basis of an existing homestead right. The taking of the distributive share in the estate divests the homestead right. Code, 1873, Sections 2007, 2008; *Whitehead v. Conklin*, 48 Iowa 478; *Butterfield v. Wicks*, 44 Iowa 310; *Meyer v. Meyer*, 23 Iowa 359. It is not made to appear that her distributive share will include the homestead lot or lots, so that, if it could be done, the rule could be made to apply that, where the homestead is set apart as the distributive share of the widow, she takes it exempt from debt contracted prior to that time. See, for such rule, Code, 1873, Section 2441; *Knox v. Hanlon*, 48 Iowa 252; *Briggs v. Briggs*, 45 Iowa 318. It is there held that, if the homestead is set apart to the widow as her distributive share, she takes it exempt from debts of hers contracted prior to that time. As we understand the facts of this case, the widow purposes to take her distributive share exempt from liability for her debts, and invest it in a new home. No authority cited sustains such a right."

Edinger v. Bain, 125 Iowa 391, is apparently in conflict with the holding in *Briggs v. Briggs* and *Knox v. Hanlon*, supra; but, as the court cites *Benjamin v. Doerscher*, 105 Iowa 391, and *Hornbeck v. Brown*, 91 Iowa 316, the decision in each of which rests upon the fact of the abandonment by the surviving spouse of the homestead before the levy, and as, in *Edinger v. Bain*, supra, the wife had caused the real estate of her husband to be sold without having her distributive share set off to include the homestead, taking one third of the proceeds of the sale of the land, the writer of the opinion doubtless based his conclusion upon the doctrine announced by the cited cases, and, as thus construed, it is not in conflict with the cases cited by him.

It will, therefore, be observed that the distributive

share set off to include the dwelling, where less in extent than the homestead, has been held exempt from judicial sale as long as the survivor continued to occupy the same. The abandonment of the homestead renders the same liable to execution. *Reilly v. Reilly*, 135 Iowa 440. The argument of counsel for appellant that, by the provisions of Section 2985 of the Code, the distributive share, although set off to include the ordinary dwelling house and the whole or part of the real estate embraced in the homestead, is nevertheless, liable to execution sale, is based upon an erroneous construction of the statute. The primary right of the survivor is to take a distributive share in the estate of a deceased spouse, and such survivor has the right to have the same set off so as to include the ordinary dwelling given by law to the homestead, or such survivor may, in lieu thereof, continue to occupy the *whole* homestead; but the election to occupy the whole homestead defeats the right of the survivor to take a distributive share. Section 2985 gives the survivor the right to "continue to possess and occupy the *whole* homestead until it is otherwise disposed of according to law, but the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is herein contemplated." That is, unless it is otherwise disposed of, the survivor may continue in the occupancy of the homestead, while at the same time retaining the primary right. We are not at this time concerned with the question of what acts constitute an election to take the homestead in lieu of the distributive share.

The disposal of the homestead by setting off the distributive share to the survivor to include the dwelling, amounts to nothing more than a waiver on the part of such survivor of the right to possess and occupy the *whole* homestead. It fixes the right of the survivor in the real estate of the deceased spouse. The real estate occupied as a home-

stead at the death of the husband or wife is, by Section 2973, made exempt from execution while the survivor continues to occupy the same, and there is no provision of statute from which the legislative intention to divest the distributive share, set off to include the dwelling, of its homestead character, can be inferred. The statutory requirement that the distributive share be set off so as to include the dwelling was evidently designed to provide the survivor a place to live, free from the claims of creditors. The exemption of the homestead from execution sale is the settled policy of the law of this state. A widow or widower, though without children, is by statute deemed a family, within the meaning of the chapter relating to homestead. Section 2972, Code, 1897, exempts the homestead of every family from judicial sale, where there is no special declaration of statute to the contrary.

The effect of the holding of this court is to exempt the distributive share, set off to include the dwelling, to the extent of the homestead, from judicial sale.

II. Before the suit brought in the

2. **IRRELEVANT: CON-** name of Mary Bosworth and the remaining
CLUSIVENESS:
 persons con- heirs of Adelia Coleman against Blaine and
 cluded: inter- the sheriff of Linn County, to enjoin the
 ested non-party sale of the 116-acre tract, was instituted,
 aiding defense.

Coleman went with one of the plaintiffs to consult attorneys with reference thereto. It appears also that some of the heirs were made parties without previous consultation or knowledge that suit was to be brought; that Coleman was present at the trial and sat near plaintiffs' attorneys and frequently consulted with them, and testified as a witness on behalf of plaintiffs; that some of the plaintiffs were not present during the trial; and that those present sat in the body of the court room. Based upon the above matters, it is asserted that the former suit was prosecuted on behalf of and for the benefit of N. R. Coleman, and that by

reason thereof, as above stated, he is bound by the decree establishing the judgment as a lien upon the undivided interest of Coleman in the land, and estopped from denying such lien.

Appellee was not a party plaintiff or defendant in said suit, offered no testimony in his own behalf, and had no right or opportunity to examine or cross-examine witnesses, or appeal from the judgment rendered.

To sustain his contention, counsel cites, among others, the following cases: *McNamee v. Moreland*, 26 Iowa 96; *Stoddard v. Thompson*, 31 Iowa 80; *Conger v. Chilcote*, 42 Iowa 18; *Marsh v. Smith*, 73 Iowa 295; *Montgomery v. Alden*, 133 Iowa 675; *Bellows v. Litchfield*, 83 Iowa 36. A careful reading of these will show some direct interest in the subject matter of the suit, and direct representation, or such participation therein as to amount virtually to management or control of the litigation.

A person not a party to a suit is not concluded by a judgment rendered therein merely because he employs an attorney to assist in the trial thereof. *Cockins v. Bank of Alma*, (Neb.) 122 N. W. 16; *Williamson v. White*, (Ga.) 28 S. E. 846; *Loftis v. Marshall*, (Cal.) 66 Pac. 571; *State v. Johnson*, (Mo.) 27 S. W. 399; *Litchfield v. Crane*, (U. S.) 31 L. Ed. 199; *Central Baptist Church v. Manchester*, (R. I.) 23 Atl. 30.

Nor is privity established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts. *Rookard v. Atlantic & C. Air Line R. Co.*, (S. C.) 65 S. E. 1047. See also *Stryker v. Crane*, (U. S.) 31 L. Ed. 194; *Bigelow v. Old Dominion C. Min. & S. Co.*, (U. S.) 56 L. Ed. 1009; *Hart v. Moulton*, (Wis.) 80 N. W. 599.

Plaintiffs in that suit were claiming to own the 116-acre tract, subject only to the homestead right of appellee, and unless the court found in their favor upon this claim.

they were not interested in the Blaine judgment. The question of the exemption of the distributive share of their father from judicial sale was not and could not have been successfully raised by them in that case. We need not discuss the question whether, under the above facts, he was bound by the decree in said cause finding that he had elected to take a distributive share in the estate of his deceased wife, as he is now claiming such share.

Appellant's plea of estoppel cannot be sustained.

III. Other questions referred to by counsel for appellant in argument will not be discussed herein, for the reason that we deem the foregoing matters controlling, and the judgment of the lower court must be—*Affirmed*.

GAYNOR, C. J., LADD, WEAVER and PRESTON, JJ., concur.

CORN BELT TELEPHONE COMPANY, Plaintiff, v. SUPERIOR COURT OF OELWEIN et al., Defendants.

VENUE: *Change of Venue—Superior Courts—Nonresident Defendant.* An action by a city to enjoin a *threatened* violation of a city ordinance is not an action "for the violation of a city ordinance," within the meaning of Section 260, Code Supplement, 1913. It follows that, in an action in the superior court for such threatened violation, a nonresident defendant has an arbitrary right to a change of venue to the district court, under Section 261, Code Supplement, 1913.

Certiorari to Oelwein Superior Court.—JOHN R. BANE, Judge.

SATURDAY, SEPTEMBER 22, 1917.

THE opinion sufficiently states the case.—*Reversed and remanded.*

. Pickett, Swisher & Farwell and Parker, Parrish & Miller, for plaintiff.

Jay Cook and Rollin J. Cook, for defendants.

WEAVER, J.—The Corn Belt Telephone Company owns and operates a telephone system in the city of Oelwein. In November, 1916, the city brought an equitable action in the superior court to restrain said

VENUE: change of venue: superior courts: nonresident defendant. telephone company from putting into effect an alleged proposed increase in its rates or charges for telephone rentals, such proposed increase being, as the petition alleged, contrary to and in violation of a city ordinance theretofore enacted, as well as in violation of an agreement or contract entered into between the company and the city. The company appeared to the action and moved for a change of venue to the district court, on the ground of nonresidence. The motion was supported by affidavit that the defendant (plaintiff herein) is a corporation organized under the laws of Iowa, having its principal place of business and its residence in Waterloo, in Black Hawk County, and that, at the beginning of said action, it was not, nor at any time since has been, a resident of Oelwein. The motion was denied, and thereupon the defendant applied to this court for and obtained a writ of certiorari, commanding the certification and return of the record to this court for review.

The statute fixing and limiting the jurisdiction of the superior courts provides, among other things, as follows:

"Changes of venue may be taken from said court in all civil actions to the district court of the same or another county, in the same manner, for like causes and with the same effect as the venue is changed from the district court. But in all civil cases where any party defendant shall, before any pleading is filed by him, file in said cause a motion for change of venue to the district court of the county, supported by affidavit showing that such party defendant was not a resident of the city where such court is held, at the time of the commencement of the action, the cause, upon such motion, shall be transferred to the dis-

trict court of the county." Code Supplement, 1913, Section 261.

That a nonresident corporation is entitled to the benefit of this statute is settled by our prior decisions. *Chicago, B. & Q. R. Co. v. Castle*, 155 Iowa 124; *Wiar v. Wabash R. Co.*, 151 Iowa 121. This proposition is not denied by counsel, nor was it denied by the court below, but the motion for a change was contested and denied upon the theory that the present case is governed by Section 260 of the Code Supplement, 1913, which provides that the superior court shall "have exclusive original jurisdiction to try and determine all actions, civil and criminal, for the violation of city ordinances." We are quite clear that the action here being considered is not one brought "for the violation of a city ordinance," within the meaning of the cited statute. It does not charge any violation of the ordinance; but shows in effect that, when the suit was begun, the company was still observing the rates set forth in the prescribed schedule. The gist of the complaint is not that the company had disregarded the ordinance, but that it threatened so to do in the near future, and this movement on the company's part the city sought to forestall by an injunction. The distinction between an action, civil or criminal, based upon an alleged violation of a city ordinance, and a procedure in equity to enjoin a merely threatened violation, is too manifest to justify argument or illustration. Moreover, the petition in the original cause is based in terms upon an alleged contract with the defendant corporation, rather than upon wrong yet done in contravention of the municipal regulation, and there is nothing in the statute to which our attention has been called to take an action to enforce such right out of the general rule which not only permits but requires a change of venue whenever the nonresident defendant appears and demands it. No discretion in this respect is vested in the superior court. The requirement

that the change be granted is mandatory when the fact of nonresidence is properly shown, and a refusal thereof may be reviewed upon certiorari. See the cases already cited.

Counsel have seen fit to indulge in elaborate arguments upon the question whether the city had any authority to provide by ordinance or otherwise a schedule of rates for a telephone company doing business within the municipal territory, but we think that is a matter we are not now called upon to consider.

For the reasons stated, the writ is sustained, and the order of the court below denying the motion for a change is annulled, and cause remanded, with directions to said court to sustain the motion and cause the records and files to be certified to the district court of Fayette County.—*Ruling reversed and cause remanded, with directions.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

AUGUST INGWERSEN. Appellee, v. CARR & BRANNON et al.
Appellants.

EVIDENCE: Opinion Evidence—Hypothetical Questions—Referring

- 1 **Witness to Record.** A hypothetical question which, in part and in an inferential way, assumes knowledge on the part of an expert witness of the condition of the record as bearing on certain material facts, without detail of such facts, is not necessarily subject to the vice of turning the witness loose to give an opinion upon all the evidence in the record. Especially is this true when the answer elicited was but a repetition of another answer formerly given without objection.

EVIDENCE: Opinion Evidence—Hypothetical Question—Improper

- 2 **Assumption of Fact.** A hypothetical question so framed as to require the expert witness to base his opinion upon what he remembers of the testimony of another witness on a certain point is not necessarily a prejudicial way of assuming the facts when the facts thus sought to be injected into the question are undisputed.

EVIDENCE: Relevancy, Competency and Materiality—Symptoms
3 of Injury. A physician, from a personal examination of an injured person, may testify, when relevant to the issues, that he did or did not find symptoms of a certain injury.

EVIDENCE: Documentary Evidence—Medical Works—Medical and
4 Surgical Teachings. Medical works being, as a general rule, inadmissible, it follows that oral testimony of what such works teach is equally improper, whether brought out on direct, re-direct or cross-examination.

APPEAL AND ERROR: Parties Entitled to Allege Error—Com-
5 plainant as First Offender. The fact that he who alleges error was the first offender in the matter complained of is a quite persuasive reason why the error, if any, should be disregarded. So held where complaint was made of a ruling allowing evidence of the teachings of medical works.

TRIAL: Instructions—Province of Court and Jury—Hypothetical
6 Questions—Jury Determining Materiality of Facts. An instruction which permits a jury to determine the materiality of the facts assumed in a hypothetical question, preliminary to determining the value of the opinion expressed thereon, is prejudicial error.

PRESTON, J., dissents on present record.

WITNESSES: Examination—Leading and Suggestive Question.
7 The question "State whether or not you exercised your best skill and knowledge in the treatment of this case," is neither leading nor suggestive.

PHYSICIANS AND SURGEONS: Malpractice—Negligence—Exer-
8 cise of Skill, Etc.—Evidence. A physician or surgeon sued for malpractice should be permitted to testify that he exercised his best skill and knowledge in the treatment of the patient.

PHYSICIANS AND SURGEONS: Malpractice—Negligence—Fail-
9 ure to Utilize Means at Hand—Evidence. Evidence is admissible, in an action for malpractice, that an X-ray machine was kept in the town where the defendant practiced, and that the use of the same was available to defendant, in connection with evidence that the use of such a machine was the only means by which the condition of the patient with respect to the matter at issue could be determined with certainty.

Appeal from Crawford District Court.—F. M. POWERS, Judge.

SATURDAY, SEPTEMBER 22, 1917.

THIS is an action at law against defendants as copartners practicing medicine and surgery, for damages for malpractice. Trial to a jury. Verdict and judgment for plaintiff. Defendants appeal.—*Reversed and remanded.*

Dutcher, Davis & Hambrecht and J. P. Connor, for appellants.

Evans & Evans and Harding & Kahler, for appellee.

PRESTON, J.—The petition alleges that, about July 15, 1912, plaintiff sustained a fracture of his left arm, the humerus being broken at the juncture of the upper and middle thirds, the broken ends of the bone being so separated and not in apposition that the musculospiral nerve was drawn in between said pieces of bone; that defendants were called and plaintiff continued under their treatment until about September 7, 1912, at which time defendants abandoned his case; that plaintiff has lost 17 months' time, has suffered severe pain and mental anguish, has incurred hospital bills and surgeons' fees, his left arm hangs useless at his side, and he is permanently crippled; that defendants were guilty of negligence in the following particulars: (1) In failing to find out that said nerve was caught between the broken ends of the bone before bandaging the fracture on the first trip; (2) in leaving said nerve caught between the broken ends of the bone; (3) in failing to remove the nerve from between the said ends of bone; (4) in failing to bring said ends of bone into direct apposition with each other; (5) in applying a permanent dressing to the fracture before they knew whether or not said nerve was caught between the broken ends. The errors assigned, of which there are 24, relate for the most part to the rulings of the

trial court upon objections to testimony, although it is also claimed that the verdict was contrary to Instruction 14 given by the court, and that the court erred in refusing an instruction offered by defendants, and that the instruction in regard to hypothetical questions is erroneous. The record is voluminous, and to notice in detail all the assignments would extend the opinion unduly. We shall therefore notice the more important propositions and those which seem to be controlling, and refer more briefly to such others as seem to require it.

A brief statement of the facts which are either established or which the jury could have so found, may be helpful. On July 15, 1912, plaintiff, a farmer, about 61 years of age, was plowing corn. One of the horses became frightened and began kicking and started to turn around. Plaintiff had the lines around his back. The exact manner in which plaintiff received his injury is not known, but in some manner he was thrown down and lost consciousness. When he came to, he discovered he was injured in his left arm. Dr. Brannon was sent for and arrived at plaintiff's home about 11 o'clock in the forenoon. Upon examination, he found plaintiff suffering severe pain, and correctly diagnosed the injury as a fracture of the left humerus near the upper part. The fracture was oblique, and parallel, or substantially so, with the musculospiral groove in which rests the nerve of that name. This nerve supplies all of the extensor muscles of the forearm, wrist and hand. There is evidence that this nerve comes from the brachial plexus in the arm pit, is about the size of a goose quill, and is in a groove which winds partly around the humerus; that a portion of the fracture involved the groove; that this nerve is frequently injured in fracture of the humerus; that injury to that nerve interferes with the action of the muscles it supplies. Upon reaching plaintiff's house, according to plaintiff's testimony, Dr. Brannon told plaintiff and

his daughter that the arm was broken. Plaintiff thought not, and showed the doctor how he could extend his fingers. The doctor gave an anæsthetic, and to show plaintiff's daughter where the break was, he raised the arm on a level with the shoulder, then straightened out the arm, and applied splints and a bandage. Evidence for defendants tends to show that, when plaintiff was put under an anæsthetic, crepitus was obtained, the fracture reduced, temporary splints applied, and the forearm and hand placed in a sling and the arm encased in a muslin swath extending around plaintiff's body. The next day, the temporary splints were replaced with permanent ones. The next day, or upon the third visit by Dr. Brannon, it was found that there was an absence of sensation in the fingers and that plaintiff could not move them. September 7th, plaintiff went to Dr. Leytze in Sioux City. An X-ray was made to assist in diagnosis. A few days later, Dr. Leytze cut down on the fracture and found the musculospiral nerve, and some muscle, between the two ends of bone. The fracture was ununited. He took the nerve out and relieved the pressure, and then fastened the pieces of bone together with an iron plate. He did not suture the nerve, but left it for nature to restore. Dr. Leytze says that the greatest distance between the ends of the bone was one-half inch. Defendants contend that plaintiff had two injuries—the fractured humerus and an injury to the nerves. There is evidence that the proper treatment of this fracture was the closed, or conservative, treatment, which the defendants followed, and that without an open operation there is no way a physician can determine the seat of the injury to the nerve. Injuries to the nerves may show a fracture of the humerus. The symptom of the nerve injury is the resulting paralysis of the muscles, if a motor nerve is injured, and a resulting loss of sensation if a sensory nerve is injured. The seat of the injury to the nerve may be at any

place between the origin of the nerve, and the spinal nerve and its distal end. Injury to the nerve causing paralysis or loss of sensation may be any one of the following: contusion, laceration, pressure, severing, or stretching.

Defendants say that they treated the fractured humerus and treated the nerve expectantly,—that is, they waited to give nature a chance to clear up the paralysis without surgical interference, relying upon nature to clear up the injury to the nerve,—and say that, if nature does not clear it up, and surgical interference is necessary, that the delay of two or three months occasioned by the expectant method does not prejudice a surgical operation. Defendants argue that the case centers about the discovery by Dr. Leytze of the musculospiral nerve between the broken ends of the bone.

I. Plaintiff's theory is that the oblique fracture of the humerus involved the musculospiral groove, containing the nerve, and that, when defendant manipulated the arm, and bent it at the point where it was broken, the nerve slipped in and was caught when the two pieces of bone closed up, and that it was negligence to fail to find out that the nerve was caught before he applied the splint and bandages on his first trip, which he should have done by getting crepitus, and that he could have gently manipulated the bone so that he could have felt a grating of the ends together; that this would have proved to him that nothing was between the ends; but that the absence of crepitus, and later the lack of sensation, would have told him that the nerve was caught; that, even though defendants at first obtained crepitus, the manipulation of the arm in the manner described caused the nerve thereafter to slip in between the ends of the broken bone; that it was negligence to leave the nerve caught when it could have been removed by extension and counter extension. They say, too, that it was negligence not to bring the ends of the bone in direct appo-

tion, and that the manipulation necessary to bring the ends directly together would have disclosed the absence of crepitus; also that defendants were guilty of continuing negligence in the treatment of plaintiff, in failing to find that the nerve was caught by testing plaintiff's ability to use the muscles supplied by this nerve, and by noting the condition as to sensation, or lack of it, in the skin area, and in failing to remove the nerve during the first few days by extension and counter extension, and later by a cutting operation. They contend that defendants failed in all these particulars, and that the nerve was pinched to death between the ends of the bone.

Defendants say that this theory is not supported by the evidence, and that other nerves were injured; that Dr. Leytze says that he does not know whether other nerves were injured or not. The defendants contend that the verdict is contrary to Instruction No. 14, given by the court, which reads:

"The plaintiff alleges in his petition that the musculospiral nerve was caught between the ends of the broken bone before defendant treated the same, and unless you find by a preponderance of the evidence that the musculospiral nerve was caught between the ends of the broken bone before or at the time the defendant, Brannon, attempted to set and treat same, plaintiff cannot recover."

As said, defendants contend that the case centers about the discovery by Dr. Leytze, in September, of the nerve between the broken ends of the bone, and they say that the fact that the nerve was between the broken fragments of the bone in September, when Dr. Leytze performed the operation, does not tend to prove it was there two months before, when the arm was first dressed by the defendants, and that presumptions do not relate backward, citing *Adams v. Junger*, 158 Iowa 449, 458. But in that case, the only proof which plaintiff had was the condition

found at the later date, when an X-ray examination was made, and it was shown by the evidence that this in itself is no proof of the condition at the time the injury was first received. But we think that in the instant case there were other circumstances, some of which have been enumerated, tending to show, and from which the jury could have found, that the nerve was caught prior to or at the time of defendants' first visit. We shall not repeat the evidence tending to so show. There was a conflict in the testimony which made this a jury question. What we have just said disposes of the assignments of error wherein it is thought that the court erred in submitting the first and fifth specifications of negligence.

II. In some of the assignments of error, complaint is made that expert witnesses were allowed to base their answers upon hypothetical questions which did not assume the facts, but made reference to all the evidence in the case. The witness Dr. Ross, testifying on the subject of how long it would take lymph to harden into bone, was asked the following question:

1. EVIDENCE: opinion evidence: hypothetical questions: referring witness to record.

"Q. In a case of a man such as the plaintiff, 61 years of age, and of previous good health, in a person such as the plaintiff was in July, 1912, as shown by the evidence in this case, about how long would it take in this case?" (Objected to as incompetent, irrelevant, and immaterial, and assuming evidence not in this record, and I am interpreting the evidence as I remember it. Overruled.) A. Four and one-half or five weeks, everything being equal."

It is doubtful whether the objection made raises the question now argued. We have repeatedly held that the objection "incompetent, irrelevant, and immaterial" is not sufficiently specific, where the objection is overruled, to raise any question for review; that it must be stated wherein the question is incompetent, irrelevant, or immaterial.

The only claim that could be made that the objection does state wherein the question is so is that it assumes evidence not in this record. It is not quite fair to the trial court or to litigants, to single out a single question in a long examination of a witness without taking into consideration the entire situation. In the instant case, Dr. Ross had been examined at great length before the question now being considered was asked. Thirty pages of the abstract are taken up with his testimony prior to that time. A hypothetical question taking up three pages of the printed abstract had been propounded to him, which begins:

"Q. In the case of a man of the size and general appearance of the plaintiff in this action, of about 60 years of age," etc.

Then follow the facts which plaintiff claims, and the court ruled, had been properly shown. Appellants assume that the question just set out requires the witness to base his opinion upon all the evidence in the case; and the cases cited, or many of them, are cases wherein witnesses were asked to give their opinion based upon all the evidence in the case, or upon all the evidence of a witness which the expert witness had heard, or similar situations. But we think the question here was not so broad. A fair interpretation of the question is that the phrase "as shown by the evidence in the case" refers to plaintiff's age and previous good health as the evidence shows he was in July, 1912. Appellants cite, among other cases on this proposition, *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed 945, 949; *People v. McElvaine*, (N. Y.) 24 N. E. 465; *Hoener v. Koch*, 84 Ill. 408; 5 Encyc. of Ev. 618, 619; and the following Iowa cases: *Smith v. Hickenbottom*, 57 Iowa 738; *State v. Watson*, 81 Iowa 380. In one of the foregoing cases, a witness was asked to give his opinion based upon all the testimony, etc. Another was asked to take all the facts as he understood them. It is true, of course, as con-

tended by appellants, that the jury are entitled to know the facts upon which a witness bases his opinion, and it is not proper for a witness to base an opinion upon his memory of what the evidence was, or to trench upon the province of the jury, and to determine what facts are established. As said in the *Watson* case, supra, where the facts upon which the opinion is to be based are in dispute, the hypothetical form of question should be used. In that case it was held that there was no error in overruling the objection, because the testimony of the witness who described conditions was undisputed. Furthermore, Dr. Ross had already testified, and without objection, that the lymph thrown out in the reparatory process would harden to the consistency of gristle in about three weeks, in a young person, and in an old person, five weeks, before it is safe to turn it loose, which is substantially the same as his answer to the question now under consideration. It is quite clear to us that no prejudice could have resulted from this answer.

III. The third assignment relates to the same matter, and is argued with the other. It refers to another question asked the same witness, Dr. Ross. The record as to this is as follows:

2. EVIDENCE:
opinion evi-
dence: hypo-
thetical ques-
tion: improper
assumption of
fact.

"Q. Do you have in mind or remember his statement as to the character of manipulation made by him in his examination of Mr. Ingwersen's arm by him in his office on September 9 and September 11, 1912? (Mr. Dutcher: Objected to as incompetent, irrelevant, and immaterial, whether he knows or not, not the proper way to assume the facts for the purpose of the question. The Court: Overruled. Defendant excepts.) Q. In a case of a patient such as Mr. Ingwersen, the plaintiff, and who received an injury such as is stated in the previous hypothetical question, and who on the 9th day of September and on the 11th day of September, 1912, was examined by Dr. Leytze, stripped on

both occasions and the arm manipulated, would there be any chance or liability that the musculospiral nerve would be caught between the two fragments of the bone because of these manipulations? (Judge Connor: Objected to as speculative and argumentative, and assuming a fact not shown by the evidence. The Court: Overruled. Defendant excepts.) A. I do not think there would be any chance, because it would have practically all that time for nature to make the provisional callous, and I do not see how it could get in there."

The complaint here is as to the first part of the question, as to whether witness had in mind or remembered Dr. Leytze's statement as to the character of manipulation made by him. It is not quite clear whether the examiner intended to waive the first part of the question and frame a new one by the latter part, or whether it was intended as a modification of the first part of the question. The answer is responsive and pertinent to the latter part as a complete question. In this latter part of the question, reference is made to the arm's being manipulated. This question was also propounded after the hypothetical question had been asked and answered by this witness. The hypothetical question referred to the examination and manipulation of Dr. Leytze; furthermore, Dr. Leytze described the manipulation, and his evidence as to what he did in that respect seems to be undisputed. The answer being now considered shows that Dr. Ross did not think the nerve could get in between the ends of the bone at the time Dr. Leytze examined and manipulated the arm, because the callous around the ends of the broken bone would prevent it. This would be true regardless of the character of Dr. Leytze's manipulations, unless the bones were then again broken apart. We do not understand appellants to claim that this was done, at least not until the cutting in operation was had after the manipulations.

IV. Another question argued in the same connection is in regard to the following question:

3. EVIDENCE: relevancy, competency and materiality: symptoms of injury.

"Q. In a case such as the case of the plaintiff in this action, are there any symptoms that the arm, muscles or nerves were stretched to the extent of causing the paralysis to all of the extensor muscles, and of causing the loss of sensibility which has existed in the plaintiff's arm up to this time? (The same objection was made, and for the further reasons that it assumes facts that are not shown. Overruled.) A. There are no symptoms of that kind present."

The prior objection was, "Incompetent, irrelevant, immaterial, and not rebuttal, and that the opinion is asked that are assumed in the question." The discussion at this point between counsel and the court was whether the evidence was rebuttal. Defendants claimed that plaintiff's condition as to the injury to the nerve and loss of sensation were from other causes than that claimed by plaintiff, such as that the nerve had been cut or stretched. The answer is based upon what Dr. Ross learned from examination of plaintiff and tests performed by him at a former time, and he says he found the condition about the same at the trial.

As before stated, the record is voluminous, and the medical witnesses were examined at great length and minutely, and the matters were gone over again and again upon different theories of the medical witnesses and of counsel. Those having had experience in the trial of such cases know, we think it is safe to say, that questions are often framed, particularly in the later stages of a long trial, with reference to what has gone before, and in such a situation, the witness, the court, and counsel understand, generally at least, the purpose of the question, and what particular theory, or phase of the evidence which has been

introduced, is sought to be met. A question standing by itself may not be clear.

V. Errors 4, 11, and 13 may be considered together. They relate to questions asked medical experts as to what medical authorities teach. Appellants' proposition is that it is not competent to ask an expert, in the examination in chief, what the medical authorities teach on a given point. One of plaintiff's medical witnesses was asked on a re-examination the following:

4. EVIDENCE: documentary evidence: medical works: medical and surgical teachings.

"Q. I will ask you whether or not you know what is the result of a given number of operations performed in this way as reported either by members of the medical profession through journals, text books or in any other way, giving a table of results in a given number of cases operated upon, whether sutured or pressed upon or wounded so as to make the suturing operation necessary. (Mr. Dutcher: The same objection, the objection being that the question is incompetent, irrelevant and immaterial for the reason that it doesn't appear that the doctor knows; he says that it is something he has heard somebody else say. The Court: Overruled. Defendant excepts.) A. I do. Q. You may state the result of said operations. (Mr. Dutcher: The same objection. The Court: Overruled. Defendant excepts.) A. In 80 cases operated upon, statistics compiled show that there are 30 recoveries. Mr. Dutcher: You are quoting now statistics that you got out of a book? A. Yes, sir. (Mr. Dutcher: Move to strike out the answer as incompetent and hearsay and not the best evidence. Mr. Evans: We certainly have a right to show statistics from any source in the medical profession. The Court: If as a matter of fact this witness read the text books himself and gained his knowledge in that way, he would be competent to tell. Defendant excepts.) A. The text books of surgeons, aided by Dr. Bevin, give 80 cases of suture, run-

ning from 11 to 48 years; 30 of them were successful, 34 of them were improved to a certain extent, and 16 were failures. The failures were in elderly persons. (Mr. Dutcher: Move to strike out the answer as incompetent, irrelevant and immaterial, and hearsay and not the best evidence. The Court: Overruled. Defendant excepts.)"

Dr. Fairchild, a witness for the defendant, after he had given testimony comprising 24 pages of the abstract, 15 of which were on direct examination by defendant, was asked, on cross-examination, this question:

"Q. I will ask you this question, Doctor: Isn't it a fact that it is recognized generally by medical and surgical authorities, and so stated in all of the standard works along this line, that the danger of the musculospiral nerve becoming involved in between the fragments is one of the dangers of a fracture of the surgical neck of the humerus? (Mr. Dutcher: Objected to as incompetent, irrelevant, and not the best evidence and not cross-examination. The Court: Overruled. Defendant excepts.) A. In case of great violence, the fragments of the bone might injure or do damage to the musculospiral nerve. Q. But in case that the nerve does become involved between the two ends of the fracture bone, isn't it true that all of the medical authorities agree that that is one of the frequent causes of nonunion? (Mr. Dutcher: The same objection. The Court: Overruled. Defendant excepts.) A. Yes, sir, where violence affects soft tissues along down the bone, but I do not remember of seeing where the musculospiral nerve alone got in there."

Dr. Carr, a witness for defendant, was asked on cross-examination:

"Q. Do not all of the medical authorities, the standard medical authorities and surgical authorities, teach you that there is grave danger, in a fracture located where this fracture was located, of the musculospiral nerve being

caught between the fragments of the bone—don't the authorities so hold? (Mr. Dutcher: Objected to as an incompetent attempt to get hearsay evidence before the jury, and not cross-examination. The Court: Overruled. Defendant excepts.) A. There is danger of the musculospiral nerve being caught lower down, hardly possible to be caught up there. Q. And do not all the standard authorities so hold? (Mr. Dutcher: The same objection. The Court: Overruled. Defendant excepts.) A. They hold that there is risk of the musculospiral nerve being caught."

It will be observed that some of these questions were asked on re-examination of plaintiff's witnesses, others were cross-examination of defendants' witnesses, and none of them in chief, as contended by appellants. Appellants cite *Etzkorn v. Oelwein*, 142 Iowa 107, *Birby v. Omaha & C. B. R. & B. Co.*, 105 Iowa 293, *State v. Peterson*, 110 Iowa 641, 2 *Encyc. of Ev.* 589, *State v. Blackburn*, 136 Iowa 743, 747, to the proposition that medical works are not admissible in evidence. That this is the general rule, there is no doubt, but there are some exceptions. It may be that a medical witness giving an opinion based upon his reading, rather than his personal experience, might be asked, on cross-examination, in regard to the teachings of the authorities, to test the accuracy of the witness' knowledge; or, should such a witness refer to a particular authority as sustaining his theory, such authority might be used as impeaching, if it should turn out that the authority did not sustain the theory of the witness; or if opposing counsel, on cross-examination, should proceed along a certain line, referring to medical authorities, the door might be opened for re-examination in regard to medical books. There may be other exceptions. Appellants also cite *State v. Winter*, 72 Iowa 627-632, to the point that it is not competent to ask a physician, as an expert, in the examination in chief, what

the medical authorities teach on a given point. In that case it was said:

"It would be admissible, perhaps, on the cross-examination of a medical expert, to inquire of him as to the teachings of the authorities in his profession. The object of such examination, however, would be to test the accuracy of the expert's knowledge. But the question in this case was asked, not with this in view, but for the purpose of proving that the theory in question is taught by the authorities."

It was also said in that case, at page 632:

"But the works themselves were admissible in evidence, and they are the only competent evidence of what they teach."

This last is contrary to the later holdings. The three questions now under consideration standing by themselves would be improper, and we are inclined to think that the trial court did not hold the examination in regard to medical books as close to the rule as it should. As already

5. APPEAL AND
ERROR: parties
entitled to al-
lege error: com-
plainant as
first offender.

stated, there was a large number of medical witnesses testifying in this case, and the examination was at great length, as to some of them at least. It should be said that the record shows that, prior to the time the three questions now under consideration were propounded, defendants had, in a large number of instances, propounded similar questions. One of these was in defendants' cross-examination of Doctors Leytze and Ross, early in the trial, and, so far as we are able to discover, defendants were the first to start this line of inquiry. Others were in the direct examination of at least three of defendants' own witnesses. Two or three of such questions will be given as illustrations. Dr. Leytze was asked by defendants:

"Q. Isn't it true that high medical authority pro-

claims that the operation can better be performed after a couple of months than before?"

Again, in the cross-examination of Dr. Ross, defendants' counsel asked:

"And it is the judgment of surgeons in excellent standing in your profession, specialists along this line, that you are justified in waiting for months before you perform an operation to determine whether the nerve will clear itself up or not or paralyze?"

Dr. Rowse, defendants' witness, testified on direct examination:

"There is a case on record that was restored after paralysis of 26 years, and the authorities teach us that, if a severed nerve is sutured two or three years afterwards, the nerve regenerates."

Again, one of the defendants testified that he read up on the authorities, and was asked by his counsel, "Q. Do the authorities you have consulted confirm your judgment?"

And so on. The record does not show that plaintiff objected to these questions put by defendants, as perhaps he should have done. The record shows that no effort was made by plaintiff to introduce medical works in evidence or to read from them. Plaintiff cites *Crunk v. Wabash R. Co.*, 123 Iowa 349; *State v. Donovan*, 128 Iowa 44; *Hutchinson v. State*, 19 Neb. 262; *Underhill on Ev.*, page 274.

While, as said, the trial court may not have held as closely to the rule in all cases as it should, we would not, under the circumstances, reverse because of the rulings on the three objections now under consideration. Since the case must be reversed on other grounds, doubtless on a retrial the rule will be more strictly observed.

Another error assigned is that the jury should not be permitted to determine the materiality of certain assumed facts incorporated in hypothetical questions, and that the materiality of such facts is a question

6. TRIAL: instructions: province of court and jury: hypothetical questions: jury determining materiality of facts.

to be determined by the court. In this connection, Instruction No. 20 is complained of. It is as follows:

"XX. Certain questions have been propounded to witnesses which are known as hypothetical questions, and the testimony of the witnesses, in some instances in this case, is based upon such hypothetical questions, or upon facts assumed for the purposes of the trial, and presented in some other form. And you are instructed in this connection that you are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from the evidence determine what, if any, of the averments are true. Should you find from the evidence that some of the material statements therein contained are not correct, and they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinion based thereon: you are to determine from all the evidence in the case what the real facts are, and whether or not they are correctly stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your minds) that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no value."

The complaint is as stated in the error assigned, which has just been referred to. Appellants cite, as holding that the instruction is erroneous, *Stanley v. Taylor*, 160 Iowa 427, at 430; *Burk v. Reese*, 143 Iowa 498; *Ball v. Skinner*, 134 Iowa 298, at 310.

Following these cases and others, the majority are of opinion that the instruction in the instant case is erroneous, and that the case must be reversed for that reason. For myself, I am inclined to think that the rule as laid

down in some of the later cases is too technical, and I would be inclined to affirm, so far as the objection now made to this instruction is concerned. In *Stutsman v. Sharpliss*, 125 Iowa 342, we said:

"It will not do to allow juries to say what facts were material in securing the opinion of the medical expert, and to what extent a variance would have changed his opinion. The only safe rule is to reject the opinion unless the facts hypothetically stated are established by the evidence. If a portion of the facts are to be eliminated, the witness, and not the jury, should be permitted to estimate the difference this change would effect in the opinion he has expressed."

And in *Ball v. Skinner*, 134 Iowa, at 310, it was held that the materiality of the facts is a matter for the court alone, and the jury is bound to assume that any fact or circumstance allowed in evidence by the trial court is material and entitled to consideration. Substantially the same thing has been said in other cases. This must mean, it seems to me, that every fact assumed in the hypothetical question must be found by the jury to have been established by the evidence, else no weight whatever shall be given to the opinion of the witness. In the instant case, the trial court twice held that evidence contained in the hypothetical question was material; first, by permitting the different witnesses to testify to the different circumstances, and again in permitting the hypothetical question containing all such matters to be answered. Appellants objected to the hypothetical question on the grounds, among others, that it was immaterial, and that it stated facts of which there was no evidence.

I concede that every fact which is really material and upon which the expert bases his opinion should be proved. And yet everyone with experience in such matters knows that, in actual practice, scarcely a single hypothetical ques-

tion is ever propounded that does not contain some matters which are really not material at all, and that a jury exercising their common sense would know that. Much depends upon the skill, accuracy and care of counsel in framing their hypothetical question. To tell a jury in an instruction that every fact in a hypothetical question must be proved exactly as put, would, in every case, if followed by the jury, result in the jury's disregarding the opinion of every expert witness. In every case of this kind there are a few really important and material questions. The jury are informed of these at the commencement, in the opening statements, and the case is developed by the evidence with these questions in view, the attorneys on either side argue these questions to the jury, and the court instructs upon them. Many matters creep in which are merely preliminary and explanatory of these main facts. In the instant case, one of the hypothetical questions contains matters such as these: It assumes that, when plaintiff was examined and operated upon by Dr. Leytze in Sioux City, he, plaintiff, was stripped to the waist; and such is the evidence. But suppose the hypothetical question read as stated, and the proof showed that plaintiff was stripped to his feet, what possible difference could that make when the examination made was as to plaintiff's arm? In such a case, could it possibly make any difference in the opinion of a medical witness, and for such a variance should the jury be told that no weight whatever should be given to the opinion of the expert, or should they be allowed to use their common sense? Again, one of the hypothetical questions assumes that the pieces of shingle, which were used as splints, were about two inches wide by about six inches long. Suppose the evidence was that they were about three inches wide and seven inches long. Appellants concede in argument that no complaint is made of the splints. Should such a variance, which, under the cir-

cumstances, could not be material, either to the surgeon basing his opinion thereon or in the consideration thereof by the jury, have the effect to destroy the opinion of the witness? From the numerous conflicting decisions on this question, I am unable to see how it is possible for a trial court to frame an instruction that would be any help to the jury, and that there is nothing to do but to simply say, in so many words, that everything stated in the hypothetical question is material and must be proved as put, and if it is not so proved, the jury will not give any weight to the opinion of the expert. I shall refer to some of our cases, but not attempt to review all, or any considerable number of them. In *Howe v. Richards*, 112 Iowa 220, at 231, a number of instructions were referred to, and in one of them, referring to hypothetical questions to experts, it was said that the court instructed to the effect that, unless the hypothesis was established in each *material* and *important* part, no weight should be given to the opinion of the witness. The opinion states that the instructions as a whole were a clear, concise, correct, and logical submission of the law of the case. This case is not referred to in the later cases and has not been expressly overruled, so far as I am able to find. In *State v. Watson*, 81 Iowa 380, 385, the jury were instructed that, to render opinions of physicians based on hypothetical questions of any value, all the *material* facts embraced in the question must have been established, and so forth. The case was affirmed, the court saying that the instruction was correct, and that, if defendant desired an instruction more specific as to the facts, he should have asked for it. In *Kirsher v. Kirsher*, 120 Iowa 337, 342, the jury were told that, if they found that such statements of facts are in material and important parts incorrect, unfair, partial, and untrue, then they should attach little or no weight to such testimony. The court said the instruction would

have been unobjectionable had the court said that the answers or opinions are of no value. In *Bever v. Spangler*, 93 Iowa 576, at 603, Mr. Justice Deemer, speaking for the court, said:

"It is also contended that many of the facts assumed in the hypothetical question are irrelevant and immaterial and have no tendency to establish unsoundness of mind. No doubt many of these circumstances, in and of themselves, had no direct tendency to show insanity. But they were a part of the testator's history, and, when taken in connection with the other circumstances, were proper to be considered as showing his condition of mind."

This but confirms, I think, my statement that usually some of the facts in a hypothetical question are not really material, and yet are preliminary or explanatory. In the same case, at page 610, it appears that an instruction was asked and refused to this effect:

"Where medical expert testimony is received, based upon a purely hypothetical statement of facts, * * * if it turns out that such hypothetical statement of facts is, in material and in important particulars, incorrect, unfair partial, and untrue, a jury in such case should attach no weight whatever to the answers," etc.

Of this instruction the court said, "That the instruction asked presented a correct rule of law there can be no doubt," and cited *In re Will of Norman*, 72 Iowa 84, 88; *Hall v. Rankin*, 87 Iowa 261. In passing, it may be remarked that, in my opinion, in many cases the hypothetical questions are unfair and partial—shaded by stating the facts as strong as the strongest witness puts it, and by omitting some of the unfavorable circumstances. I shall refer to this again in a moment, in a further reference to the *Hessenius* case. I understand the rule is supposed to be that all of the facts must be fairly stated. The question in the *Bever* case was as to whether it was reversible

error to refuse the instruction. In the *Beyer* case, at 611, the court quoted from another case, in regard to another feature of the instruction, however, that the court must trust somewhat to the common sense of jurors. That remark applies, as before stated, to questions of the character being now discussed.

In *State v. Hessenius*, 165 Iowa 415, the court instructed that, before the jury could give any weight whatever to expert testimony, they must first find, from the evidence, that the facts upon which it is based are substantially true. The instruction was approved, and the words "substantially" and "materially" distinguished. It appears to me that there is but little difference; that is, that the two words would impress a jury in about the same way. Under such an instruction as was approved in the *Hessenius* case, the jury could well find that some of the minor matters contained in the hypothetical question had not been established, and yet give weight to the opinions of the experts. It was further said in that case:

"A recitation of the evidence in a question to an expert witness may include all that has bearing upon the case, it may include that which has not been proven, or it may omit some parts which should be included. The instruction did no more than to tell the jury that all that which served as a basis for the question must be substantially true or proven," etc.

It seems to me that this leaves some of these matters to the jury just as much as though the words "material" and "important" had been used, instead of "substantial" or "substantially." In the instruction now being considered, the jury were told that they were not to take for granted that the statements contained in the questions are true, but that they should carefully scrutinize the evidence and determine what, if any, averments are true, and that, if the jury should find that some of the material

statements are not correct, and of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, the jury may attach no weight. The use of the word "may" may be objectionable, because the jury should have been told directly that, under such circumstances, they should give no weight to such opinions; but that question is not raised on this appeal. In the last clause, the instruction reads that an opinion based upon a hypothesis wholly incorrectly assumed, or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no value. The use of the word "wholly" and the statement that the opinion would be of little value, may be objectionable, but these matters are not argued. But it seems to me that the thought of this last clause (that is, that, if the hypothesis is incorrectly assumed, and to such an extent as to impair the value of the opinion, it is of little or no value) is correct, and would allow the jury to disregard minor, unsubstantial, and immaterial matters, which I have tried to show are often included in hypothetical questions. As stated, this instruction may be objectionable on other grounds, but, in so far as the use of the word "material" therein is concerned,—and that is the objection now made,—it seems to me that there is no reversible error; but I am outnumbered, and the majority are of the opinion that the case should be reversed because of this instruction.

VII. Dr. Brannon, the member of defendant firm who performed most of the services in the treatment of plaintiff, was asked:

7. WITNESSES: examination: leading and suggestive question.

"Q. Doctor, what do you say so far as your connection with this case was concerned that the best of your professional ability was brought to bear upon the case? Q. State whether or not you exercised your best skill and knowledge in the treatment of this case. Q.

What is the fact about your having exercised the utmost good faith as well as your best skill and ability in the treatment of this case?"

To these questions plaintiff objected, "as leading and suggestive, calling for a conclusion and invading the province of the jury. It is the ultimate question for the jury, and not for the witness." These objections were sustained and the rulings are assigned as error. Similar questions were asked of Dr. Carr, the other member of the firm, in so far as his connection with the case was concerned, and he testified in reference thereto without objection. Appellant cites 9 Encyc. of Ev. 846, to the proposition that

8. PHYSICIANS AND SURGEONS: malpractice: negligence: exercise of skill, etc.: evidence.

a physician and surgeon sued for malpractice may be permitted to testify that, in his treatment of the plaintiff, he used the best ability and skill he possessed. The text cites *Doyle v. New York Eye & Ear Infirmary*, 80 N. Y. 631. In *Fisher v. Niccolls*, 2 Ill. App. 484 (S. C. Wade's Malpractice Cases, page 166), the court said:

"On the trial of the cause below, appellants were severally asked by their attorney if, in the treatment of appellee's hand, they exercised the best judgment and skill of which they were capable. The question was objected to by appellee and the objection sustained by the court. As there was no question made as to the general knowledge and skill of appellants, but the real controversy related to the manner in which they had treated appellee's hand, we think this evidence was proper and should have been admitted, as tending to rebut the charge of negligence."

See, also, *Bonnet v. Foote*, (Colo.) 28 L. R. A. (N. S.) 136, 138.

Some of the cases say that the skill of a defendant or the want of it, is put in issue in a suit for malpractice. But in the instant case, as in the Illinois case just referred to, we understand that the claim against defendants is

that they were negligent in the treatment of plaintiff's arm. While Dr. Brannon, who treated plaintiff, was the younger member of the firm, he had been practicing about seven years at the time of this transaction. Both defendants had been regularly admitted to practice. Appellee seeks to meet this point by the claim that the questions were leading and suggestive, and that it calls for a conclusion and invades the province of the jury. We think the questions are not leading or suggestive, nor do they call for the conclusion of the witness. As to the last suggestion, counsel for appellee say that, had defendant Brannon been allowed to give his opinion as to the degree of skill and knowledge he used in examining and treating plaintiff, he would have been deciding one of the questions which it was the jury's duty to decide. But this does not quite meet the objection. The witness was not asked as to whether he was negligent, or whether he exercised the care required of a physician in such cases. The purport of the questions is as to whether he, in good faith, used the skill and knowledge which he possessed. Appellee cites *Butler v. Chicago, B. & Q. R. Co.*, 87 Iowa 206, *Nosler v. Chicago, B. & Q. R. Co.*, 73 Iowa 268, to the point that, where the issue is as to whether a person exercised reasonable care and skill, and the facts are such that any man of common knowledge, experience or education is capable of forming a just conclusion, expert opinions are inadmissible, and that the question of negligence is for the jury alone. In the *Butler* case, the court refused to permit a witness to testify as to the skill of another person, the engineer, who was running the engine. The ruling was held correct. In the *Nosler* case, a railway engineer was asked as a witness whether he did everything he could to stop his train. This was held objectionable, and as the opinion of the witness, after he had stated all that he did. To the same effect. see *Bruggeman v. Illinois Cent. R. Co.*, 147 Iowa 187, 196.

But we think the rule is a little different with a professional man. He must not only possess the requisite degree of learning in his profession, but he must use it. It might be thought at first blush, and it is doubtless true, that, although defendants did use all the learning and skill they possessed, it would not be sufficient if they did not possess and use the knowledge and skill required of them by the law.

In 30 Cyc. 1570, after stating the degree of skill and care required, it is stated that it is the physician's duty to use reasonable care and diligence in the exercise of his skill and the application of his learning, and to act according to his best judgment. See, also, page 1575, same volume of Cyc., and 1578. In our opinion the court erred in excluding the offered testimony.

VIII. Other questions are argued, but they are such as are not likely to occur on a new trial. The opinion is already too long, and we shall not take the time to discuss them in detail. But one other may be noticed briefly, and that is that we think there was no error in admitting evidence as to there being X-ray machines in the town where defendants were practicing, which were available to defendants. It is true that the petition did not charge the defendants with negligence in failing to use an X-ray machine, but it did charge as negligence that defendants failed to find out that the nerve was caught. There is testimony that a surgeon, to be certain whether or not the nerve is caught, should take an X-ray. That defendants did not use an X-ray machine was a circumstance to be considered by the jury as bearing upon the question as to whether defendants failed to use ordinary care to discover that the nerve was caught.

For the errors pointed out, the judgment is reversed

9. PHYSICIANS AND
SURGEONS: mal-
practice; negli-
gence: fail-
ure to utilize
means at hand:
evidence.

and the cause remanded for a new trial.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

EMMA J. MAGARRELL et al., Appellees, v. AMERICAN INSURANCE COMPANY, Appellee; SECURITY FIRE INSURANCE COMPANY, Appellant.

INSURANCE: Forfeiture—Additional Insurance—Mistake as to Expiration of Former Policy. The act of taking out insurance from a specified date, on the mutual but mistaken assumption on the part of the insurer and insured that a former policy on the same property but in a different company expired on said date, with no intention to effect concurrent, additional or double insurance, instantly works a complete surrender of all rights under the unexpired portion of the former policy, and thus leaves the property with but one insurance thereon, to wit, the new policy.

Appeal from Cass District Court.—E. B. WOODRUFF, Judge.

NATURDAY, SEPTEMBER 22, 1917.

The opinion states the case.—*Affirmed.*

W. A. Follett, for appellant.

H. M. Boorman, C. B. Cloris and Flansburg & Flansburg, for appellees.

WEAVER, J. The plaintiff herein, Emma J. Magarrell, was the sole owner of a tract of land in Cass County, on which there was a dwelling house. On July 22, 1910, G. H. Magarrell, husband of plaintiff, went to the local office of the agents of the American Insurance Company of Newark, New Jersey, and took out a policy on said dwelling house, insuring it against loss or damage by fire. The policy was written to expire on July 13, 1915. As written, the policy named G. H. Magar-

INSURANCE:
forfeiture: ad-
ditional insur-
ance: mistake
as to expira-
tion of former
policy.

rell as the owner of the property, and for the premium thereon, he executed and delivered to the company his own two promissory notes, the last falling due September 1, 1911. About the first of July, 1915, as the evidence tends to show, acting in view of the approaching expiration of this policy in the American Company, negotiations were begun between Magarrell and the agent of the Security Company for placement of the risk in the latter. Question arose as to the exact date on which the existing insurance would expire. The policy itself appears to have been left at the agency of the American Company and was not in the possession of the plaintiff or her husband, and they did not know, or they failed to remember, the true date. G. H. Magarrell as a witness testifies that he applied to one White, the agent of the American, to ascertain the date of the expiration, and was informed that it was July 6, 1915. White admits that he had talk with Magarrell concerning the renewal of the policy, but denies that he stated the date of expiration. Whatever may be the truth as to this conversation, it is too clear for doubt that Magarrell believed and stated to the agent for the Security Company that the date of such expiration was July 6, 1915. The negotiation between them was conducted on that understanding, and, as a result thereof, said last named company, on July 1, 1915, issued its own policy on the property for the same amount named in the American policy, with the expressed condition that the risk so assumed should take effect on July 6, 1915. On July 7, 1915, the insured property was destroyed by fire, and proofs of the loss were made out and furnished to each insurer.

The companies having each for itself denied liability for such loss, this action was begun in equity, making both insurers defendants thereto, though asking final recovery only as against the one which the court might find bound in equity and good conscience to perform its contract of

indemnity. As against the American Company, it was also alleged that the policy issued by said defendant was by mistake made to G. H. Magarrell instead of to his wife, the plaintiff, and she prayed a reformation of the contract by substituting her name therein in place of the name of her husband.

Answering the petition, the American Company admitted the issuance of the policy sued upon, but denied that there was any mistake made in the writing, and alleges that the policy was forfeited by the act of the insured in taking out additional insurance in the Security Company, and by false representations to the American Company, at the time the policy was issued, that G. H. Magarrell was the owner of the property insured.

The separate answer of the Security Company admits the issuance of its policy mentioned in the petition, but says that it was issued to take effect only upon expiration of the policy in the American Company, and that, as such expiration did not take place until July 13, 1915, said policy had not come into force and no risk had attached under said contract at the time the fire occurred. It further pleads that one of the terms of its policy makes the same void if, at the time of its issuance, the insured had or should thereafter procure other insurance, and that such provision was violated and the insurance avoided by the fact that at that date the insured had other valid insurance, as shown by the American policy.

The issues were tried to the court as in equity, and, upon the proved and admitted facts, the court denied the plaintiff's prayer for reformation of the American Company's policy, but found that such policy was void and of no effect, because of the untrue representations of G. H. Magarrell that he was the owner of the property, and, as said policy was never delivered to plaintiff and remained at all times in the possession of the company's agents, said

company never became liable thereon, and there was in fact no valid outstanding insurance upon the property at the date when the policy of the Security Company, according to its express terms, became effective. This conclusion necessitated a judgment in plaintiff's favor against the Security Company.

We have, then, to inquire whether, upon the record as made, the court should have found against the validity of the Security policy. While the plaintiff has appealed from that part of the decree denying her any relief against the American Company, she expresses herself as willing to waive her exception in this respect if her recovery against the Security Company is permitted to stand, and asks that her appeal be considered only in the event that such recovery cannot be sustained.

Were it necessary to the proper adjudication of the rights and liabilities of the Security Company to first determine whether plaintiff was entitled to a reformation of the American policy, we are not at all convinced that she would not be entitled to such relief. We are inclined, however, to the view that, even assuming the validity of the American policy up to July 6, 1915, and assuming also the date of its expiration, as expressed in the contract, to be July 13, 1915, it does not necessarily follow that, under the admitted facts, it would have the effect to avoid the Security policy issued to take effect July 6, 1915. Both the insurer and the insured, under this last policy, were attempting to effect an insurance which was to succeed, in order of time, the American policy. Both believed and understood that the American policy expired July 6, 1915. Neither party intended to effect concurrent or additional or double insurance, even for the matter of the short period between July 6th and July 13th, and we see no good reason and are aware of no sound principle to prevent the court's carrying that mutual agreement and understanding into

effect by holding it to operate as an abandonment or forfeiture by the insured of all right she otherwise might have had to the protection of the American policy from and after July 6th. and that there was at no time any double insurance. The case does not, in our judgment, fall within the familiar class where the policy sued upon is issued without notice to the insurer of the existence of other insurance covering all or part of the period named. It falls rather within the fair scope of the rule affirmed by this court in *Wilson v. Anchor Fire Ins. Co.*, 143 Iowa 458, and the authorities there cited. Quite in point, see *Emery v. Mutual C. & V. Fire Ins. Co.*, 51 Mich. 469 (16 N. W. 816). The effect of these authorities is that, if the issuance of the latter policy has the necessary effect of avoiding or putting an end to the earlier policy, the condition against other or additional insurance in the policy last issued is not violated.

Whether we proceed upon this theory or upon that adopted by the trial court, the same result is obtained—the affirmance of the recovery in plaintiff's favor. Such being the case, we think there is no occasion to further consider or review the points made and authorities cited by counsel. The decree below is right, and it is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

JAMES LOWE CHRISTIE MATHESON, Appellee, v. IOWA STATE TRAVELING MEN'S ASSOCIATION, Appellant.

INSURANCE: Accident Insurance—What Constitutes Accident—

- 1 **Evidence—Sufficiency.** Evidence reviewed, and held to establish bodily injury through external, violent and accidental means, and that the blindness resulting therefrom occurred within the period of time covered by the contract.

PLEADING: Amendments—New Defenses. Amendments during
2 trial setting up new defenses are allowable when the opposite
party (a) suffers no surprise, (b) does not ask for a continu-
ance, and (c) is not legally prejudiced. So held where the
amendment set up a contract provision limiting the time in
which action might be brought.

INSURANCE: Actions—Limitations by Contract—Accrual of Ac-
3 **tion.** A cause of action on an accident policy of insurance ac-
crues on the expiration of 40 days from the date on which the
insured *actually gives notice and proofs of loss*. (Section 1744,
Code Supplement, 1913.)

Appeal from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

SATURDAY, SEPTEMBER 22, 1917.

ACTION at law to recover indemnity under a certifi-
cate of membership in defendant association. There was
a trial to a jury and a verdict and judgment for plaintiff
for the amount claimed, \$1,250, interest and costs. The
defendant appeals. Plaintiff has also appealed from the
ruling of the court in permitting defendant to amend
its answer.—*Reversed on defendant's appeal and affirmed
on plaintiff's.*

Sullivan & Sullivan, for appellant.

Dowell, McLennan & Zeuch, for appellee.

PRESTON, J.—Plaintiff alleges that he
1. **INSURANCE: ac-** became a member of defendant association
cident insur-
ance: what
constitutes ac- February 11, 1913, and a copy of his cer-
cident: evi- tificate of membership and a copy of the
dence: suffi- articles of incorporation and by-laws re-
ciency. ferred to therein are made a part of the petition; that such
exhibits and application constitute the contract between
the plaintiff and defendant; that, on September 27, 1913,
in the state of California, and while plaintiff was in good
standing in defendant association, he sustained bodily in-

juries through external, violent and accidental means, as follows: While plaintiff was riding in his buggy, the horse became suddenly frightened, and turned the buggy quickly, causing plaintiff to be thrown against the iron frame of the buggy, and to strike his left eye against the frame. He further alleges that he did not then know he had received any injury which would result in any impairment in the sight of his eye; that he immediately consulted a physician and was advised that no injury had been done to the eye, and that plaintiff would not be incapacitated as a result of the injury; that, on January 29, [12] 1914, the same physician advised plaintiff that he would totally lose the sight of said eye, and as a result of said injury, plaintiff has totally lost the sight of his eye; that, within 15 days from the time plaintiff had knowledge that said accident would result in the impairment of his sight, he notified defendant in writing of said accident and the injury therefrom; that one of the by-laws of defendant association provides, "or if such injuries shall result in the loss within 90 days from the date of said injury of the entire sight of one eye, the member shall receive as indemnity the sum of \$1,250." Plaintiff further alleged that at the date of his injury, and at the time of the discovery of the same, he had lost the sight of his eye, and was therefore entitled to \$1,250; that plaintiff has demanded the compensation provided in the contract, but that defendant has failed and refused, and now refuses, to pay any part thereof; that, by reason of the said acts of injury resulting therefrom, and by reason of his membership in said association, said sum is due plaintiff.

For answer, defendant denied all allegations of the petition; denied that plaintiff ever furnished any notice of injury or proof of loss or disability within the time and in the manner and form provided in the by-laws, and that by reason thereof, there is no liability on the part of de-

fendant. For further answer, defendant alleged that, if plaintiff sustained bodily injuries as alleged, they were not sustained through external, violent and accidental means. Afterwards, and by way of amendment to answer, and over plaintiff's objection, defendant stated that it was provided in the contract sued on that:

"No action of any kind or character shall be commenced in any court against the association to recover any benefit or indemnity provided for in this article unless the same shall be commenced within twelve months after the cause of action accrues, and after said period all liability of this association to such member, beneficiary or heirs for indemnity and benefits on account of such injuries shall cease and end."

Defendant charged at the time of the commencement of this action that more than 12 months had elapsed after the cause of action therein had accrued, and that, by reason of all the foregoing, there was no liability. As to the nature of the injury and the effects of it, after stating how it occurred, plaintiff, as a witness, says:

"A swelling immediately arose. In a few moments I realized that I could not see out of that eye. I called upon Dr. Thomas. Within an hour or so after the accident occurred, the sight returned to the left eye for a few seconds and then disappeared again, and has never returned since that time. I explained all these facts to Dr. Thomas, and he advised me to use hot and cold compress treatment, in the hope that the sight would be restored. Dr. Thomas explained to me, on my first visit, on September 29, 1913, that it would take three months' treatment to accomplish the desired result. During all that time I applied the hot and cold compresses two or three times a day, and during all that time I was not able to see out of the eye. I had no sight in that eye from the time the injury was received, except a few moments that sight returned within an hour

or so after the accident first occurred. I am now convinced and state the fact to be, that the eyesight was totally, completely and absolutely destroyed when it disappeared within an hour or so of the accident. When the three months' period treatment was up, I returned to Dr. Thomas and he then made an examination, and informed me that the eyesight was totally, absolutely and forever destroyed, and that the eye was totally and absolutely blind."

Plaintiff testifies that he followed the treatment which the doctor had prescribed with the hope that, as Dr. Thomas had advised him, the sight might be restored, and that the first time the doctor advised him that the sight was gone was on January 12, 1914. He says the reason he did not notify defendant of the injury until after January 12, 1914, was because he relied upon the statements of the doctor that the loss of his eyesight might be restored if he followed the treatment. Plaintiff further testifies:

"My understanding of the condition of my left eye after the injury and at the time of my consultation with Dr. Thomas was this: The sight of the eye was gone at that time, but there was a hope that this was only temporary, and that the hot and cold compress treatment might restore the sight. Having this hope, I consented to follow the prescribed treatment and did follow the same, but without successful result. The first time that I knew for certain that the eyesight was absolutely and forever gone, was when I visited Dr. Thomas, January 12, 1914. Before that time I knew, of course, that I could not see out of the eye, but I was in hopes that this absence of sight was only temporary, and that the treatment would restore the sight. I discovered the loss of my eyesight immediately after the accident, but the sight returned in an hour or two after the accident, but only for a few moments, and then disappeared. I became totally blind in the left eye within an hour or two after the accident.

which occurred September 27, 1913. I know now that I was totally blind in the left eye within an hour or so after the accident occurred, but I did not realize this until Dr. Thomas made his examination, January 12, 1914."

Plaintiff further states that, after the doctor advised him that his eyesight was gone, he notified defendant, and accordingly mailed a letter or notice to defendant February 18, 1914, as follows:

"Oakland, Cal., February 18, 1914.

"Iowa State Traveling Men's Association,

"Mr. A. W. Rader, Secretary,

"Des Moines, Iowa.

"Dear Sir: The undersigned, James Lowe Christie Matheson, notifies you as follows: That I am the holder of certificate of membership No. 84467, of your association. That I am now and have been for the past twelve months employed as traveling salesman for Moore-Watson Dry Goods Company, Front and Market Street, San Francisco, California. On Saturday, September 27th, 1913, as my stepson, John O'Donnell, and I were riding in my buggy to the car line of Hayward, Alameda County, California, I met with an accident as described by Dr. Howard G. Thomas. As his notification gives a full report on the same, there is no necessity for my going into further detail at present. That, under the terms and conditions of your certificate of membership, I am entitled to receive from the above association for the loss of my left eye, \$1,250, which I ask you to forward as soon as convenient for the association to do so. If the association has blank forms for notification of injury to its members, and blank proof of injury, I will ask you to forward any of such necessary blanks as you desire for me to fill, and I am willing to give you any other further proof of my injury that the association may require. I enclose herewith my physician's notification and report to the said Traveling Men's Association.

Trusting that I may hear from you immediately, and that you will forward all necessary blanks for me to fill out for such notification and proof of injury, I am,

"Very sincerely,

"JAMES LOWE CHRISTIE MATHESON.

"No. 1202 Hampel Street, Oakland, Calif."

This notice was received by the defendant company February 24, 1914. Dr. Thomas also sent a report to defendant as follows:

"Physician's notification and report to the Iowa State Traveling Men's Association, and to A. W. Rader, its secretary, of the examination of James Lowe Christie Mathe-

"The undersigned physician, Hayward G. Thomas, M. D., notifies the said association as follows: That he is a duly licensed and practicing physician under the laws of the state of California, having his offices at Rooms 509-514, Dalziel Building, No. 532 15th Street, Oakland, California. That, on September 29, 1913, at about half past two o'clock P. M. thereof, the above named James Lowe Christie Matheson came to my office for medical examination and treatment. He stated to me that, on the preceding Saturday, viz., September 27, 1913, he had met with an accident when on his way to the railroad train at the town of Hayward, Alameda County, California, and that the accident occurred in this manner: That he was riding in his buggy, when the horse drawing the same became frightened, turned the buggy quickly and threw him violently against the iron frame of the buggy, which struck him over the left eye. That upon careful and thorough examination of said Matheson, I found the injury resulting from striking the iron had caused hemorrhages in and around the left optic nerve, and caused blindness from atrophy of the left optic nerve. That the blindness of the left eye is total and permanent, and the sight thereof can

never be restored. That I have given said Matheson medical treatment for the injured eye, and in my opinion said blindness is not affected by any infirmity or disease existing previous to the accident, and that the disability was caused by the above mentioned accident. The right eye is normal.

"HAYWARD G. THOMAS.

"Dated January 29, 1914, Oakland, California."

Thereafter, plaintiff received from defendant the following:

"Iowa State Traveling Men's Association.

(Letter Head.)

"Des Moines, Iowa, February 24, 1914.

"Mr. Jas. L. C. Matheson, 1202 Hampel St., Oakland, Calif. My Dear Sir: We have your letter of the 18th instant, and affidavit of Dr. Thomas, advising us that you sustained an injury on September 27, 1913, which resulted in the loss of an eye. We are not sending you any blanks with the idea of leading you to believe that you are entitled to benefits from this association on account of your injury, inasmuch as more than four months have elapsed since you received such injury, and the by-laws of the association provide that notice of injury should be given within fifteen days, and that failure to give notice within sixty days invalidates any claim for indemnity. We regret the necessity of having to give you this advice, but under the circumstances, have no alternative.

"Yours very truly,

"Claim Dept. MR

"J. S. IRISH, *Secretary.*"

No blank proofs of loss were ever sent by defendant. The substance of the testimony of Dr. Thomas, and as set out by plaintiff, is as follows:

"I advised him that the hemorrhage in his eye was probably due to the injury he had received while riding in the buggy; that the sight of the left eye was impaired.

but that the eyesight might be saved, and I so advised him and prescribed treatment for that purpose. I did not think that the sight was permanently gone then, or that the eye was permanently impaired in vision, and so I prescribed the hot and cold compress treatment. I first discovered that Matheson had lost the sight of his left eye on January 12, 1914. By January 12, 1914, I knew that the sight was permanently and absolutely gone. That was the first time that I knew it, but probably he had been blind permanently some time before that, because that process was a gradual one; but he did not realize that the condition was permanent blindness, nor could he realize that until I so advised him, because the loss of vision or total blindness was due in his case to gradual atrophy of the optic nerve caused in turn by the violent blow. My present opinion is, looking back over the history of his case and the conditions in all their phases, that Matheson was blind from the time of the accident, except in the hours when he says sight returned for a short while, but he did not realize this was permanent blindness and hopelessly so, nor did I, before January 12, 1914, because there was the hope that the optic nerve had not been permanently injured, and hence the sight might yet be saved. January 12, 1914, I made an ophthalmoscopic examination. That is, I took the patient in a dark room, and with an instrument made for that purpose I looked into the interior of his eye, and found the optic nerve dead, and announced the sight totally gone and the man permanently and hopelessly blind in the left eye."

The doctor also testified:

"I have practiced 28 years. When plaintiff came to me, September 29, he was suffering with optic neuritis, with hemorrhage in the retina around the optic nerve. The sight of the left eye was impaired, but I thought the eyesight might be saved and so advised him, and I pre-

scribed certain treatment for him. I examined him next on January 12, 1914. I found the optic nerve in the left eye dead. There were no arteries to be seen. This means that the arterial blood which nourishes the optic nerve retina was absolutely gone, and therefore the eye was blind. His condition on January 12, 1914, was in my opinion directly traceable to the original injury of September 27, 1913. If the treatment advised could absorb the hemorrhage, in my opinion the eye and sight could be saved, but when I saw him on January 12th, I found then that the sight was gone, and that the eye was absolutely blind."

Section 3, Article VI, of the by-laws of defendant association, provides, among other things:

"Whenever a member in good standing shall through external, violent and accidental means received bodily injuries which shall independently of all other causes result in the loss, within 90 days from said injuries of the entire sight of one eye, the member shall receive as indemnity the sum of \$1,250. Provided, however, that the said member shall give, or cause to be given, due notice in writing to the secretary of the association, giving date and place where, and the circumstances under which said injuries were received, also the nature of the injury sustained, together with the name and address of his medical attendant. Such notice shall be given the secretary of the association within 15 days after the date of injury is received, and failure to give such notice within 60 days from the date of injury shall invalidate any claim or indemnity under his membership. No claim under this section shall be valid unless such written notice of said injuries shall have been sent to the secretary of the association as hereinbefore provided, and unless there shall be sent to the secretary of the association due preliminary proof of injuries, on blanks which will be provided by the association upon request, setting

forth the nature and the extent of the injuries sustained, together with a report of his attending physician.

"Sec. 4, Art. VI: No action of any kind or character shall be commenced in any court against this association to recover any benefit or indemnity provided for in this article unless the same shall be commenced within 12 months after the cause of action accrues, and after said period all liability of this association to such member, beneficiary or heirs for indemnity and benefits on account of such injuries shall cease and end. * * * This association shall not be liable to any member for any benefit or indemnity unless the notices of the injuries and proofs of disability are given and furnished this association within the several period of the time fixed. Any member failing to so furnish said notices and proofs shall forfeit all rights to said benefits, and this association in such case shall, without any acts of its officers so declaring, be released from any and all liability to the said member, his beneficiary or heirs on account of such injuries."

Also, the provision before set out as a part of defendant's amendment to answer. The defendant offered no evidence except the by-laws and the pleadings and filing dates, and the original notice. The original notice was placed in the hands of the sheriff April 21, 1913, and the petition was filed April 22, 1915.

1. Taking up first plaintiff's appeal
2. PLEADING : from the order of the court permitting de-
amendments : fendant, on May 15, 1916, to file the amend-
new defenses. ment to answer heretofore set out: Plain-
tiff moved to strike said amendment on the ground that it sets out and pleads a matter of the statute of limitations, matter which he says must be pleaded specifically in the answer, or it will be deemed waived, and that it pleads a new and specific defense not mentioned in the original answer, and further that plaintiff is surprised because it

sets up a new defense, and for the reason that depositions had been taken prior thereto, and that such issue was not in the case when the depositions were taken. The amendment was filed during the trial and before the evidence was closed. Appellee cites and relies upon the case of *Greenlee v. Home Ins. Co.*, 103 Iowa 484.

Conceding that the record in the two cases is somewhat similar, it will be noted that the motion to strike the amendment in the *Greenlee* case was sustained, and the court held that, because the allowing of amendments is so largely within the discretion of the trial court, there was no error. So, in the instant case, had the trial court sustained plaintiff's objection, or motion to strike, doubtless the holding would be the same. But in the instant case, the motion was overruled, and, under the same rule in regard to the discretion of the trial court, we think we ought not to interfere. The rule is to allow amendments, and to deny the right is the exception. The plaintiff did not ask for a continuance, so that the trial was not delayed. Furthermore, the defendant offered no evidence in the case except the files showing the dates of the commencement of the action, as bearing upon the statute of limitations provided for in the certificate. This was all known to the plaintiff as well as the defendant, and we are unable to see how plaintiff could have been surprised or prejudiced. Under all the circumstances shown, we think there was no abuse of the discretion of the trial court such as to constitute reversible error. See *Livingston v. Heck*, 122 Iowa 74, 77; *Mansfield v. Mallory*, 140 Iowa 206, 209; *Franzen v. Hutchinson*, 94 Iowa 95; *Daly v. Simonson*, 126 Iowa 716; *McCormick Mach. Co. v. Richardson*, 89 Iowa 525.

2. Defendant claims that it is not shown that plaintiff received bodily injury through external, violent and accidental means, resulting in the loss of eyesight, within the terms and meaning of the by-laws of defendant. But this

proposition is not seriously argued. The question was submitted to the jury under proper instructions. We think the evidence before set out, which will not be further discussed, justified the finding of the jury.

3. It is next contended by appellant that indemnity is only payable under the contract where the loss of eyesight results within 90 days from the receipt of accidental injuries. The defendant offered an instruction to the effect that the jury must find for the defendant unless it was found that plaintiff's injuries resulted in the loss of the entire sight of his eye within 90 days from the receipt of his injuries. The trial court, by proper instructions, left it to the jury to find whether the loss of eyesight did result from such injuries, and within 90 days. Under the evidence before set out, we think the jury could not have found otherwise than that the plaintiff did lose the sight of his eye within 90 days from the date of his injuries. In fact, as we view the record, there is substantially no dispute on this point. We would even go further, and say that it cannot be fairly said that plaintiff did not lose the sight of his eye within a few hours even, after he received his injuries, though appellee contends that he had no knowledge of that fact until January 12, 1914. Indeed, appellant concedes in argument that plaintiff lost the sight of his eye within 90 days, for it says:

"Upon the issue as to whether or not in fact his eyesight was totally lost within 90 days, there is no dispute."

Appellant contends further that there is no dispute in the record but that plaintiff knew from the first that he would not see, and that he had lost the entire sight of one eye, because plaintiff testified: "I became totally blind in the left eye within an hour or two after the accident." Appellee also concedes in argument that the evidence is undisputed that plaintiff lost the sight of his eye within 90 days from the date of the injury. Under this

record, it is clearly unnecessary to discuss this feature of the case further. It is true, of course, that 90 days from the date of the injury would be before January 12, 1914, the date when plaintiff claims he first had knowledge from Dr. Thomas that he had lost the sight of his eye. The correct date here is January 12th, as we understand the record, though given as 29th a part of the time.

4. Appellee claims that the loss of the sight of his eye immediately followed the injury, but that the blindness was not known to him until after the period of 90 days. Appellant says that this claim is made by plaintiff to excuse his failure to furnish proof of disability within 60 days from the date of disability, as provided by defendant's by-laws. Defendant also contends that no proofs of injury were made within 90 days of the receipt of the injury, as provided by the contract. It is conceded, as it must be, under the record, that no notice or proofs were given within 90 days, but it is the contention of appellee that he was entitled to 90 days from the date when he had knowledge that he had lost his eyesight, citing Section 1820, Code Supplement, 1913; *Baumister v. Continental Casualty Co.*, 124 Mo. App. 38 (101 S. W. 152); *United States Casualty Co. v. Hanson*, (Colo.) 79 Pac. 176; *Peele v. Provident Fund Society*, (Ind.) 44 N. E. 661 (46 N. E. 990); *Rorick v. Railway Officials', etc., Acc. Assn.*, 119 Fed. 63 (55 C. C. A. 369); *Odd Fellows Fraternal Acc. Assn. v. Earl*, 70 Fed. 16 (16 C. C. A. 596); *Hoffman v. Manufacturers' Accident Indemnity Co.*, 56 Mo. App. 301; *Hayes v. Continental Casualty Co.*, (Mo.) 72 S. W. 135; *Woodmen Accident Assn. v. Byers*, (Neb.) 87 N. W. 546 (55 L. R. A. 291); *Trippe v. Provident Fund Society*, (N. Y.) 35 N. E. 316 (22 L. R. A. 432); *Manufacturers' Accident Indemnity Co. v. Fletcher*, 5 Ohio Cir. Ct. 633; *Comstock v. Fraternal Accident Assn.*, (Wis.) 93 N. W. 22; *People's Mutual Accident Assn. v. Smith*, (Pa.) 17 Atl. 605; *Simpkins v. Hawkeye Com'l*

Men's Assn., 148 Iowa 543; *Lyon v. Railway P. A. Co.*, 46 Iowa 631; *Maryland Casualty Co. v. Ohle*, (Md.) 87 Atl. 763.

Appellant contends that the court erred in submitting to the jury the issue as to whether plaintiff knew that he had lost his eyesight within 90 days from the receipt of bodily injuries, because of Section 3, Article VI of the by-laws. It cites *Carnes v. Iowa S. T. M. A.*, 106 Iowa 281 286; *Taylor v. Pacific Mut. Life Ins. Co.*, 110 Iowa 621. 623; *Binder v. National M. A. Assn.*, 127 Iowa 25; *International Trav. Assn. v. Rogers*, (Tex.) 163 S. W. 421; *Clarke v. Illinois, etc., Assn.*, 180 Ill. App. 300.

This matter, as to plaintiff's knowledge of his blindness, will be referred to later, in so far as it appears to be necessary to discuss it, and in connection with the question of the limitation provided for in the contract and the statute, which we regard as the controlling point in the case.

It is also contended by appellant that no proofs of loss were furnished, and that a waiver as to furnishing the proofs of loss was not pleaded, and that, therefore, for this reason alone, there should have been a directed verdict for the defendant. Appellee states in argument that he never furnished any proofs to the defendant, and concedes that no waiver of proofs was pleaded by either party. Appellant concedes the two foregoing propositions in substantially the same language used by appellee. We apprehend that this argument is made by plaintiff to escape the argument as to the matter of the limitation provided in the certificate and statute, because they say that the difficulty of the case rests in the fact that we have no definite time at which the 40 days provided by statute begins to run, because, as they say, plaintiff never furnished any proofs of loss to the defendant, but the fault for this was on defendant, for the reason that it failed to furnish blanks. In other words.

appellee's purpose seems to be, by the argument that there were no proofs of loss or waiver, to extend the time so as to prevent the bar of the limitation. Appellant, though conceding at one point that there were no proofs, yet contends that, if there were any proofs at all, it was the notice or letter from plaintiff of February 18, 1914, received by the company February 24, 1914. The company seems to have treated this letter and the affidavit of Dr. Thomas as proofs of loss, and, as we understand it, the trial court so held as matter of law. And the appellant contends that plaintiff's cause of action accrued when the defendant, on the same day, February 24th, denied all liability. Appellant's contention as to the bar of limitation is that plaintiff's cause of action accrued upon such denial of liability, and that action would have to be brought within one year from that date, or at least within 40 days thereafter, under Section 1744 of the Code. *Kenny v. Banker's Accident Ins. Co.*, 136 Iowa 140, and other cases are cited, as holding that this section applies to associations such as defendant appellant. If appellant accepted plaintiff's letter, and the doctor's affidavit before referred to, as proofs of loss, and denied liability, plaintiff's cause of action would have accrued even though no waiver was pleaded. In other words, plaintiff could sue when his cause of action accrued, and then, if defendant pleaded the failure to give proofs of loss, plaintiff could plead a waiver, or perhaps could plead a waiver of proofs originally. The question is not now strictly one of waiver of proofs of loss, but rather when plaintiff's cause of action accrued, and whether it is barred. It was said in *Kiisel v. Mutual Res. L. Ins. Co.*, 131 Iowa 54, 55, that the limitation period does not commence to run until a cause of action has accrued; that is, until suit may properly be brought.

5. The right of an insurance association to limit the time within which an action may be brought is recognized by our statutes, if such limitation is not contrary to the statutory provisions, and if reasonable, but the time agreed upon will be construed to begin to run when the right of action accrues (*Read & Traversy v. State Ins. Co.*, 103 Iowa 307; *Kiisel v. Mutual Res. L. Ins. Co.*, supra); and it is held that, under Section 1744, Supplement to the Code, 1913, 40 days shall elapse after the service of notice and proof of loss before action may be brought (*Salmon v. Farm P. M. I. Assn.*, 168 Iowa 521). The statute itself seems to be plain as to that. Under the statute last cited, as now in force, the insured was entitled to 60 days after loss in which to file notice and proof, but the amount due is not payable under the statute, nor can an action be begun, until 40 days after such filing; that is, after the notice and proofs are furnished. Under the statute, the insured has 60 days within which to furnish notice and proofs, but the 40-day period begins to run, not from the end of the 60 days, as we understand appellee to contend, but from the date on which the notice and proofs are actually furnished. In other words, in computing the time within which action must be brought, plaintiff may not count both the 60 and the 40 days, where, as here, the notice was given before expiration of 60 days. As bearing upon this, see *Jones v. German Ins. Co.*, 110 Iowa 75, 80; *Bradford v. Mutual F. Ins. Co.*, 112 Iowa 495; *Read v. State Ins. Co.*, supra. It is appellee's contention that the 60 days allowed, both by statute and by the contract of defendant, began to run January 12, 1914, at the time plaintiff claims he first had knowledge that he had lost the sight of his eye, and would terminate on March 13, 1914, and that the 40 days allowed by statute would begin to run on March 13, 1914, and end April 23, 1914, and he cites a North

Carolina case to sustain his contention. But we have heretofore shown that both the 60 and the 40 days may not be counted in determining the bar of limitation. He also contends that the one year allowed in addition thereto by the statute begins on April 23, 1914, and ends on April 23, 1915, and that, his action having been begun April 21, 1915, he was in time. As already shown, defendant's by-laws provide that no action shall be brought unless the same shall be commenced within 12 months after the cause of action accrues, and the statute provides that the time within which action shall be brought shall not be limited to less than one year from the time when a cause of action accrues. The statute also provides that no action shall be begun within 40 days after notice and proofs of loss have been given to the company. Under the record, defendant denied liability on February 24, 1914, and plaintiff's cause of action accrued 40 days thereafter. It would therefore be barred one year after the expiration of said 40 days, which would be 17 or 18 days before the action was brought. As said, appellee contends that, under the by-laws, which provide that notice should be given the company within 15 days after the date of injury, and not more than 60 days therefrom, he was entitled to 60 days from January 12, 1914, to furnish notice and proofs of loss. But he did give notice and proofs of loss, and the only ones that were given, February 24, 1914, and the company denied liability on that date, and, as said, the 40 days began to run then. It is our conclusion that the plaintiff's action was not brought in time, and that it was barred when brought. Other questions are argued, but the one last referred to is decisive of the case, so that such other points need not be noticed.

For the reasons given, the judgment is *Reversed on defendant's appeal and remanded* for further proceedings.

in harmony with the opinion.—*Affirmed on plaintiff's appeal.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

T. RICHTER & SONS, Appellee, v. AMERICAN EXPRESS COMPANY, Appellant, et al.

CARRIERS: Interstate Shipments—Limiting Liability—Conversion by Carrier—Effect. Limited liability clauses in interstate bills of lading are valid, under the Carmack Amendment to the Interstate Commerce Act, even though it be conceded that the carrier, after issuing the bill of lading, *was guilty of conversion* by turning the entire carriage of the goods over to another carrier without authority from the consignee so to do. (For Carmack Amendment, see Act June 29, 1906, Chap. 3591, page 595, 34 Stat. at L.)

WEAVER, J., dissents.

Appeal from Scott District Court.—WILLIAM THEOPHILUS, Judge.

SATURDAY, SEPTEMBER 22, 1917.

ACTION brought by the owner of a package of furs, against both defendants as common carriers. It was an interstate shipment. The goods were lost in transit and never delivered to the consignee. The action is in trover to recover the value for conversion. The contract of carriage, by its express terms,—and appellant contends by the law then in force,—limited the recovery to \$50. The goods were worth more, and plaintiff sues for their actual value. Trial to a jury resulted in a verdict for plaintiff against the defendant American Express Company for \$1,138.75, with interest from December 19, 1913, and against the defendant United States Express Company for \$50, with interest. Plaintiff waived its right to judgment against the United States Express Company, and judgment

was rendered against the American for the amount of the verdict. The judgment entry recited that the judgment should be without prejudice to any claim the American Express Company might have against its codefendant. The American Express Company appeals. The United States Company has refused to join in the appeal.—*Reversed.*

T. B. Harrison and Bollinger & Block, for appellant.

Thuenen & Shorey and Lane & Waterman, for appellee.

CARRIERS: in-
terstate ship-
ments: limit-
ing liability:
conversion by
carrier: ef-
fect.

PRESTON, J.—The plaintiff's claim is substantially this: That it is an Iowa corporation; that each defendant is a common carrier; that defendant American Express Company had a continuous line for the carriage of goods from Brooklyn, New York, to Davenport, Iowa; that both defendants have a line to Davenport; that, some two or three weeks before December 19, 1913, plaintiff sent a package of furs to Schiff Bros., at Brooklyn, New York, to be tanned or dressed, and that, on said December 19th, plaintiff, by its agents, Schiff Bros., delivered said package to defendant American Express Company at Brooklyn for carriage to plaintiff in Davenport, and that said company accepted said package and undertook in writing to perform such services; that it did not perform said services, but, unlawfully and without the knowledge of plaintiff, delivered said package to the United States Express Company in the city of Brooklyn, thus converting said package to its own use; that the United States Express Company, knowing that plaintiff had not confided said package to it and that it had no right to take same, took it and has converted same to its own use; that said package has never been delivered to plaintiff; and, plaintiff asked judgment for \$1,321.15. In a second count, plaintiff asks the same judgment, and alleges further that both defendants

combined to injure plaintiff, the one by giving and the other by receiving and undertaking to carry the package to plaintiff, and that the package was lost or stolen from the United States Express Company car in the course of said carriage. The defendant American Express Company denied the conversion, and pleaded substantially that it has never known the contents or value of the package; that the two defendants and the National Express Company maintained a joint office in Brooklyn, where the three received and distributed shipments, using the same employees and wagons in so conducting the business; that this was well known to Schiff Bros., the consignor, who for many years had used but one express receipt book, that of the American Express Company, for all its shipments through the said office, irrespective of which of said three companies might carry its shipments. Defendant alleges that said package, addressed to T. Richter & Sons, Davenport, Iowa, was in fact delivered to the United States Express Company by Schiff Bros., though the driver left with Schiff Bros. the receipt of the American Express Company; and that said receipt was accepted by the consignor and constituted a contract for the forwarding of the furs from Brooklyn to Davenport by the United States Company; that the package was carried by the agent of said joint office to the joint office in Brooklyn without any shipping instructions from said consignor, and the United States Company thus undertook the forwarding of said package to its destination, rightfully, and with the authority, knowledge, and consent of Schiff Bros. The defendant alleged, and the evidence shows that said written contract provided, as follows:

"Nor in any event shall this company be held liable or responsible, nor shall any demand be made upon it beyond the sum of \$50 upon any shipment of 100 lbs., or less, and of not exceeding 50 cents per pound upon any shipment weighing more than 100 lbs., and the liability of the

express company is limited to the value above stated unless the just and true value is declared at the time of shipment and the declared value in excess of the value above specified is paid for or agreed to be paid for under this company's schedule of charges for excess. It is also understood that the stipulation contained herein shall extend and inure to the benefit of each and every company or person to whom, through this company, the said property may be intrusted or delivered for transportation."

Said defendant also alleged, and the evidence shows, that, under the laws of Congress, both defendants had, prior to the date of the shipment in question, caused to be filed with the Interstate Commerce Commission their schedule of rates between Brooklyn and Davenport, and that said rates are based on the value of the shipments; that the rates, classifications, schedules and tariffs were jointly filed by the defendants and approved by the commission, and were in force on December 19, 1913; that such schedule contained the following provisions:

"(a) The rates governed by this classification are based upon a value of not exceeding \$50 on each shipment of 100 lbs. or less, and not exceeding 50 cents per pound, actual weight, on each shipment weighing more than 100 lbs., and the liability of the express company is limited to the value above stated unless a greater value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under the schedule of charges for excess value in paragraph (c) of this rule. * * *

"(c) When the value declared by the shipper, or indicated by an invoice, exceeds the value of \$50 on a shipment weighing 100 lbs. or less, or 50 cents per pound on a shipment weighing more than 100 lbs., a charge for the excess value must be made according to the following schedule of charges: When merchandise rate is \$3 or less per

100 lbs., 10 cents for each \$100 excess value or fraction thereof. When merchandise rate exceeds \$3 and not more than \$8 per 100 lbs., 15 cents for each \$100 excess value or fraction thereof."

Said defendant also alleges and claims that the package was accepted as an interstate shipment, subject to the terms and conditions of the receipt given in the name of the American Express Company, and subject to the regulations of the Interstate Commerce Commission under said act, and that any liability of the defendants is to be determined by the act as amended, and particularly by Section 20 thereof; that, by reason of the matters just referred to, defendants were authorized to carry pursuant to the terms of said classification, whereby the agreed value was fixed at \$50, in consideration of the rate agreed to be paid for the carriage of said package, and for its loss in shipment the liability of either defendant is limited to said agreed valuation; that plaintiff knew that the rates were based upon the value of the shipment, and that, had its true value been disclosed, the rate would have been based upon a value in excess of \$50, while the rate actually agreed to be paid was the lowest rate; that Schiff Bros., plaintiff's agents, in accepting the receipt without declaring the true value, and knowing the true value, were guilty of a fraud in attempting to obtain an illegal and discriminatory rate, and one lower than allowed by law. It is shown that the package in question weighed 90 pounds, and that the rate would have been \$1.65 more had the true value of the package been declared. Said defendant alleges that plaintiff is estopped from claiming that the value of the package is in excess of \$50; that, by declaring the true value, the consignor and plaintiff could have obtained a service involving a greater degree of care, and, in failing to declare the true value, the consignor induced the defendants to lessen their vigilance; that the value of \$50 placed upon said shipment.

by the failure to declare a value thereon, was a part of the rate fixed by law. It is alleged and shown that Rule 2 was one of the rules before referred to, and is as follows:

"The rates of the companies, parties to this classification, are conditioned upon their right to route business as they may elect, which right is expressly reserved."

Said defendant alleges that, even if it be found that the package was received by it for shipment, still, under said Rule 2, it might forward the package over such route as it deemed shortest and least expensive, and that, therefore, there was no conversion, because defendant was acting within the terms and conditions upon which it received such package, if it be held that it did receive it. Said defendant denied generally all allegations not admitted. It is shown that the package would reach Davenport by the United States Company four hours sooner than by the American. The defendant United States Express Company pleaded substantially the same facts. Both defendants offered to confess judgment for \$50 and interest and costs, which was refused. The trial court instructed that the United States Express Company was only liable for \$50, but as to the other defendant, instructed on the theory of conversion, and that, under the undisputed evidence, plaintiff was entitled to recover \$1,138.75 as the true value of the package, if the jury found there was a conversion. The instructions read:

"7. The only question or issue for you to try and determine in this case is: Was it within the reasonable contemplation of Schiff Bros.—that is, within the reasonable contemplation of their president, Abraham Schiff, or their secretary, Theodore Schiff, or their shipping clerk, Paul Meyer, or their assistant shipping clerk, Charles Schiff, when the said package was delivered to Michael Connor, the joint agent of the two defendant express companies, for shipment,—that the same might be routed and forwarded

over the line of the defendant United States Express Company?

"8. It is to be presumed in this case, until the contrary appears from the evidence, that the said package was to be routed and forwarded over the line of the American Express Company; hence the burden of proof is upon the defendants to establish and prove by a preponderance of evidence that it was within the reasonable contemplation of Schiff Bros., when they so delivered the said package for shipment, that the same might be routed and forwarded over the line of the United States Express Company.

"9. So, in this case, if you find from a preponderance of evidence that it was within the reasonable contemplation of any one of the said persons, namely: Abraham Schiff, president, Theodore Schiff, secretary, Paul Meyer, shipping clerk, or Charles Schiff, assistant shipping clerk, of the said Schiff Bros., when the said package was so delivered for shipment to said Michael Connors, joint agent of the defendants, that such package might be routed and forwarded over the line of the United States Express Company, then in that event your verdict must be against both defendants for the sum of \$50, with six per cent interest thereon from December 19, 1913; but if you do not so find, then your verdict must be against the defendant American Express Company in the sum of \$1,138.75, with interest thereon, and against the defendant United States Express Company in the sum of \$50, with six per cent interest thereon from December 19, 1913."

Only this one fact question was submitted, and appellant contends that the trial court denied all of its other defenses. We shall refer later to the evidence as each side claims it to be, and as bearing upon the question as to whether there was or was not a conversion. At this point, appellant contends that there is no conflict in the evidence, while appellee contends otherwise; but appellant says that.

even though there is a conflict in the evidence of the witnesses as to their purposes and intentions in making the shipment, still, under Rule 2, before referred to, defendants had the right to route the shipment as they chose, and that, therefore, there was no conversion in fact, and they contend broadly that, even though there was a conversion, there could not, under the law, and because of the provisions in the receipt and the schedules filed with the Interstate Commerce Commission, be a recovery of more than \$50.

In fairness to the trial court, it should be said that some of the decisions of the Supreme Court of the United States, upon which we think a determination of the questions involved turn, were decided after the trial of this case.

1. As said, appellant contends that, though the receipt or contract is signed by the appellant, the package was accepted by the agent for the United States Express Company. There is some conflict in the testimony as to the purposes and intentions of the consignors and the driver who received the package and receipted for it and the agents of the companies, as to whether the shipment should be carried by the appellant or the United States Company. Consignors, or some of them, testify that they intended and expected the appellant to carry the furs, and that they did not authorize the United States Company to carry the package, or consent thereto; and yet the consignors, or some of them, also say that they were indifferent as to which company carried the goods, and one of them says that, when he took an American receipt, he knew that the goods might go over the United States Express Company's line. There is also some evidence as to the custom of these companies as to the method and manner of making shipments and as to the consignors' knowledge thereof, and that in some instances goods receipted for as were these, were carried by one of the other companies. We shall not go into the tes-

timony further. It is enough to say that, if the driver and other agents were acting for these different companies jointly, they were acting for the appellant, and the appellant gave its receipt or contract and is bound thereby.

2. Appellee says, at one point in the argument, that the plaintiff sues upon a written contract of carriage, and that the appellant, a party to that contract, in so far as the receipt is a contract, may not show by parol testimony that it was intended as a shipment over the United States Company's lines. They say also that, although the consignors supposed they had delivered the package to appellant for carriage, they had not done so, because it was never accepted for carriage by appellant, and that the consignors never intended it to be accepted for carriage by the United States Company, and therefore there was no contract of carriage between Schiff Bros. and any person for the shipment of these goods; that plaintiff can hold the American Company bound by the contract that it led it to believe was made. And they say that, by reason of these things, there was no contract of shipment, and the Carmack Amendment to the Interstate Commerce Law could not apply. Plaintiff's contention is that, because appellant receipted for the goods, and, without any attempt to perform its contract, turned them over to the other company for carriage, this amounted to a conversion, and they say that it is not a mere technical conversion, and that it is not a case of loss through negligence or nonperformance of the contract, but a positive misfeasance of appellant itself,—a willful act,—as though appellant were guilty of theft, or willful destruction of the property. Their contention is that, this being so, appellant cannot by contract limit its liability for such an amount.

Appellee contends that there was at least a conflict in the evidence as to whether there was in fact a conversion of the property, while appellant contends that, under the

undisputed evidence, there was in fact no conversion, and calls our attention to some of the circumstances which they claim so show, including Rule 2 before referred to, in regard to routing. Some of the facts referred to in a prior division of the opinion have a bearing upon the question of conversion. There are other circumstances bearing upon this question, but we shall not take the time to set out the evidence. Appellee concedes that for mere negligence or nonfeasance of duty on the part of appellant, the recovery would be limited to \$50, but, as stated, contends that the rule does not apply where there is a conversion, and that a carrier may not limit its liability for loss of a shipment occasioned by its own willful wrong. It should be stated, if we have not already done so, that there is no claim in this case that there was a theft of the property by appellant or either of the defendants, or any act by them of that character. The evidence shows that the goods were lost while being carried by the United States Express Company. Appellee relies largely upon the case of *Sleat v. Fagg*, 5 B. & Ald. 342, the syllabus of which case, with three words which appellee has added in parentheses, is as follows:

“ ‘A parcel containing country banker’s notes, of the value of 1,300£ and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail coach, and was accepted by him to be so carried. The parcel was sent by a different coach (owned by others), and was lost. The carriers had previously given notice that they would not be answerable for any parcel above 5£ in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, held, notwithstanding, that the carrier was responsible for the loss.’ The counsel for defendant relied upon the case of *Batson vs. Donovan*, 4 B. & A., 21. which was an action founded

upon the negligence or non-feasance of the carrier. The plaintiff had a verdict below for the full amount of the value of the package."

The judgment of the lower court was sustained, on the theory that it was not a case of the negligent performance of the contract, but, because defendant did not carry the package in pursuance of the contract, but substituted a different carrier, it was a refusal altogether to perform the contract, and a misfeasance. Counsel for appellee seek to distinguish *Georgia, etc., R. Co. v. Blish Milling Co.*, 241 U. S. 190 and later cases relied upon by appellant.

Appellant's contention at this point is that, under the holding in the *Blish* and other cases, the question of conversion—at least such a conversion as is relied upon in the instant case—is not controlling, and that, whether the suit is on contract or in tort, the amount of recovery is lawfully limited to the amount specified in the contract; and they quote the language of Mr. Justice Hughes in the *Blish* **case**

"The words of the statute are comprehensive enough to embrace responsibility for *all* losses resulting from *any* failure to discharge a carrier's duty as to any part of the agreed transportation."

The trial court seems to have adopted plaintiff's theory, and, as we understand it, instructed the jury, under the doctrine of *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.*, 130 Iowa 123, 130, and other cases, that, if the carrier transports the goods over some other route than that specified in the contract, or reasonably within the contemplation of the parties, he must answer as for conversion. If it be conceded that, under the evidence, there was such a conflict therein that the jury was justified in finding that there was a conversion, under the doctrine of the Iowa cases just referred to, and even though, as contended by appellee, it was not a mere technical conversion, still, the goods being lost

in transit and not stolen by the defendant or its agents, it was not such a conversion as to constitute an act of misfeasance in the sense contended for by appellee; that is, as though the defendant itself had stolen or willfully destroyed the goods. In passing, we may refer to a remark of the court's in *D'Utassy v. Barrett*, (N. Y.) 114 N. E. 786, 787, that the rule should not be extended so as to permit a carrier to realize a profit by converting valuable shipments. Such conversions are so unusual as to be almost negligible. But, as before indicated, we are not now dealing with a case of conversion by theft and the like, hence do not determine the effect of such a conversion; although in the *D'Utassy* case it was held that, under the circumstances of that case, plaintiff could not recover the true value where the goods were stolen by the company's agent, and the *Blish* case was cited to sustain the proposition that the effect of the stipulation in the receipt or contract cannot be escaped by the mere form of the action, etc.

Appellant cites many cases which it says control the instant case, and appellee does not dispute the propositions laid down in any of them, except the *Blish* case, but contends that appellant's cases do not apply because of the alleged conversion. Among other cases, appellant cites *Adams Exp. Co. v. Croninger*, 226 U. S. 491, *Georgia, etc. R. Co. v. Blish Milling Co.*, 241 U. S. 190 (60 L. Ed. 948), *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, to the point that, by the Carmack Amendment, Congress took supreme control of a carrier's liability in interstate shipments. They also cite *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657 (57 L. Ed. 690), *Glassman v. Chicago, R. I. & P. R. Co.*, 166 Iowa 254, and *Herminghausen v. Adams Express Co.*, 167 Iowa 230, to the point that the Carmack Amendment furnishes an exclusive rule for the liability of a carrier under contracts for interstate shipments. Appellant also cites *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477.

486, *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, and the *Blish* case, *supra*, as sustaining their contention that the defendant's liability under Section 20 of the Interstate Commerce Act does not exceed \$50, and that a judgment of a state court for more than that amount deprives the defendant of a Federal right; and *Adams v. Croninger*, *supra*, *Kansas City So. R. Co. v. Carl*, 57 L. Ed. 683, 688, and *Missouri, K. & T. R. Co. v. Harriman*, *supra*, to the point that the Federal law limits the liability to \$50 on the principle of estoppel; also *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, U. S. Adv. Ops. 1915, page 555 (241 U. S. 319), to the proposition that, where a bill of lading contained provisions for limited liability, published rates, tariff regulations, and choice offered shipper, the limited liability was valid, and that the court will presume that such regulations had been filed with the Interstate Commerce Commission. Appellant claims also that, under the third paragraph of Section 10 of the Interstate Commerce Act, and Section 6 thereof as amended by the Hepburn Act, plaintiff was guilty of a fraud in attempting to obtain transportation for the furs in question at less than the regular rates, and to obtain a concession or discrimination; and they cite *Poor Grain Co. v. Chicago, B. & Q. R. Co.*, 12 L. C. C. R. 418, 422, as holding that:

"When once lawfully published, a rate, so long as it remains uncanceled, is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of the Congress. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law. * * * Any departure from it, either by the carrier or the shipper, is as much a crime as it would be if the rate had been fixed by specific enactment. Not even a court may interfere with a published rate or authorize a departure from it."

This case cites *Texas & P. R. Co. v. Abilene C. O. Co.*,

204 U. S. 426. The case above referred to, as well as the case of *Wells, Fargo & Co. v. Neiman-Marcus Co.*, supra, is quite similar to the instant case, though it does not have the conversion feature. But, as we understand it, appellant's claim at this point is that plaintiff or its agent, Schiff Bros., knowingly and willfully, by false billing or false classification, sought to obtain transportation at less than the regular rates. We do not deem it necessary to determine this point. It may be remarked, however, that, while no other valuation was placed upon the package of furs than that stated in the receipt, it appears that the agent who received the package did not ask for its true value, nor was it given by the consignors. Schiff Bros. testify that, under the circumstances, they would not give a valuation unless directed so to do by plaintiff. Finally, appellants contend that a recovery for full value in this case gives the shipper an undue advantage, and is a favoritism which the Commerce Act was designed to avoid, citing *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278 (59 L. Ed. 576).

We are of opinion that the instant case is ruled by the *Blish* case. The Supreme Court points out, in the *Croninger* case, the confusion that existed in the various states as to validity of limited liability clause in interstate carriage contracts, before the Carmack Amendment. Appellant contends that, if plaintiff's theory in regard to conversion prevails, the national law will be circumvented, and the former chaos will return; that the \$50 limit would stand by virtue of the Federal statute, except in cases of conversion. It is argued that, as to the owner of goods, there can be no difference whether the goods are lost or stolen and converted by the carrier; that the owner has simply lost his goods; that the shipment does not lose its interstate character simply because it was converted. It is argued, too, that the Carmack Amendment does not provide that a bill of lading shall be null, nor its conditions void.

nor that a shipper may recover more than the amount stated, if there be a conversion by the carrier, and that the state courts are without authority to declare the \$50 limitation of liability provision of the contract, or any of its provisions, void, unless so authorized by Congress. It is argued, too, that the express company's tariff sheet contains no provisions for the payment of more than the agreed valuation based upon the transportation charge, even in the case of conversion by the company's employees. It may be, as contended by appellee, that, under the authorities cited by it, a conversion by appellant in turning over the furs to the other company would constitute an abandonment or waiver of the contract, but we think this does not apply to interstate shipments since the passage of the Carmack Amendment. On the date of the shipment in question, defendants had filed their tariffs, rules, and regulations, including the \$50 limit of liability for loss. The contract of shipment and the receipt were issued to plaintiff in accordance therewith. These terms may not be varied by the parties. The contract imposes a duty upon the carrier, and this is imposed by the law itself. It would seem that neither the shipper nor the carrier could waive or abandon what the law demands of each of them, and that is, an adherence to the contract. To hold otherwise, and allow a recovery in one amount for conversion, such as is here alleged, and limit the liability in other cases, would be likely to open the door to rebating, favoritism, and other abuses which it was the purpose of the Commerce Act to avoid.

Coming now to the *Blish* case. There it was claimed there was a conversion, and a recovery sought otherwise than according to the terms of the shipping contract. The suit was brought in trover. This is the technical name of the common law action provided for the redress for conversion. The point in the contract that plaintiff sought to escape by suing in trover was not the agreed amount of re-

covery, as in the instant case, but it was in a sense a limitation of liability; it was as to the time and manner stipulated in the contract as to notice of loss. The bill of lading provided that claims for loss or damage must be made to the carrier within four months. The restrictions of the shipper's rights in that case reduced the time of plaintiff's remedy, and in the instant case, the amount. The holding of the Georgia court was, substantially, that the carrier was guilty of conversion, in making a misdelivery of the shipment contrary to the terms of the bill of lading, and that the carrier had thereby abandoned the contract of carriage and could not, therefore, insist upon the stipulation providing for the written notice of loss within four months; and it allowed the plaintiff to recover the value of his shipment (82 S. E. 784). In the instant case, appellee contends that, because of the alleged conversion, the clause in the contract of carriage limiting the carrier's liability to \$50 should be held to be invalid, but that clause was approved by the Interstate Commerce Commission, and, under the authorities before cited, such a clause has been held comprehensive enough to embrace all losses and liability that could result from any failure of duty, on the carrier's part, with respect to the shipment. In the *Blish* case (241 U. S. 190), it was said, in respect to the alleged conversion, that the stipulation in the contract could not be escaped by the mere form of action, and that:

"The action is in trover, but, as the state court said: 'If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.'"

So it is in the instant case,—a suit to recover the value of the shipment. It is also said in the *Blish* case:

"It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the con-

tract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

And so it is here. Appellant could not waive the terms of its contract with plaintiff, neither could it, by its conduct, conversion, give plaintiff the right to ignore the agreed \$50 limitation of liability, and plaintiff may not hold the appellant to any different responsibility than that fixed in the contract. The *Blish* case is cited, though under somewhat different facts, in *D'Utassy v. Barrett*, supra, and *Metz Co. v. Boston & M. R. Co.*, (Mass.) 116 N. E. 475. Counsel for appellee seeks to distinguish the *Blish* case from the present case by saying that the conversion in the *Blish* case was purely technical, and that the conversion in the case at bar was real and a misfeasance, but in the *Blish* case the Supreme Court of Georgia (82 S. E. 784, 787) condemned the carrier by saying:

"The railway company, without regard for the Milling Company's rights or wishes, and in violation of its expressed intention, committed conversion."

This is substantially the same claim as appellee makes here. We are of opinion that the *Blish* case determines the instant case, and that the \$50 limitation is, under the record in this case, valid and binding, and limits plaintiff's recovery to that amount.

The cause is therefore reversed, with directions to the district court to enter a judgment for \$50 with interest at 6 per cent from December 19, 1913, the interest to be computed and included in the judgment. In that case, the defendant having made a tender, the plaintiff will pay all

costs in the district court and in this court. It follows, then, that the judgment of the district court ought to be, and it is,—*Reversed*.

GAYNOR, C. J., LADD and STEVENS, JJ., concur.

WEAVER, J., dissents.

MAGNUS ANDERSON, Appellee, v. STANDARD OIL COMPANY,
Appellant.

NEGLIGENCE: Acts Constituting Negligence—Inadvertent Mixing
1 of Oils—Evidence. Evidence quite closely analyzed, and held to present a jury question on the issue whether defendant oil company, in delivering oil to a customer, had placed gasoline in a tank intended for kerosene only, and was therefore guilty of negligence.

EVIDENCE: Weight and Sufficiency—Credibility of Witnesses—
2 Testimony Absurd and Impossible. Before the court may peremptorily stamp certain testimony as a nullity on the grounds that it is absurd, impossible, and contrary to fixed, known, scientific and physical facts and laws, it must be very certain, from the entire record, that no reasonable mind could entertain the truth of said testimony. Evidence reviewed as to the very unusual way in which it was claimed an explosion of oil occurred, and held not so inherently impossible as to justify its withdrawal from the jury.

Appeal from Polk District Court.—CHARLES A. DUDLEY,
Judge.

MONDAY, SEPTEMBER 24, 1917.

Action at law for damages claimed to have resulted from an explosion of a mixture of kerosene and gasoline which had been sold to plaintiff as kerosene. Trial to a jury. Verdict for plaintiff. Defendant appeals.—*Affirmed*.

Carr, Carr & Evans and Nourse & Nourse, for appellant.

John L. Gillespie, for appellee.

STEVENS, J.—I. On the morning of March 21, 1915, while appellant was about to pour part of the contents of a can containing kerosene into a stove in a wash shanty near his residence, in which stove he had placed some paper and kindling, to which he had set fire a short time before, the oil in the can exploded, setting fire to his clothing and severely burning his hands and legs, thereby inflicting painful and permanent injuries upon both his hands and legs.

According to his testimony, he purchased the oil, a few days prior, of Whittaker & Burgess, retail dealers at Marquisville, Iowa; it was kept in the shanty prior to the accident; and shortly after setting fire to the paper in the stove, he left the shanty, returning in a few minutes, and, looking into the stove, saw no fire. This occurred about 9:00 A. M. He took the can containing the kerosene from a bench a short distance from the stove, and when within about 18 inches or 2 feet of the stove, he testifies that he unscrewed the cap from the top and placed his hand on the bottom of the can preparatory to pouring some of the liquid into the stove, when the can exploded, setting fire to his clothing and burning him, as above stated.

The defendant maintained a station at Altoona, from which point gasoline and kerosene were distributed by its agent, by wagon, to customers at near-by places. Upon receipt of the oil at Altoona, it is emptied from the tanks on the cars into storage tanks. The means employed makes it impossible for it to become mixed, either in filling the storage tanks from the cars or in emptying them into the tank wagon, unless by carelessness in pumping oil into the wrong compartment of the tank wagon. It appears from the evidence that the oil in the storage tanks, from which that in question was taken, had been previously inspected by the state oil inspector, and approved.

On the 17th of March, the agent of defendant filled the respective compartments or tanks on his wagon with kerosene and gasoline from the storage tanks at Altoona, and started to Marquisville to deliver oil to Whittaker & Burgess. On account of the bad condition of the roads, he was compelled to return to Altoona, and the following morning, backed a farm wagon up to within a few feet of the rear of his tank wagon, and in the usual way drew both gasoline and kerosene from the wagon tanks into a measuring bucket and poured the same into separate common 10-gallon milk cans. Defendant's agent testified that he first filled 20 cans with kerosene and placed the same in the front end of the wagon box; that he then placed the end gate from his wagon box immediately back of the cans and across the box, so as to make a partition, and then filled four 10-gallon milk cans with gasoline and placed the same in the wagon in such a way that the cans containing the gasoline and the cans containing the kerosene were separated by the end gate. He also testified that he placed red tags on the cans containing gasoline, on which were printed the words, "Gasoline—Dangerous." He further testified that the oil was drawn from the separate compartments of his tank wagon through a faucet; that same could be turned only with a wrench; and that in drawing kerosene it would foam up in the measuring bucket to a much greater extent than the gasoline.

Whittaker & Burgess had three storage tanks: one for gasoline, in an outbuilding; and two for kerosene, one known as the north and the other as the south tank. Upon the arrival of defendant's agent at Marquisville, he first emptied the cans containing gasoline into the tank in the gasoline house. He then emptied 10 cans of kerosene into the north tank, and then 10 cans of kerosene into the south tank, thereby emptying all of the cans which he had on his wagon. The gasoline was used or sold by Whittaker &

Burgess, and appears to have been good oil. The oil in the storage tanks at Altoona from which the oil in question was drawn was sold, and no complaint was ever made of it.

The oil purchased by appellee was taken from the south tank. Later, the oil inspector tested the oil in both the north and south tanks, the result of which was that the oil in the south tank was found bad, and in the north tank, good. Burgess and Whittaker and a clerk testified to the manner of handling both the kerosene and gasoline at the store. They used a 5-gallon and a 2-gallon can in measuring and selling the gasoline to customers, and when they sold five gallons, they used a 5-gallon can, and when they sold two gallons, they used a 2-gallon can. The gasoline was kept in a separate building from the kerosene. Without setting out the details of the evidence, they each testified that the method of drawing the oil from the tanks and delivering it to customers was such as to make it very improbable that there could have been negligence upon their part in doing so.

The oil that was put in the south tank by defendant's agent was sold to parties by the names of Brugioni, Amedi, Murray, Fletcher, Pinott and Ballentini, and to appellee. After the accident, the oil sold to Fletcher, Murray and Amedi was poured out. Mrs. Brugioni undertook to use some of the oil with which to start a fire in the kitchen stove, when the same exploded, causing her death and that of her daughter. Mrs. Ballentini testified that she used some of the oil with which to start a fire; that, when she touched a match to it, the oil took fire, and the cap on the top of the can was blown therefrom a distance of 10 or 12 feet. Mrs. Anderson testified that, on the same morning, and shortly before the accident, she took the can to the kitchen and poured some of its contents into a lamp, which was at the time partly filled with oil. A sample of the oil taken from the lamp was tested by the state oil inspector and

flashed at 84 degrees. A sample which it is claimed was taken from the Ballentini can was also tested by a deputy oil inspector, and flashed without applying any heat. Tests made of this oil showed that it would flash when a lighted match was brought within an inch of two or three tablespoonfuls emptied into a saucer. The state oil inspector testified that a sample claimed to have been taken from the Ballentini oil would take fire at any temperature above 32 degrees, and that it flashed at that temperature. He further testified that good, safe kerosene oil should not flash until it reached a temperature of 101 degrees. The temperature at the government station in Des Moines on the morning of the accident, at about the time the explosion occurred, was 31 degrees above zero. It was also claimed by appellee that samples of the oil were taken from the tanks by the representatives of defendant, and that the 35 gallons left in the south kerosene tank were taken away by defendant's agents.

The evidence satisfactorily shows that the oil in question and that contained in the south tank was a mixture of kerosene and gasoline. The evidence of some of the experts was that, under certain conditions, the gasoline would rise to the top of the can containing a mixture of kerosene and gasoline.

Appellant contends: (1) That it is as consistent, under the evidence, that the oil became mixed after its delivery to Whittaker & Burgess as before, and that, therefore, plaintiff has failed to make out a case of negligence; (2) that plaintiff's testimony regarding the explosion is so unreasonable and contrary to fixed, known, scientific and physical facts and laws as to be unworthy of belief; (3) that there was error in the admission of certain expert evidence offered by appellee; (4) that there was error in the refusal of the court to give an instruction requested by defendant regarding the direct cause of the explosion.

We have above set out substantially all of the evidence detailing the manner in which the oil in question was handled by the agent of defendant. He testified that the portion of the oil remaining in his tank wagon after filling the milk cans was sold, as was all of that in the storage tanks at Altoona, and that he never heard any complaint in regard thereto. The testimony of defendant's agent, who filled the milk cans with oil and delivered the same to Whittaker & Burgess, is contradicted to some extent by a farmer who went toward the road, to buy some oil from the wagon. He testified that he stood on an embankment near the wagon and about four feet above it. The evidence shows that the cans stood several inches above the top of the wagon box. The driver told him that the gasoline cans were tagged, but he testified that he saw no tags on them, and that he looked down into the wagon box, but observed no end gate or other partition between the cans.

As before stated, the witnesses detailed the method of taking the oil from the different tanks at the store, the kind of receptacles used, and the method of filling the cans of customers and delivering same to them. The gasoline tank of Whittaker & Burgess was in a building separate and at some distance from the tanks containing the kerosene. Defendant placed 100 gallons of kerosene in each of the tanks on the 18th of March. The oil in question was delivered to Mrs. Anderson on Friday, and the explosion occurred on Sunday morning, the 21st, so that but little, if any, opportunity existed after the delivery of the kerosene to Whittaker & Burgess and the sale thereof to Mrs. Anderson for the same to become mixed with gasoline. More than one third of the oil placed in the south tank was taken away by defendant after the Anderson explosion. We think it was a question for the jury to say whether or not the defendant was negligent in handling the oil, and caused the same to become mixed in the tank from which the same

was sold to Anderson. The rule regarding circumstantial evidence, as stated by the authorities cited by counsel for appellant, is undoubtedly correct, but the jury had the evidence of defendant's agent and of the several persons handling the oil at the store, and it was a question of fact to be determined by it, whether or not the proximate cause of plaintiff's injuries was negligence upon the part of defendant. The mixture of the oil was in the south tank, and no fact appears in evidence from which it is made to probably appear that same was mixed by the retail dealer. The court, in its instruction, submitted the question fully and clearly, and stated the rule substantially as contended for by counsel in argument. We think this point was fairly and properly submitted to the jury and that its finding thereon should not be disturbed. *Ellis v. Republic Oil Co.*, 133 Iowa 11.

II. Appellee testified that the can containing the oil was kept on a bench in the wash shanty, in which there had been no heat for several hours preceding his attempt to kindle a fire in the stove. We may assume that the temperature in the shanty was somewhat higher than that shown at the weather station on that morning. The can containing the oil had been taken from the shanty to the kitchen that morning. The evidence is silent, however, as to the length of time it was kept in the kitchen; nor is the temperature of that room shown. Plaintiff does not testify that there was no fire in the stove at the time he removed the cap from the top of the can, but that, when he looked, he saw no fire. A witness who examined the stove after the accident testified that the pipe was in place and the kindling did not have the appearance of having been burned. Plaintiff further testified that he was 18 inches or 2 feet from the stove at the time the explosion occurred. The temperature of the shanty, it may well be presumed,

was above 32 degrees, at which the sample claimed to have been taken from the Ballentini can flashed.

There is no doubt that courts generally recognize the rule that the testimony of a witness may be so absurd and unreasonable, impossible and self-contradictory that it should not be believed by court or jury, and should be treated as a nullity. Such was the holding of this court in *Graham v. Chicago & N. W. R. Co.*, 143 Iowa 604. See, also, *Lake Erie & W. R. Co. v. Stick*, (Ind.) 41 N. E. 365; *Weltmer v. Bishop*, (Mo.) 71 S. W. 167; and *Post v. United States*, 67 C. C. A. 569.

The Supreme Court of Kentucky, in *Louisville & N. R. Co. v. Chambers*, 178 S. W. 1041, 1043, referring to the rules relating to the credibility of witnesses, said:

"Of necessity, these rules cannot apply where the only evidence upon which such adverse party rests his right to succeed consists of a statement of alleged facts, inherently impossible and absolutely at variance with well-established and universally recognized physical laws. In such case, that which purports to be evidence is insufficient to constitute a compliance with the requirements of the scintilla rule, for it is the essence of that rule that there must be some evidence (however slight) upon which the jury might rationally find a verdict for the party producing it."

See, also, *Louisville Water Co. v. Lally*, (Ky.) 182 S. W. 186, and *Peat v. Chicago, M. & St. P. R. Co.*, (Wis.) 107 N. W. 355.

The Supreme Court of Wisconsin, in *Winkler v. Power & Mining Machinery Co.*, 124 N. W. 273, discussing a like question, used the following language:

"Appellant's counsel assigns numerous errors in the proceedings below, making his principal argument, however, on the proposition that the testimony on the part of the plaintiff relating to the manner in which his injury was inflicted is in contradiction of known physical laws, and

therefore impossible and incredible. This proposition must be supported by demonstration, not by mere conflict of evidence, and, in order to present it properly, all the necessary data for demonstration must appear affirmatively, and not depend upon mere credibility of other witnesses.

* * * It is suggested that common sense is sufficient to show the incredibility or the impossibility of plaintiff's testimony. What is thought to be common sense is frequently nothing more than a fixed belief based on no evidence and supported by no reasons, and it then ordinarily lacks the certainty requisite for the annihilation of positive evidence to the contrary."

The same court, in *Salchert v. Reinig*, (Wis.) 115 N. W. 132, said:

"But when this stage has been passed, the question whether the court should direct a verdict, or whether this court on appeal may in effect do so, depends merely upon whether there is any credible evidence which, in the most favorable view, and granted all reasonable inferences and construction in favor of the conclusion of the jury, tends to support the verdict. To declare sworn testimony of a fact incredible, we must be convinced that it is so in conflict with the uniform course of nature or with fully established physical facts that no reasonably intelligent man could give it credence."

In *Bates v. Chicago, M. & St. P. R. Co.*, (Wis.) 122 N. W. 745, this court again said:

"On the question of contributory negligence, it is contended that the respondent must have seen and ought therefore to have avoided this pit or depression, and that her testimony to the effect that she did not see it is manifestly impossible and untrue. It requires an extraordinary case to authorize the court to so dispose of sworn testimony."

"So frequently do unlooked-for results attend the meeting of interacting forces that courts, in such cases, should

not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other." *Lang v. Missouri Pac. R. Co.*, 115 Mo. App. 489 (91 S. W. 1012); *Rattan v. Central Electric R. Co.*, (Mo.) 96 S. W. 735; *Scroggins v. Metropolitan St. R. Co.*, (Mo.) 120 S. W. 731; *Gessner v. Metropolitan St. R. Co.* (Mo.) 119 S. W. 528.

Is the testimony of plaintiff so in conflict with established physical and scientific facts as to render the same wholly unworthy of belief, or should we say that, notwithstanding the extreme improbability of the explosion's occurring as detailed by him, yet the known physical facts are not so clear and irrefutable as to leave no room for the entertainment by reasonable minds of the conclusion that the explosion may have been caused substantially as detailed?

The evidence is without conflict that plaintiff went to the shanty about 9 o'clock Sunday morning for the purpose of kindling a fire in a stove in said shanty; that he placed paper and kindling in the stove, set fire to the paper, left the shanty, and shortly thereafter returned, looked into the stove and saw no fire. It does not appear that he had other errand or purpose in visiting the shanty at the time. A witness testified that, after the accident, he looked into the stove and saw kindling; that the stovepipe was in place; and that the stove bore no evidences of an explosion's having occurred therein. The presence in the shanty of the can containing the oil is established by the testimony of both plaintiff and his wife. The fact of the explosion is contradicted by no testimony, and the jury could have reached no other conclusion than that there was an explosion, setting fire to the clothing of plaintiff and

causing his limbs to be burned in the manner shown in evidence.

The temperature of the atmosphere at the weather station in Des Moines at or about the time of the explosion was 31 degrees above zero. The state oil inspector called as a witness by plaintiff testified that he tested two samples of oil; one, the jury under the evidence may well have found, came from a lamp in the Anderson home, and the other from the Ballentini can. The test of the two samples resulted differently. The Anderson oil flashed at a temperature of 84 degrees, and the other sample, without heating, at probably 32 degrees. The witness making the test testified that the latter sample, in his judgment, would flash at any temperature above freezing. The oil used was purchased from Whittaker & Burgess after the delivery in question by the agent of defendant, and was taken from the same storage tank. The jury may have inferred that the difference in the result of the test of the two samples is accounted for by the testimony of Mrs. Anderson, who testified that she poured a portion of the oil from the can into the lamp from which the sample was taken, which at the time contained a quantity of oil, making a different mixture. The jury may have inferred from the testimony that the sample which flashed without heat's being applied thereto was exactly like the oil in the Anderson can. The jury may reasonably have inferred that the Anderson can contained a quantity of gasoline, and that, under certain conditions, the gasoline would separate from the kerosene and rise to the top of the can.

It is ably argued by counsel for appellant that, even though all of the foregoing matters may possibly be sustained by some evidence, the explanation given by plaintiff of the explosion is so contradictory to known physical and scientific facts as to render the same utterly unworthy of belief. The temperature of the morning, as shown at

the government weather station, probably justified the jury in inferring that the temperature of the shanty was, at the time, 32 degrees or above, and that the oil in the Anderson can was the same as the sample taken from the Ballentini can, and would flash at any point above freezing. If the explosion could only result from vapor escaping from the can, coming in close contact with fire or heat, then may not the jury properly have inferred from the fact of the explosion that appellee was mistaken as to the presence of fire in the stove and distance he held the can from it? No evidence was offered to account for the explosion upon any other theory, and we do not feel that we can say, under all the facts and circumstances, as a matter of law, that appellee's testimony is so at variance with scientific facts and natural laws as to utterly destroy its value. Its weight and credibility were for the jury, and we cannot, in the absence of a showing of such disregard for the evidence as to amount to passion or prejudice, disturb its finding.

III. Complaint is made of the admission of certain testimony, and of the refusal of the court to give certain requested instructions. The instructions given by the court were sufficiently clear and explicit, and covered the point contained in the requested instruction. We think the court rightly refused to give the requested instruction. We find no error in the admission of testimony.

The judgment is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

NELS ANFENSON et al., Trustees, Appellees, v. HENRY BANKS,
Appellant, et al.

**PARTNERSHIP: The Relation—Ostensible Partner—“Holding
1 Out.”** One who has never held himself out as the partner of another, and who, when he learned that he had been falsely held out by such other as such partner, promptly sought out such other and repudiated such holding out, and received a promise that such holding out would cease, is, *nothing else appearing*, under no legal or moral duty to give further publicity to his repudiation.

PRINCIPLE APPLIED: See No. 8.

**TRIAL: Taking Issue from Jury—Inferential Withdrawal of Un-
2 supported Issue—Effect.** A wholly unsupported issue should be unequivocally withdrawn from the jury. An *inferential* withdrawal may not be sufficient, especially when the party adverse to the issue requests a specific withdrawal. So held on the issue of actual partnership.

**ESTOPPEL: Equitable Estoppel—Implied Fraud—Estoppel to De-
3 ny Partnership.** Conduct which will work an estoppel *in pais*, in those cases *where there is no affirmative evidence of wrongful design or fraudulent purpose*, must be so grossly negligent or of a character so manifestly misleading to others that it would be tantamount to a fraud to permit the actor to escape liability to those who, in the exercise of reasonable diligence, have been misled to their injury. So held on the issue of a partnership by estoppel.

PRINCIPLE APPLIED: One Penfield operated in a small village a private unincorporated bank, under the name of “The Bank of Kelley.” He caused a booklet relative to the financial affairs of the bank to be issued and circulated in the village and contiguous territory. In effect, he represented in this circular that one Banks, his father-in-law, was a partner in said banking business. This representation was wholly without the authority of Banks. Very soon thereafter, Banks was informed by his nephew that such a paper had been issued, and on the following day, Banks went to the village for the purpose of learning why his name had been so used. Penfield was absent from the village, but Banks protested to the cashier against the use of his name, and the cashier promised to report the

matter to Penfield and to have the matter corrected. On the same day, Banks saw Penfield's father, whose name had also been used in the circular, and the father told Banks that he had seen a lawyer about the use of their names, and assured Banks that he need not bother about it. Two days later, Penfield visited at Banks' house, and Banks again protested against the use of his name. Penfield told Banks that he used his (Banks') name because he thought it would make the bank look better. Penfield apologized, and promised that the use of Banks' name should cease. This promise was kept, and the circular was not thereafter circulated; but, from the circulation already had, some general reputation and talk subsequently grew up, in and around the village, that Banks was a partner in the bank, a fact of which Banks had no knowledge. After the last talk with Penfield, Banks gave the matter no further attention. Banks lived on a farm over 6 miles from the village, and did all his business and banking in another town. Banks' visits to the village were infrequent. At times, he was seen in the bank and behind the counter, but this latter practice was common with callers at the bank. He never did any business for the bank, never assumed any authority in the management thereof, and was never a borrower of or loaner to or depositor in the bank, or in any manner interested therein. Three and a half years after the circular or booklet was first issued, the bank failed, and Penfield absconded. Many of the old depositors then claimed that they had allowed their deposits to remain in the bank on the strength of said circular, and their belief that Banks was a partner. Many new depositors claimed that they had made their deposits on the same basis and in the same belief. Some of the depositors had seen and read the circular. Other depositors had never seen it, and knew nothing of it except what they had gathered from public rumor and talk. After the bank failed, Banks, for the first time, actually saw one of the circulars. Banks was at all times known to all the depositors, either personally or by reputation. None of the depositors ever asked Banks whether he was a partner in the bank, though they had ample opportunity to do so. Banks had no knowledge that anyone was dealing with the bank on the belief that he (Banks) was a partner therein. The depositors sought to hold Banks as a quasi partner.

Held: (1) That Banks was under no legal or moral duty to give wider publicity to his repudiation of Penfield's unauthorized acts.

(2) That Banks, being guilty of no moral turpitude, was not equitably estopped to deny that he was a partner of Penfield's.

(3) That Banks was under no obligation to speak, further than he did speak, with reference to Penfield's unauthorized act, and therefore his subsequent silence did not work an equitable estoppel.

(4) That, irrespective of the conduct of Banks, the depositors might not recover, because of their failure to exercise due diligence to learn whether Banks was in fact a partner of Penfield.

ESTOPPEL: Equitable Estoppel—Silence—Duty to Speak. Silence, when there is no moral or legal duty to speak, cannot work an estoppel *in pais*.

PRINCIPLE APPLIED: See No. 3.

PARTNERSHIP: The Relation—Third Persons—"Holding Out"—Evidence—Reputation. Evidence that a person is generally reputed to be the partner of another, when in fact no partnership existed, is admissible solely on the one narrow issue whether the party who seeks to establish a partnership by estoppel relied on the reputed existence of such partnership.

PARTNERSHIP: The Relation—Evidence—General Reputation. Concede, *arguendo*, that general reputation that one person is the partner of another might have the force of notice of such reputation to the one sought to be charged, yet manifestly such could not be the case when such reputation existed only in a community where the one sought to be charged neither resided nor did business.

PARTNERSHIP: The Relation—Evidence—Reputation—Knowledge. No one should be held to be under a duty to know that he is reputed to be the partner of another when in truth he does not know such fact, directly or indirectly, and when for the existence of such reputation he is in no manner responsible.

PRINCIPLE APPLIED: See No. 3.

TRIAL: Instructions—Form, Requisites and Sufficiency—Implied License to Consider Incompetent Testimony. Instructions which limit the incompetency of testimony (which is incompetent on both of two issues) to one issue only, may be prejudicially erroneous, because impliedly leading the jury to infer that such testimony is competent on the remaining issue. So held where both an actual and a quasi partnership were in issue, and the court, inadvertently perhaps, limited the incompetency of hearsay testimony to the issue of actual partnership only.

PARTNERSHIP: The Relation—Quasi Partnership—Evidence—

9 **Sufficiency.** Certain facts and circumstances in evidence reviewed, and held incompetent to show that one sought to be held as a quasi partner ought to have known that people were dealing with the business on the assumption that he was a partner therein.

ESTOPPEL: Equitable Estoppel—Diligence to Learn the Truth.

10 One setting up an estoppel by conduct is under obligation to exercise good faith and due diligence to know the truth. Therefore, the creditors of a bank who seek to hold defendant as a quasi partner because of his having been held out by another as a partner, may not recover if they had ample opportunity to learn, with trifling trouble or expense, that defendant was not such partner, and failed to avail themselves of such opportunity.

PRINCIPLE APPLIED: See No. 3.

PARTNERSHIP: The Relation—Partnership by Estoppel—Evidence.

11 On the issue of a partnership by estoppel by reason of the defendant's having been held out as a partner, circulars setting forth that defendant was a partner in the business, though issued without the authority of the defendant, are admissible as tending to show what the creditor relied on in extending credit.

PARTNERSHIP: The Relation—Partnership by Estoppel—Hearsay.

12 On the issue of a partnership by estoppel, based on the fact that defendant had been "held out" as a partner, in a circular issued without the authority of the defendant, evidence of what a creditor who had never seen the circular had been told about the circular is inadmissible, unless some culpable act or omission with reference thereto is first brought home to the defendant.

PARTNERSHIP: The Relation—Partnership by Estoppel—Burden

13 **of Proof.** One who seeks to hold another as a quasi partner, on the theory that such other had been held out as a partner, has the burden to show affirmatively: (a) That such other assented to such holding out; or (b) that such other, by negligence so gross as to be tantamount to fraud, permitted such holding out to continue, and that those dealing with the supposed partnership were deceived thereby to their damage.

PRINCIPLE APPLIED: See No. 3.

Appeal from Story District Court.—R. M. WRIGHT, Judge.

TUESDAY, JUNE 26, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

THE opinion states the nature of the case.—*Reversed.*
George A. Underwood and John Y. Luke, for appellant;
Dyer, Jordan & Dyer; Goodykoontz & Mahoney and
B. B. Welty, for appellee.

WEAVER, J.—In the year 1903, one Starr, who was conducting a small private banking business in the village of Kelley, in Story County, Iowa, sold the same to E. J. Penfield, who continued the business under the name of "The Bank of Kelley," until the year 1911, when he absconded, leaving the bank in an insolvent condition. Thereafter, plaintiffs herein, for themselves and as trustees of numerous depositors in the bank, brought this action at law, alleging that the defendant Henry Banks was a partner with Penfield in said business, and therefore personally liable for the payment of their several claims. In another count of the petition, plaintiffs allege, in substance, that the appellant, Banks, knowingly allowed Penfield to hold him out to the world as a partner in the business, and did not deny or repudiate such representations, thereby inducing plaintiffs and those whom they represent to become depositors in the bank, relying upon appellant's credit and financial responsibility, and that, by reason of such conduct, he has estopped himself to deny liability in this action.

The defendant denies the alleged partnership, and denies that he is in any manner chargeable with the debts of the bank, or that he has been guilty of any conduct which estops him from pleading and relying upon such defense to plaintiffs' claim. There was a trial to a jury, and verdict returned for plaintiffs, aggregating \$22,132.81. From the judgment entered on said verdict, the defendant Henry Banks appeals.

The record is very voluminous, rendering it entirely

impracticable to set forth all the matters and things having legitimate bearing upon the merits of the litigation, and in discussing the facts, we shall, to a great extent, speak of what the testimony fairly tends to show, without attempting to quote the language of witnesses, except as it seems necessary to make the situation clear. It will be quite impossible to take up and discuss each separate point pressed upon our attention by counsel in argument, and we shall confine our discussion to such only as appear to us of controlling importance.

I. We give first consideration to the question whether there is any evidence to support a finding that defendant was in fact a partner in the Bank of Kelley.

A careful search of the record fails to reveal even a scintilla of support for the claim that he ever, at any time, sustained such relation to Penfield or to the bank.

2. TRIAL: taking issue from jury: inferential withdrawal of unsupported issue: effect. On the contrary, the negative of that proposition seems to be established to a moral certainty. Counsel for appellees do not contend in argument that an actual partnership was proven, but rest their case upon the theory that the evidence justifies a finding of what they term an "ostensible partnership," a subject which we shall consider in a later paragraph of this opinion. Indeed, they say that the question of a partnership in fact is not before us, because the trial court withdrew that issue from the jury. If the showing made in the abstracts could be said to bear out this statement of counsel, further discussion at this point would, of course, be idle; but we do not so read the record. It there appears that, before the case was submitted, appellant's counsel requested an instruction withdrawing the issue of actual partnership from the jury, and such request was denied. It is true that the refusal was accompanied by a statement from the court that such direction was "substantially given in the court's

instructions," but a careful reading of the charge given the jury does not disclose an instruction of that character, or one which the jury would necessarily understand as its equivalent. In informing the jury concerning the issues submitted to them, the court stated the plaintiffs' allegations of both an actual partnership and a so-called ostensible partnership, or partnership by estoppel, and that appellant had taken issue thereon by denial. In another instruction, both actual partnership and ostensible partnership were defined to the jury, but neither here nor elsewhere was the jury told that the evidence would not justify a finding of an actual partnership between appellant and Penfield. It is to be admitted that the charge of actual partnership was not otherwise specially featured nor emphasized in the instructions, and the several paragraphs thereof were largely devoted to more or less minute directions as to the law governing "ostensible partnerships," or partnerships by estoppel; from all which, a jury of lawyers might reasonably have inferred that, in the mind of the court, the plaintiffs' claim on the latter ground presented the dominant issue in the case; but we regard it quite clear that a jury of laymen might well understand that they were at liberty to consider and pass upon both issues. It is, therefore, our opinion that the defendant's request for the distinct withdrawal from the jury of the issue of actual partnership should have been sustained.

II. Claims of depositors upon nearly seventy different counts were submitted to the jury, on all of which there were verdicts against the appellant. In order to comprehend the force and effect of the trial court's rulings and instructions, it will be necessary to refer at some length, but briefly as practicable, to portions of the testimony introduced. It was shown that, in August or September,

1907, a small circular or booklet was issued from the bank of Kelley, of which document the following was a copy:

**"The Bank of Kelley
Kelley, Iowa**

Capital \$10,000
Individual Responsibility, \$75,000.00

E. J. Penfield, President

C. L. Siverly, Cashier

Henry Banks

F. W. Penfield

(Above is front page)

(2d page)

"We invite your attention to the first sheet of this announcement showing an individual responsibility of \$75,000 and giving the names of the owners and managers of this bank. We are proud of this showing and desire to thank our many patrons for their loyalty in the past and hope we may be of still more service to you in the future. The policy of the Bank will continue the same, paying 4 per cent interest on time deposits, clerking sales and discounting notes at current rates. Again thanking you, we are,

"Yours for business,

"The Bank of Kelley."

Some of these booklets were distributed on the counters of the business houses of Kelley, others enclosed in passbooks of depositors, and still others passed out by Penfield to his customers. About the same time, if not before, a sign in large letters, reading, "Bank of Kelley, Individual Responsibility \$75,000," was placed upon the front window of the bank building, but no names were attached thereto. F. W. Penfield, whose name appears in the printed advertisement, was the father of E. J. Penfield, and the appellant, whose name appears in the same connection,

was the father of E. J. Penfield's wife. Appellant was a farmer living $6\frac{1}{2}$ miles from Kelley and $4\frac{1}{2}$ miles from the city of Ames, which was his principal market town, and the place where he did such banking business as he had occasion to transact. Kelley was a small village, of comparatively few business places, and appellant's visits there were comparatively infrequent—he going there occasionally to attend public sales, and at times to call upon his daughter. When in the bank, he was at times seen behind the counter, as was the custom of many other callers and visitors. No one ever knew him to transact business for or with the bank, or saw him assume any authority therein. The nearest approach to any such testimony is the statement of one witness who says he once saw him looking into a book behind the counter, but he does not know or pretend to say what was the nature or character of the book to which he refers.

Appellant testifies, and there is no evidence whatever to contradict him, that he never invested a dollar in the bank or in the business, and never consented to or authorized the use of his name by Penfield in connection with the business; that he never loaned any money or credit to Penfield or to the bank, was never a borrower there, and never made a deposit therein. In these matters, he is fully corroborated by the several cashiers and clerks serving the bank during the period under consideration. Very soon after the booklet was issued, a nephew of appellant's told him he had seen or heard of it, and on the following day, appellant went to Kelley and went to the bank for the purpose of ascertaining the meaning of such use of his name. Penfield was out of town, but Siverly, the cashier, was present, and to him appellant broached the subject and protested against the unauthorized use of his name. The cashier promised that he would report the matter to Penfield on his return and have him rectify it. Later, on the

same day, appellant saw F. W. Penfield, whose name had been coupled with his own on the printed document, and was informed by him that he had consulted a lawyer on the subject, and that appellant "need not bother about it; it is all right." This visit to Kelley was on Friday, and on Sunday following, E. J. Penfield came to the farm, and, being called to account by appellant for the unauthorized use of his name, he apologized, saying he did it because he thought it would make the bank look better, and promised that there would be no more of it, and that he would "straighten it right up." Appellant never saw the paper itself until after this suit was begun, and his only knowledge of its contents was such as he obtained from his nephew's report to him that his name was used therein as having some connection with the bank. The evidence strongly tends to show that his protest to Penfield and the cashier had the effect of putting an end to the issuance and circulation of the objectionable circular, and that from that time until the collapse of the bank, 3½ years later, it was not renewed or continued. All the depositors who claim to have seen and been influenced by the printed circular locate the time as being in the summer or fall of 1907. At least 14 of the depositors who were permitted to recover testify that they never saw the circular, but most of them say they heard about it. A large majority of the depositors had been such from a time anterior to the issuance of the booklet, and continued in that relation until the bank closed; but, in avoidance of the natural effect of this admitted fact, they swear that they would have withdrawn their business from the bank had they not believed appellant to be responsible for the bank's debts. Others became depositors long after the issuance of the booklet. They never saw the paper and knew nothing of it except as a matter of hearsay from others. There was no newspaper published in Kelley, and, so far as shown, appellant did not know

what persons were depositors or customers of the bank; and though he was known, either personally or by reputation, to all of them, no one of them at any time applied to him for information as to his business relations with the bank or Penfield, or notified him that anybody was patronizing the bank on the credit of his supposed interest therein; nor is it shown that any of these depositors ever knew or heard that information of Penfield's unauthorized act had been reported to appellant by his nephew or any other person.

It is the claim of plaintiffs, however, that, when knowledge came to appellant of the issuance of the booklet, it was his duty to make all reasonable effort to publicly repudiate the act of Penfield in so publishing his name, and to bring such denial on his part to the attention of those who might be misled by such advertising into giving the bank credit to which it was not entitled, and that the question whether the appellant did his duty in this respect was for the jury. It is further contended that the evidence was sufficient to sustain a finding against appellant in this respect, and that, as against all persons making deposits in the bank or continuing their deposits therein in the faith or belief that he was an owner or partner in the bank, he is estopped to deny that he did sustain such relation. This theory of the law and of the record was adopted by the trial court.

As having a proper bearing upon such alleged estoppel, the court allowed plaintiff to introduce certain evidence, which, at the risk of unduly extending this opinion, we think it necessary to set out in the language of the witnesses. In explanation of what follows, we may say that "Exhibit B" referred to is a copy of the booklet in question; also that this testimony was given in April, 1914.

E. N. Ryerson, who was permitted to recover from defendant the sum of \$1,040, was examined in his own behalf.

and the following is an excerpt from the abstract of his testimony. After having told of depositing money in the bank, as shown by three certificates dated in February, 1911, a few days only before the bank closed, the examination proceeded:

"Q. Now, I will show you a paper marked by the reporter as Exhibit B, and ask you whether or not you ever saw that paper or one identical with it. (Objected to by all defendants as being incompetent, irrelevant, immaterial and calling for the conclusion and opinion of the witness. Objection overruled and defendants except.) A. I don't think I did. Q. You may state, Mr. Ryerson, whether or not you heard of a statement issued by the Bank of Kelley in the fall of 1907, concerning its responsibility? (Objected to by all defendants as incompetent, irrelevant and immaterial, leading and suggestive. The court: The objection will be overruled, and the witness will be permitted to answer the question, but for the purpose only of showing, if it does show, why he acted as he did act himself, without—I think probably that covers the reasons. Defendants except.) A. Yes, sir. (The objection is added that it is hearsay. The court: Well, that objection does not go to the fact that it might affect his mind, and that is the only purpose for which it is admitted at the present time. Overruled and defendants except.) Q. Have you answered, Mr.—? A. Well I will answer that. (The court: What is the answer?) A. I had the idea then, when I put that money in there, that the bank was good, and I heard the circular was out, and that it was marked on the window \$7,500 someway. That is why I put that money in at that time. I thought it was good. (Defendants move to strike the answer as incompetent, immaterial, irrelevant, stating a conclusion of the witness. The court: It is admitted, but only for the purpose of showing his conclusion and opinion, and for no other purpose. Defendants except.) Q. Now, let me ask you what made you

think the bank was responsible? (Same objection as last made. The court: The same ruling, but it will be received only for the same purpose. Defendants except.) A. On account of the 75,000 that was out, and I saw it with my own eyes marked on the window, and that is my reason.

Q. Now what do you mean by saying on account of the \$75,000 that was out? A. The circular. (Objected to by defendants as incompetent, immaterial and irrelevant and calling for a conclusion of the witness, and cross-examining his own witness. The court: The objection will be overruled, but it will be received only in so far as it affected the mind and act of this witness. Defendants except. The defendants make the further objection that that question has been answered by the witness. He stated that it was \$75,000 marked on the window as their responsibility. Objection overruled and defendants except. Question read.)

A. Well, the circular gave me the idea. (Defendants move to strike the answer of this witness for the reason that it is incompetent, irrelevant and immaterial, in view of the fact that the witness stated that he never saw the circular.)

A. I heard of it. (Objection and motion overruled and defendants except.) Q. Now, you say on account of the circular issued by the bank that gave you the idea that there was \$75,000 back of it? (Objected to as incompetent, irrelevant and immaterial. The court: The objection will be overruled, but the testimony will be received only so far as it affected the mind and conduct of this witness. (Defendants except. Question read.)

A. Well, I heard that it was out. And I saw it marked on the windows. The circular, I heard of that. Q. What were you told that that circular stated as to who were the owners of the bank? (Defendants object on the ground that it is immaterial, irrelevant and incompetent. And that the circular is the best evidence.) The court: Overruled, but the evidence will be received only

in so far as it affected the mind and conduct of this witness. Defendants except.) A. Well, I was told that it was Penfield and old man Penfield and Banks and Siverly.

Q. Now, Mr. Ryerson, about when did you hear this concerning this circular? (Objected to by defendants as incompetent, immaterial and irrelevant. Objection overruled and defendants except.) A. Well, that is pretty hard for me to know, the date when I heard it. Somewhere around

in—oh, about two years ago, I think, I can't just— Q.

You may state whether or not you believed that those statements that those parties were the owners of the bank were true? (Objection by defendants that it is immaterial, irrelevant and incompetent, in view of former answer of this witness. Objection overruled and defendants except. Question read.) A. Well, I believed they were. Q. Now, you say you believed they were? A. Yes, at the time. Q.

You may state whether or not you believed that when you first heard it? (Objected to as incompetent, irrelevant and immaterial and as an attempt to cross-examine his own witness. Objection overruled and defendants except.) Q. You don't understand it? A. No. Q. I want to know whether or not you believed those statements that you heard, that that circular was out, stating that these parties were the owners of this bank, were true? (Objected to as incompetent, irrelevant and immaterial. Court: Overruled. It will be received only in so far as it bears on the mind and purpose of this witness. Defendants except.)

Q. Now, Mr. Ryerson, I will ask you to state whether or not you would have deposited your money in this Bank of Kelley if you had not believed that these parties that you have named were the owners of that bank and responsible for its debts? (Same objection as last made; calling for a conclusion of the witness and a matter too remote. Objection overruled and defendants except.) A. No, sir. No, sir. I would not. Q. When was it you first heard of this circular? (Same objection as last made. Same rul-

ing. Exception.) A. Well, I didn't take any particular attention when— Q. I know, but about when, if you could give some idea of when it was with reference to the time when you left here? (Same objections and same ruling. Same exception.) A. You ask me when I left here? About three years ago. Q. Well, when was it before that that you heard of this circular—about when? A. About two years.

Cross-Examination: "I heard of this circular somewhere around about the time it came out. It is somewhere in the neighborhood of two years since I first heard of the circular. I believed the circular to be true. I depended on it and all that. I wouldn't have put my money in the bank but for that. Q. And that you first heard of this circular about two years ago? (Mr. Mahoney: Now, I object to that, because the witness didn't state that he heard of the circular two years ago.) A. No, I— (The court: Well, I will have to sustain the objection in accordance with the fact. Defendants except.) I didn't read the circular. I just heard it. I heard quite a few talk about it. Q. Whom did you talk with? A. I didn't pay so much attention to it, but I heard it. What I heard and what other people said was enough to influence my mind and impel me to let my money remain in the bank. I don't remember a single person that told me about these facts. I paid no particular attention from the time I heard it, and it was all around, and I just thought it was all right. I couldn't help it though. I saw the 75,000 in the window, on the glass, nice, big, gold - I didn't pay much attention to names there on the window. Just paid attention to 75,000 was the capital of it. Q. Then you say, when you saw that statement in the window that there was seventy-five thousand behind it, that that influenced and controlled your mind, and you left your money remain there? A. Yes, sir. Q. And afterwards, you had a talk, you say, with a number of people, and that influenced you? A. Well, I

didn't really have a talk with them, but I heard it. I was doing business there and— I was pretty often in Kelley. I did not have a telephone. I didn't know Mr. Banks. I knew Mr. Siverly. Q. Did you approach Mr. Siverly and ask him, during all this time, when you say you heard this rumor, about the truth of this circular? A. No, I didn't ask him any— Q. Did you ever seek out Mr. Banks, and try to ascertain the truth of him in regard to this so-called circular? A. No, I didn't. (Exhibits Nos. 2, 3 and 4 offered in evidence by plaintiffs. Objection by defendants that they are irrelevant, incompetent and immaterial. Objection overruled and defendants except.)”

William Swanson, another depositor, who was found entitled to recover an aggregate of \$3,897.09 upon certificates issued by the Bank of Kelley in the year 1910, testified as follows:

“I have seen that paper, Exhibit B. I got it in Kelley, one that is home. I got it in a letter and the children read it to me, and that is all I paid attention to it. Q. Do you know what was in the circular that your children read to you? A. Well, I know it says \$75,000 bond. Q. Was there anything else in that circular that you remember? A. No, I can't think of it. Q. At the time this circular was received at your house, had you heard of Henry Banks? (Objected to as leading and suggestive. He has already stated he didn't know him. Overruled and defendants except.) A. Well, people talked that he was giving bonds. Q. People talked? A. Talked that Henry Banks was giving bonds for \$75,000. Q. You heard some talk at that time about Henry Banks, did you? A. Yes. Q. What did you hear? A. Like I hear them talk he was the bonds for the bank for so much. I didn't hear how much he was worth, because I didn't know him, and I heard people said he had a whole lot of land, and was well off, and so on. That is all I know. Q. Did you ever talk to any other person about this circular, except your children? A. No,

I didn't talk much. No, I didn't ask much questions. I don't understand it. Q. After this circular was sent to your home, did you believe that the statements in it were true? (This is objected to as incompetent, irrelevant and immaterial, and for the further reason that the witness has already stated that he does not remember anything that was in the circular with the exception of the statement of \$75,000. Overruled and defendants except.) A. Yes, I believe so. Q. Now at that time, who did you think owned the bank? A. I thought Penfield. *I thought Penfield owned the bank.* Q. Did you think any other persons were interested in the bank? A. Oh, I didn't know that. I deposited some money in the Bank of Kelley. I had money there when it failed. I don't remember how much, around \$4,000. It was on certificate. Exhibits 21, 22 and 23 are the certificates I received from the bank. I had some money there all of the time. Q. Now, Mr. Swanson, when you put this money in the bank, who did you think was responsible for the debts of that bank? (Objected to as incompetent, irrelevant and immaterial, and a repetition, the witness having already stated that he thought E. J. Penfield was the owner of the bank, and further than that he didn't know. Objection overruled and defendants except.) A. Penfield and—oh, I can't think of the name—Banks. (Plaintiffs offer in evidence Exhibit 21, which is a certificate of deposit issued to William Swanson by the Bank of Kelley, March 19, 1910, for \$3,367. Exhibit 22, a certificate of deposit to same party from same bank, dated July 22, 1910, for \$100. Exhibit 23, a certificate of deposit to same party from same bank dated Dec. 21, 1910, for \$697. Objected to as incompetent, irrelevant and immaterial. Overruled and defendants except.)

The testimony of these witnesses is quite typical of that of the depositors generally, and the rulings made thereon reveal the theory of the trial court in its admission. Other depositors testifying in this case were asked

as follows: "Now at the time you made these various deposits, who did you think were the owners of the bank?" and, over appellant's objections, answered, "E. J. Penfield, F. W. Penfield and Henry Banks." Again: "What was the general opinion among the people as to the financial responsibility of the men named in that circular?" "What was the general opinion among the people that you talked to as to its financial standing?" And in each instance, the witness was allowed to give his understanding that appellant was an owner or partner in the bank. One witness, Mr. Sorenson, was examined as follows:

"Q. And what was your understanding in relation to his (Banks') financial responsibility, say along in the year 1907? (Objected to as immaterial, irrelevant and incompetent. Overruled and defendants except.) A. Well, at that time I don't know anything about it. I heard about his financial responsibility I should judge about 1909 or 1910. This was before I deposited any money there. I never saw one of those circulars that was issued by the Bank of Kelley. Q. Now, Mr. Sorenson, did you ever hear it stated by any person in the town of Kelley or vicinity as to who were the owners of the Bank of Kelley, and who were responsible for its debts? (Objected to as immaterial, irrelevant, incompetent and leading and suggestive to the witness. Court: It is unless it was prior to the time the money was deposited. Mr. Mahoney: Well, I mean prior to the time this money was deposited. Objection overruled and defendants except.) A. Well, Mr. Banks and Mr. Penfield, both of the Penfields, I mean— Q. Now, about when did you hear that? A. Well, about 1909. Q. And where did you hear it? A. Oh, just people talking around, most anywhere. All around Kelley and through the country, I might say. Q. Did you believe these statements that were made to you that these parties you have named were the owners of that bank and responsible for its debts?

(Same objection as last made. Same ruling and exception.)

A. I did.

G. A. Peterson testified:

"I didn't live in Kelley in 1907. I saw a circular like Exhibit B about the time the bank broke up. This was the first time. I heard of the circular before the bank broke up. My brother told me about a year before. I moved to Kelley in the spring of 1910. I heard of this circular in the summer time of 1910. I did not make any inquiries with reference to who were the owners of the Bank of Kelley in the fore part of the year of 1910. I heard who were purported to be the owners. I got my information in the vicinity of Kelley. Q. Now, I wish you would state what you learned or heard with reference to who the owners of the Bank of Kelley were at that time? (Objected to for the reason it is incompetent, hearsay, the witness not being competent to answer the question. Objection overruled and defendants except.) A. I understood that the two Penfields and Mr. Banks were the owners of that bank. (Move to strike the answer as incompetent, irrelevant, immaterial and hearsay. Overruled and defendants except.)"

I. N. Ball testified:

"I was a depositor in the Bank of Kelley, in 1911. I believe. I never saw a circular issued by the Bank of Kelley sometime in 1907. Q. Did you ever hear about the circular being issued? A. Well, I heard something about it, yes. That is when I came back from down there. I wasn't living here at the time, but after I came back. I returned from the southern part of the state in 1909, I think. The first of March of that year. I heard something about this circular about the time I returned. They said it wasn't safe at one time, but now it was all safe, before I deposited my money there. Q. Were there any names mentioned in regard to the ownership of the bank? (Objected to as leading and suggestive. Overruled and de-

fendants except.) A. Why, they told me these men was interested in it; yes, sir. It was Ellis Penfield, his father, Henry Banks and Siverly. I had known Henry Banks quite a number of years. He was east of Ames here. I knew he was pretty well fixed and had property. After I came back, I did not deposit any money in the Bank of Kelley till fall of 1911. (Must be 1910.) Q. When you deposited your money in this bank, who did you think were the owners of the bank? (Objected to as incompetent, immaterial and irrelevant. Overruled and defendants except.) A. 'The men I have just spoke of.'

Lars Fjare, having testified, on examination in chief, that he made a deposit in the Bank of Kelley in 1908, and that he then thought or had heard that the Penfields and appellant were responsible for the debts of the bank, said, on cross-examination:

"I never saw this circular myself. I heard about it the spring of 1908. The first banking business I ever did in this country was in the Bank of Kelley. I had a little money before this time, but I did not put it in the bank. I heard that E. J. Penfield and his father and a man living southeast of Ames, by the name of Henry Banks, a rich farmer, was the owners of the bank. That is what I heard the circular stated. I don't remember who told me about it in the first place. I can remember one person—I believe it was William Peterson. I didn't think about him a minute ago. I don't know how William Peterson got his knowledge. I suppose he read one of those circulars, but I don't know whether he did or not. I didn't talk with anyone else about it. I heard others talk among themselves. Q. Well, tell us all you remember. A. The talk was all in Kelley, different kinds."

All of the witnesses mentioned above recovered judgment for the amount of their several deposits.

In submitting the case, the court gave, among others,

the following instructions to the jury (the *Italic* being ours) :

"V. Evidence as to the general reputation of the existence of a partnership, while admissible as it may tend to prove a belief on the part of the depositor that there was a partnership and his reliance on the existence of the same, will not prove that there was an *actual* partnership, and it cannot be considered by you for such purpose, as no one can be made a partner against his consent on the mere declarations of another that such one is connected with him in partnership against one having no knowledge of such declarations and not consenting to the same. One may, however, become liable as an ostensible partner if the general reputation that he is a partner has been so persistent and so long continued as to raise the presumption that he is in fact a partner, and he has knowledge of such general reputation, or as an ordinarily careful and prudent man *should have knowledge* of such general reputation, but makes no attempt to contradict or deny the fact of partnership, and others are by such general reputation led to believe that he is a partner, and, acting on such belief and by reason thereof, are induced to extend credit and are damaged thereby.

"VI. In the course of these instructions, the words 'actual partnership' and 'ostensible partnership' have been used. Now, an actual partnership exists where two or more persons contribute their property or services to be employed jointly in some enterprise or business, the profits or loss of which is to be shared among them in some fixed proportion. An ostensible partnership, as distinguished from an actual partnership, exists where a person intentionally or by want of ordinary care causes a third person to believe that another is his partner, though that other is not in fact such partner. To illustrate, if the defendant Banks, Siverly and E. J. Penfield had contributed their property or services to be employed in the banking busi-

ness jointly, the profit or loss of which was to be shared between them in some fixed proportion, they would have been actual partners. On the other hand, if the defendants Banks and Siverly, either intentionally or by want of ordinary care, had caused third persons, when acting as persons of ordinary care and prudence, to believe that they were partners of Penfield, then, in such case, they would have become what is termed ostensible partners, even though they were not actual partners.

"VII. You are instructed that there may be cases in which the holding out has been so public and so long continued that it will be presumed that the party alleged to be a partner must have known that he was being held out as such, and that credit was being obtained on the strength of such holding out. Thus if, in this case, it has been shown by the evidence that the paper designated in these instructions as Exhibit B was publicly circulated for such a long period of time that Banks and Siverly must have had it brought to their attention, and it does not appear that they made any efforts to contradict the contents of said circular, and it further appears from the evidence that a certain depositor, or certain depositors, acting as reasonably careful and prudent men would have acted under the circumstances, relied on the truth of such contents, and that he or they did in fact rely on the truth of such contents, and that, because of such reliance, he or they placed his or their money in the said bank, and would not have done so but for such reliance, and that by reason of so depositing his or their money it has been lost to him or them, then, in such case, the defendants or the defendant, as the case may be, would be liable in this action to such depositor or depositors, if he or they had before suit commenced duly assigned his or their claim or claims to the plaintiffs herein, or in some way given them authority to bring suit thereon. * * *

"XI½. There being no evidence that Banks and Siverly ever signed the said circular known as Exhibit B, it, the said circular, is not to be considered by you as evidence that they were actual partners in the said bank. The circular is not competent for such purpose, because for such purpose it would be mere hearsay. It may, however, be considered by you as evidence that a claim was being made by *someone* that Banks and Siverly were partners in said bank, and that such claim was being made for the purpose of inducing the people to deal with and to deposit their money in said bank, and for the purpose of showing, if it does show, *what it was that induced the said depositors to deal with the bank*, to rely on its solvency and to deposit their money in the said bank, and it is on such grounds, and on such grounds only, that said circular was admitted in evidence in this case.

"XI¾. Some of the depositors who had never seen the said circular swear that they were orally told of its existence and what its contents were. Now, these oral statements made to the depositors are not to be considered by you as evidence that Siverly and Banks were actual partners in the said bank. Said statements are not competent for such purpose, and were not admitted in evidence for such purpose, because for such purpose they would be mere hearsay. These statements were admitted in evidence for the purpose of showing, if they do show, what it was that induced the hearers of the statements to deal with the said bank, and to rely on its solvency, if they did rely, to deposit their money therein, and said statements may be considered by you for such purpose, and for such purpose only."

At the request of the plaintiff, the court further instructed the jury as follows:

"C. You are instructed that, in determining whether or not the defendant Banks, as a reasonable, prudent man, knew or should have known that people in the town of

Kelley and vicinity would and did deposit their money in said bank in reliance upon his individual responsibility after the issuance and distribution of said circular, you are authorized to consider the knowledge, if any, possessed by said Banks of the financial responsibility of E. J. Penfield, *the relation existing between said Banks and said Penfield*, and the knowledge or belief, if any, that the said Banks had as to the responsibility of the said E. J. Penfield, the number and frequency of his visits to the town of Kelley, *his presence in the bank, on such occasions as you find that he was present in the bank*, the fact, if it be a fact, that the said Banks was told by the said Penfield, if he was told, that the object in issuing the circular was to make the bank appear better, and all other facts and circumstances as disclosed by the evidence.

"D. While a person who is held out by another as a partner in any given enterprise, and who is not in fact a partner therein, is not required to use *strict* diligence to prevent others from extending credit to such enterprise in reliance upon his supposed partnership relation thereto, still, if he knows or has reasonable cause to believe, under the circumstances of the particular case, that others will extend credit to such enterprise in reliance upon his supposed partnership relations thereto, he cannot sit silently and make no denial, and allow such others to extend credit to such enterprise in reliance upon his supposed partnership relation thereto, but is required, as against such others who, in the exercise of reasonable care and diligence, have a right to rely on such supposed partnership relation, and who did rely thereon, *to make denial* of his connection with such enterprise as a partner, and to give such reasonable publicity to such denial as would appear to a reasonably prudent man in such situation should be given under all the circumstances in the particular case, and if he fails to so make denial and so give reasonable publicity to such

denial, he is bound as a partner in said enterprise as to those who, acting as reasonably prudent men, believe him to be a partner therein, and who, under all the circumstances, had, as reasonably prudent men, a right to so believe, and who extended credit to such enterprise in reliance thereon."

The court on its own motion, gave the jury an additional instruction, as follows:

"A. You are instructed that, before the plaintiffs can recover on any account of their petition in this cause, they must prove by a preponderance of the evidence that the depositor in the bank exercised good faith and used due diligence to know the truth with regard to who were the owners of the Bank of Kelley and who were liable for its debts and obligations, and in this regard you are instructed that, if the evidence in this case shows that circumstances were brought to the notice of such depositors as would excite inquiry in the mind of any prudent man, and the means of satisfying such inquiry were such that a reasonably prudent man would have used the same, but such depositor did not use such means and made no such inquiry, then you are instructed that such a depositor cannot recover against the defendants C. L. Siverly and Henry Banks, but such depositor cannot, under such circumstances, be held to have exercised good faith and to have used due diligence to know the truth as to who were the owners of said bank of Kelley, and in such circumstances, on such count your verdict must be for the defendants."

III. That there may be circumstances

3. ESTOPPEL: equitable estoppel: implied fraud; estoppel to deny partnership.

under which a person will be held to liability as a partner though he is not and never has been a partner in fact, will not be denied; but such burden can be imposed upon him only when, by reason of some act or wrong or fault on his own part, he has estopped himself to deny the partnership relation. Before undertaking to consider

whether this is a case of that character, it may be well to recall some of the established principles of the law of estoppel. Of the several kinds of estoppel recognized by the courts, the one sought to be enforced in this case is to be classified as an equitable estoppel, or estoppel *in pais*, a term applied to a situation where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact. The naked statement that a party in a court of justice may be properly denied the right to assert or testify to the truth is, at the first blush, somewhat startling, but the rule is one capable of wholesome application when kept within its proper function for the prevention of fraud, actual or constructive. On the other hand, when misapplied, it is a most effective weapon for the accomplishment of injustice. From an early day, the courts were disposed to consider the rule a harsh one, and it was and still is a common expression that "Estoppels are odious." We have ourselves held that "estoppel is not favored in law, and must always be clearly proved." *Baldwin v. Lowe*, 22 Iowa 367. The courts do not hesitate, however, to uphold a claim of estoppel wherever it is essential to prevent fraud. A party may thus estop himself by his spoken or written statements or representations, or by his mere silence when, in equity and good conscience, he ought to speak; but it is not enough to estop him from asserting the truth that he has at some prior time spoken or acted inconsistently therewith. To have that effect, it must clearly appear that, by his statements and representations, or by his silence when, as an honest man, he ought to have spoken, he has misled another to his injury, or has himself thereby acquired an unfair advantage. *Franklin v. Merida*, 35 Cal. 558. For "no party ought to be precluded from making out his case according to its truth, unless by force of some positive principle of

law." *Curtis v. Root*, 20 Ill. 518, 524. Says the New York court:

"An estoppel *in pais* is a moral question. It can only exist where the party is attempting to do that which casuists would decide to be a wrong; something which is against good conscience and honest dealing." *Delaplaine v. Hitchcock*, 6 Hill (N. Y.) 14.

Generally speaking, an estoppel *in pais* is applicable only where the conduct or words of the party estopped are intended to be or are of such character that, under the circumstances shown, they will be presumed to have been intended to influence the other party to act thereon, and did in fact so influence him. The Supreme Court of the United States, speaking by Field, J., says:

"For the application of that doctrine (equitable estoppel) there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury." *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326 (23 L. Ed. 927, 929).

The same distinguished jurist quotes approvingly from Judge Story as follows:

"In all this class of cases the doctrine proceeds upon the ground of constructive fraud, * * * or concealment or negligence so gross as to amount to constructive fraud." 1 Story's Equity, Sec. 391. Also, from the Pennsylvania court as follows:

"The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." *Hill v. Epley*, 31 Pa. St. 331, 334.

The same doctrine is again announced by the Supreme Court of the United States in *Henshaw v. Bissell*, 85 U. S. 255 (21 L. Ed. 835, 840), where the above quoted definition of equitable estoppel is repeated, following which the court adds:

"An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury."

To the same effect, see *Combs v. Cooper*, 5 Minn. 254; *Adam's Equity* (8th Ed.), pages 150, 151; *Viele v. Judson*, 82 N. Y. 32; *Andrews v. Lyons*, 93 Mass. 349, 350; *Boggs v. Merced Mining Co.*, 14 Cal. 279, 366; *Taylor v. Ely*, 25 Conn. 250; *Trenton v. Duncan*, 86 N. Y. 221.

Such, also, is the repeated holding of this court. For example, we have said:

"The facts in cases of this kind, to be sufficient to justify the application of the law of estoppel, always involve bad faith on the part of the party sought to be estopped from showing the truth." *Laub v. Trowbridge*, 71 Iowa 400.

Again:

"The doctrine of estoppel *in pais* is based upon a fraudulent purpose or fraudulent result. If the element of fraud is wanting, there is no estoppel, as where both parties were equally cognizant of the facts, and the declaration or silence of the one party produced no change in the conduct of the other. There must be deception and change of conduct in consequence." *Garretson v. Equitable Mut. L. & E. Assn.*, 93 Iowa 402, 411.

Again:

"Perhaps as clear a statement of what is an estoppel by acts and declarations as can be found is in Bouvier's

Law Dictionary 541. It is as follows: 'Such as arises from the acts and declarations of a person by which he *designedly* induces another to alter his position injuriously to himself.' " *Wishard v. McNeill*, 85 Iowa 474, 479.

And again:

"An estoppel *in pais* is based on fraud, and the conduct relied upon to establish it must be such as to amount to fraud, actual or constructive. * * * There can be no estoppel by silence unless there is a duty to speak." *Beechley v. Beechley*, 134 Iowa 82.

This is not to deny that an estoppel may arise where there is no affirmative evidence of wrongful design or fraudulent purpose, but in such cases, it must appear that the conduct complained of was so grossly negligent, or of a character so manifestly misleading to others, that it would be tantamount to a fraud to permit the party to escape liability to those who, in the exercise of reasonable care and diligence on their own part, have been thus misled to their injury.

There is another class of cases sometimes spoken of as coming within the same exception, as, for example, where declarations are honestly made, with knowledge or expectation that another will act upon them or be influenced thereby, and it later appears that the person making them was mistaken as to the facts, and that another has been thereby influenced to his injury. Such situation, however, falls not so much within the technical scope of the law of estoppel as of that other familiar rule or maxim, that, where loss or damage must fall upon one of two parties, both innocent of any actual or constructive wrong with respect thereto, it ought to be borne by the one by whose mistake the other has been misled.

We have indulged in this somewhat extended consideration of the law of estoppel *in pais* because we think that a proper conception of the subject, as applied to the peculiar circumstances of the present case, is requisite to a proper review of the rulings made and instructions given on the trial below. Examinations of the precedents show that, in general, the claim of an estoppel *in pais* is based upon alleged positive acts, declarations, statements or admissions by the party sought to be charged; or upon the alleged silence of such party under circumstances in which, as an honest man, with due regard for the rights of others, he was in duty bound to speak. It is manifest that cases of the first description are the more easy of solution, for statements, declarations and admissions are matters capable of direct proof, and their meaning and effect may be ascertained by application of the ordinary rules of construction. But when the party is sought to be charged simply because he was silent, or because he has done nothing, or because he did not do as much as in equity and good conscience he was bound to do, the party claiming the estoppel assumes a more difficult burden. The case before us is of this latter class. It is the plaintiff's claim that, when appellant heard that his name had been used by Penfield in an unauthorized manner, he was in duty bound to repudiate it promptly, and in such manner that depositors and others doing business with the bank should be made to understand that he had no connection therewith; and that, failing so to do, plaintiffs and those whom they represent were led to patronize the bank to their injury. This requires the court and jury to consider when, if at all, the appellant became bound to speak; to whom he should have spoken; in what manner he was required to make denial and repudiation of the alleged partnership; and whether he was bound to diligence to know that his name was being

4. **Estoppel:** equitable estoppel: silence: duty to speak.

used without his authority, or to ascertain whether anyone was being misled thereby; and finally, whether, in view of all the facts, his conduct in these respects was marked by fraud or want of good faith, or by such clear disregard of his duty in the premises as to be tantamount to fraud. If these inquiries be answered against the appellant, it is further necessary, before he be adjudged liable for the debts of the partnership with which he had no connection, that inquiry be made as to what notice or knowledge, if any, the complaining depositors had of the use of appellant's name by Penfield; of what effort or inquiry, if any, they made to know the truth of such holding out by Penfield; what reasons, if any, they had to assume or believe his legal liability for their deposits; whether they did in fact rely thereon in making such deposits; and how long after the unauthorized use of appellant's name had ceased they can be heard to say they continued to rely thereon.

IV. Much evidence was introduced

5. PARTNERSHIP: to show an alleged general reputation that
 the relation:
 third persons:
 "holding out":
 evidence: repu-
 tation.

fifth paragraph of the court's charge, already quoted, informed the jury that such testimony was not to be considered as showing an actual partnership, but was competent to prove the depositor's belief that there was a partnership, and his reliance thereon. In that same connection, the jury was further told that one may become liable as an ostensible partner if such general reputation of a partnership "has been so persistent and so long continued as to raise the presumption that he is in fact a partner, and he has knowledge of such general reputation, or as an ordinarily careful and prudent man should have knowledge of such general reputation, but makes no attempt to contradict or deny the fact of partnership, and others are by such general reputation led to believe that he is a partner, and acting on such belief, and

by reason thereof, are induced to extend credit and are damaged thereby."

- . In our judgment, this instruction cannot be approved. The initial proposition that an actual partnership cannot be established by general reputation is, of course, correct, and has the support of nearly all the authorities; but the remainder of the paragraph, which is, in effect, an instruction that an ostensible partnership may be established by such testimony, is unsustainable, upon principle or well-considered precedent. It includes in its statement the further assumption that such general reputation that he is a partner may be so persistent and so long continued "as to raise the presumption that he is in fact a partner;" and this, if we understand the meaning and force of the language employed, is wholly at variance with the correct rule which the court had just announced as to the incompetency of reputation in proof of an alleged partnership relation. No presumption of partnership can arise from reputation alone, however long continued. It is true, as we shall have occasion to note, that reputation is a question which plays a larger part in the matter of an alleged ostensible partnership than in an actual partnership; but, barring an occasional loose or inapt expression to be found in a few decisions, the rule that a partnership is not to be proved by current gossip or vague general understanding is applicable to all partnerships, whether actual or ostensible. Were the partnership in this case actual, plaintiffs would be under no necessity of proving reliance thereon in suing for a recovery of their deposits. In such case, their proof need go no further than to prove the fact of their deposits, and that they are still unpaid. But where they seek to recover on the theory that, although the person charged is not a partner in fact, yet he has by his own representations estopped himself as against them from denying the partnership relation, they must not only prove the matter which so estops him, but

go further, and prove that they relied thereon in making their deposits. It is upon the latter element in their case, and upon this only, that testimony of the general reputation of the existence of a partnership is admissible. *Brown v. Crandall*, 11 Conn. 92; *Boicen v. Rutherford*, 60 Ill. 41; *Bryden v. Taylor*, 2 Har. & J. (Md.) 396; 2 Wigmore's Evidence, Sec. 1624. Two or three cases may be found where evidence of reputation of partnership is held admissible if it further appear that such reputation has arisen or grown out of the acts or declarations of the person sought to be charged as a partner. For example, see *Gilpin v. Temple*, 4 Harr. (Del.) 190. But to allow one person who desires to improve his appearance of credit to circulate without authority a report that some other person is his partner, and thereby create or give rise to a reputation of the existence of such partnership relation, and then hold that such reputation may be put in evidence to prove its own truth, would assuredly not appeal to one's natural sense of justice, nor have tendency to enhance one's respect for the law. Says the Connecticut court, in *Brown v. Crandall*, supra, to admit such evidence would be to open the door to fraud; for a trader in poor credit would be tempted to circulate the rumor that a man of wealth was a member of his firm in order to help his credit, and his creditors would be tempted to further it so that they might collect their debts. See, to like effect, *Brown v. Ruess*, 53 Iowa 81, 82.

There would seem to be enough in the undisputed evidence in this case to emphasize the truth and justice of the expression just quoted; for it is shown that plaintiffs, without exception, base their alleged belief that defendant was a partner in the bank solely upon the printed circular which they saw, or of which they had more or less remotely heard, and it is further shown without dispute that

the circular was prepared and issued by Penfield alone, without the knowledge or consent of the appellant.

- Proceeding then, to the remaining portion of the fifth paragraph of the charge to the jury, we do not overlook the fact that the court, in stating the condition of appellant's liability, follows up the language to which we have adverted, as follows: "And he has knowledge of such general reputation, or as an ordinarily careful and prudent man should have knowledge" of it. This proposition is open to very material objections. In the first place, there is not a word in the evidence upon which the jury could properly find that the existence of such rumor or story or reputation was ever brought to the notice or knowledge of the appellant, and the instruction is, to that extent, without basis in the record. If, in any case, general reputation may have the force of notice to a person affected thereby, such rule must in reason apply only to those who are living or doing business in the community where the reputation prevails, and where it may reasonably be presumed that the matter would have come to their attention. To extend this rule beyond these bounds would be to expose every man to danger of financial ruin at the hands of conscienceless adventurers. Appellant did not live in Kelley. His neighborhood was tributary to Ames, and not Kelley. His visits to Kelley were occasional only. Not one of the depositors ever spoke to appellant concerning the bank or his alleged connection with it, and, if these people so peculiarly interested in the subject did not mention it to him, there is no room for any presumption or inference that any other person did. But the even more vital objection at this point is in the further instruction that appellant may be charged with liability if, as a careful and prudent man, he ought to have known of the alleged reputation and did not contradict it. The
6. PARTNERSHIP:
the relation:
evidence: gen-
eral reputation.
7. PARTNERSHIP:
the relation:
evidence: rep-
utation:
knowledge.

effect of this is to hold that he was under a legal duty to exercise some degree of diligence to discover or to know the existence of floating rumor or gossip or general repute in and about the town of Kelley connecting him with the bank at that place, and, having discovered it, to enter some kind of a denial. We feel very certain there is no such rule of law, and that a precedent to such effect ought not to be established. *Gaffney v. Hoyt*, 2 Idaho 199; *Campbell v. Hastings*, 29 Ark. 512; *Cole v. Butler*, 24 Mo. App. 76. No man is to be held responsible for the truth or falsity of a current report or reputation concerning himself or his business, unless he has given rise thereto by his own conduct, or the existence thereof has been brought to his knowledge in such manner that, in equity and good conscience, he should meet it with a denial. Having no actual knowledge of such report or reputation, he is under no duty to inquire or investigate whether anything of that kind is afloat in the community, and, if in fact ignorant thereof, he cannot be held to liability as for the truth of the report, on the theory that he ought to have known it. Few people would have time for anything else if they were legally bound to inquire what others were saying about them, or about their business enterprises and relations, in order to protect themselves against being estopped to deny the verity of a reputation so made.

The appellant's assignment of error upon the giving of the fifth instruction to the jury must be sustained.

V. The appellant also challenges the correctness of the instruction numbered XI $\frac{1}{2}$. In this, as we have seen, the jury was told that, while the printed circular was not competent evidence that appellant was an actual partner in the bank, yet it could properly be considered "as evidence that a claim was being made by someone" that he was a partner therein,

8. TRIAL: instructions: form, requisites and sufficiency. Implied license to consider incompetent testimony.

"and that such claim was being made to induce people" to patronize the bank, and "for the purpose of showing, if it does show, what it was that induced the depositors to deal with the bank and rely on its solvency." In Paragraph XI $\frac{3}{4}$, a similar rule is stated as to the use of the testimony of depositors who never saw the circular, and knew nothing of it except what they had been told by others. Referring to the first of these paragraphs, it may be said, as before intimated, that, had there been any other and independent evidence that plaintiff had held himself out as a partner, or had knowingly permitted himself to be so held out by Penfield (a state of facts which is not shown), then proof that depositors had seen the circular before entrusting their money to the bank would, under the rule of many of the cases, be admissible as tending to support their claim, not of a partnership of any kind, but of their belief of a partnership and their reliance thereon. Proof of this fact alone would not, however, sustain the finding of an estoppel, for the belief and reliance of the party is but one of the elements of estoppel. In both paragraphs, the court limits the incompetency of the testimony to the claim of an "actual partnership," and we think the jury would be apt to infer, from this emphasizing of the word "actual," that such evidence was competent for consideration upon the question of an ostensible partnership, though this is not expressly stated in the instruction, and doubtless was not so intended by the court. Whether the testimony referred to in Instruction No. XI $\frac{3}{4}$, of depositors who knew nothing of the circular except what they had been told by others, is competent for any purpose, is very doubtful, especially under the record made in the present case. Each and every depositor testifying expressly states that his belief or faith in the existence of a partnership was based on the printed circular alone. None of them claims to have knowledge of any act or word on the part of appellant holding

himself out as a partner in the bank, and none of them claims to have known whether appellant was or was not aware of the use which Penfield had made of his name. The most they say which in any manner hinges upon the conduct of appellant is that, if he had reported to them that he was not a partner, they would not have given credit to the bank; and yet none of them at any time gave him the opportunity to admit or deny his alleged interest in the business. This phase of the case will arise again in our consideration of other exceptions argued by counsel, and we pass it for the present without further discussion.

VI. In the instruction marked "C,"

9. PARTNERSHIP: the relation: quasi partner-ship: evidence: sufficiency. the court called the attention of the jury to certain circumstances which could be considered as tending to show that appellant ought to have known that the "people of Kelley and vicinity" would and did deposit money in the bank relying upon his individual responsibility, and mentioned the following: (1) The relationship between Banks and Penfield; (2) his knowledge or belief as to the responsibility of Penfield; (3) his visits to Kelley and his presence in the bank; and (4) the fact, if it be true, that he was told by Penfield that the purpose of issuing the circular was to make the bank appear better.

It has quite frequently been said to be an undesirable practice for a trial court to select one or a few matters of evidence for special reference in its charge to the jury, as it tends to give to such items undue importance in the minds of the jurors, who are apt to assume therefrom, that, in the mind of the court, such evidence is decisive of the case. We have to express our doubt also whether the fact that Penfield's wife was the daughter of the appellant can properly be considered as having any tendency to suggest to his mind that the people of Kelley were depositing money in Penfield's bank "in reliance upon his (appel-

lant's) individual responsibility," or that any such effect would follow from his knowledge, if any, of the financial soundness of Penfield. Nor do we believe that the evidence of appellant's visits to the bank tended in any degree to indicate to the mind of any reasonable person that he was in any manner connected therewith. The witnesses are agreed that his calls at the bank were brief and infrequent, and at no time has anyone seen or known of his having any hand in its business. After the easy and informal manner of small country banks, the space back of the counter was a resting or loafing place, the convenience and warmth of which attracted many of the callers, and appellant's calls or visits there are not shown to have differed in any manner from those which were made by many others. His testimony that he never at any time had anything to do with the bank or patronized it in any way is corroborated without exception by the several cashiers, clerks and assistants in its employ from time to time throughout the history of Penfield's connection therewith, and, in our judgment, the jury should not be allowed to draw therefrom any inference that he was thereby giving any ground for the belief by the patrons of the bank in general that he was a partner or owner, or liable for the bank's debts.

VII. The appellant requested the court to instruct the jury that, before plaintiff could assert an estoppel against defendant's denial of liability for the debts of the bank, because of the circular issued by Penfield, or because appellant did not exercise due diligence to deny it, the depositors must themselves have exercised reasonable care and good faith to discover the authenticity of the circular; and if they could, easily and with slight effort or expense, have learned the truth from the appellant, or have called upon him to affirm or deny his liability as a

10. ESTOPPEL:
equitable es-
toppel: dili-
gence to learn
the truth.

partner, and did not do so, and they neglected or failed to use such means of obtaining knowledge, they were not entitled to recover. The court refused the request, but on its own motion gave the instruction which we have already quoted as No. A. This, it will be seen, states the duty of reasonable care and diligence of the depositors in general terms, qualifying it, however, by the statement, in substance, that plaintiffs might be chargeable with negligence if it should be shown "that circumstances were brought to their notice such as would excite inquiry in the mind of any prudent man, and the means of satisfying such inquiry were such as any reasonably prudent man would have used," and they failed to avail themselves of such means of information, and that then they could not recover in this action.

Had the jury given careful heed to the instruction, even as given by the court, we are of the opinion that a verdict for the defendant was inevitable; but we are disposed to hold that the qualifications so made of the obligation upon plaintiffs to exercise diligence to know the truth of the printed document upon which they relied, render it less favorable to the defendant than he was entitled to. The bank was being conducted by Penfield under the business name which he had used from the outset. There was no act or representation by appellant indicating that he had any interest therein. To charge him as an ostensible partner in a business so conducted, persons crediting the bank on such supposition must show affirmatively that they exercised the care and caution of reasonable men to know the truth in regard to the alleged partnership, and that they were in some manner misled by his act or fault. It does not lie in their mouths to say that appellant should have come to them and informed them that he was in no manner responsible for the debts of the bank with which he had no connection, if they did not exercise any care to

know the truth of Penfield's representations, or of the reports or reputation on which they claim to have relied. Says the Illinois court, in speaking of an alleged estoppel of this kind:

"Creditors, by ordinary caution and inquiry, can protect themselves from imposition. They need not part with money or goods until they ascertain the fact of partnership, or the joint liability of the persons to whom the credit is given." *Bowen v. Rutherford*, 60 Ill. 43.

In *Cook v. Penrhyn Slate Co.*, 36 Ohio State 135, where it was sought to impose the liability of a partner upon one who was not in fact a member of the firm, because of certain mercantile reports on which the plaintiff relied, the court says:

"There is nothing in the evidence to show that defendant authorized these reports or was in any way connected with them. They cannot, therefore, be used to charge him with liability. * * * If he (plaintiff) was ignorant of whom the firm was composed, his duty was to make inquiry of those he was about to credit, and not of strangers."

In *Davidson v. Jennings*, 27 Colo. 187, it is said that, to entitle a party to invoke the doctrine of estoppel *in pais*, he "must actually have been misled and induced to act to his prejudice by reason of another's conduct, he having on his part exercised due diligence to ascertain the truth."

Upon the same subject it has elsewhere been said:

"If he was not so misled, * * * and with a reasonable use of means within his reach he might have ascertained the fact, he could not set up an estoppel. * * * The party setting up an estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth." *Moore v. Bowman*, 47 N. H. 494.

In another case of alleged ostensible partnership:

"It is not enough to show that he was represented by

others to be a partner, or that his name appeared in the firm; it must be shown that he knew he was being held out as a partner and that he assented thereto, or facts from which assent can be fairly implied. * * * A party setting up an estoppel by conduct is bound to the exercise of good faith and due diligence to know the truth." *Morgan v. Farrel*, 58 Conn. 413; *Atkinson v. Plum*, 50 W. Va. 104 (58 L. R. A. 788, 803). See, also, Bigelow on Estoppel (1st Ed.), 480. In 11 Am. & Eng. Ency. of Law, at page 434, the authorities are quite fully gathered, and, speaking therefrom, the author of the article says:

"It may be stated as a general rule that it is essential to the application of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the state of the facts but was also destitute of any convenient means of acquiring such knowledge; and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." See, also, *Boggs v. Merced Mining Co.*, 14 Cal. 279, 368; *Whitaker v. Williams*, 20 Conn. 98, 104; 1 Story's Equity Juris., Sec. 391.

Applying this rule to the case before us, we are of the opinion that the jury should have been explicitly told that if, at and before the time the depositors put their money in the bank, on the alleged belief that appellant was a partner therein and on faith of his responsibility for its debts, they could easily and conveniently have ascertained the truth in this respect from the appellant, or otherwise, and failed to do so, then no estoppel arose in their favor, and they could not recover. It is true that a careful reading of the instructions in this respect, as given by the court, would, or ought to, have led the jurors to this conclusion; but the result of the trial demonstrates that they did not so understand it. As witnesses, the depositors

without exception state that their belief of appellant's partnership in the bank was based, not on anything they knew or had seen in the conduct of the appellant, but on what they had seen or heard from others of the printed booklet issued in the summer or fall of 1907. Each of them knew appellant personally, meeting him from time to time during all the 3½ years intervening between that date and the collapse of the bank, yet none of them was sufficiently solicitous about the matter to mention it to him or make inquiry of him concerning it, until Penfield, who conducted the bank, and to whom they had entrusted their money, absconded. No witness undertakes to say that, in conversation or dealing with him or in his presence, appellant ever held himself out as a partner. The holding out by means of the circular was by Penfield alone, and, if the appellant is to be held liable at all, it is because he, in some way, expressly or impliedly, assented to or ratified the act of Penfield. Appellees do not claim that they have any evidence of an express assent or ratification on his part, but rest their case solely upon the proposition that he did not give sufficient publicity to his repudiation of Penfield's unauthorized act, and thereby they were deceived into the belief that he was a partner in fact, and thus led to give credit to the bank. There is, therefore, neither wrong nor hardship in requiring them to show that they exercised reasonable care to know the truth. To quote again the language of the Ohio court in a similar case, if the creditor was 'ignorant of whom the firm was composed, his duty was to make inquiry of those whom he was about to credit, and not of strangers.' *Cook v. Penrhyn Slate Co.*, *supra*. See, also, our recent case, *Farmers' Exch. Bank v. McDonald*, 167 Iowa 582, 590.

VIII. Passing other portions of the court's charge of which complaint is made, we take up the exceptions to rulings on evidence. These are very numerous, and we shall

be compelled to omit discussion of many, combining them as well as we may under a few general heads.

The first question thus raised has reference to the admissibility of the circular. 11. PARTNERSHIP: the relation: partnership by estoppel: evidence. Exhibit B, with proof that it was issued from the bank in August or September, 1907, and that it was then seen or received by several of the depositors interested in this suit, and that they believed and relied upon its authenticity. The court quite consistently overruled these objections, on the theory that the testimony was competent in so far as it tended to show what these depositors relied upon in giving credit to the bank. As thus restricted, the ruling, for reasons already indicated, is not vulnerable to the appellant's objection.

A more doubtful question arises upon the ruling admitting testimony of those who 12. PARTNERSHIP: the relation: partnership by estoppel: hearsay. had not seen the circular, as to what they had heard about it and how this information had influenced their minds. Examples of these rulings will be seen by reference to the extracts from the record, found in the second paragraph of this opinion. To illustrate, the following questions were allowed, over appropriate objections: "State whether you heard of a statement issued by the Bank of Kelley in the fall of 1907 concerning its responsibility." "What were you told the circular stated as to the owners of the bank?" "Did you ever hear about the circular being issued?" Many other inquiries of the same general import were permitted, and in answer thereto, witnesses swore that they had heard of it; but few, if any, were able to state with any clearness where they got their information. Some of them were not living in Kelley at the time, and the story did not come to their ears until from one to three years subsequent to the appearance and use of the circular. In most cases, the

origin of this information was, for the greater part, "they said," "they told me," "I heard it talked,"—the usual form in which a vague rumor finds its way from mouth to mouth, and always quite untraceable to any responsible source. That there are circumstances under which general reputation concerning certain matters may be put in evidence as bearing upon the question of notice, or the reasonableness of one's belief in the existence of a given fact, need not here be denied, but no rule is better settled than that rumor and hearsay are not evidence to prove a contract right or a cause of action, and, for even better reason, it is wholly incompetent to prove an essential element constituting an estoppel. So far as the appellant is concerned, the circular issued by Penfield was, at the best, clearly hearsay, and what the witnesses who had never seen the paper had to say about it was hearsay derived from still other hearsay. The danger of unduly extending the exceptions to the rule which excludes such evidence is too clear for controversy. The court, in overruling the objections to questions of this kind, while conceding the hearsay character of the testimony, said it would be received "in so far as it affected the mind and act of the witness." But is that a sound reason for the ruling? The mind of the witness may have been affected or influenced by an infinite variety of circumstances, for none of which the appellant was in the remotest degree responsible, and to put them in evidence would bring us no nearer the solution of the issue being tried, but would undoubtedly tend to cloud the real issues and confuse and mislead the jury. We do not forget what we have repeatedly conceded: that an estoppel *in pais* may be established by proof either of an act or representation or culpable silence of the party to be charged, whereby the party claiming the estoppel has been misled to his injury, and where it would operate as a fraud to permit the former to deny the truth of that which he induced the other party to be-

lieve. But proof of what influenced the plaintiff's act would be wholly immaterial, unless the fact or thing sought to be shown is something for which the appellant is in some way responsible. As applied to this case, it must first be shown that the circulation of the story of an actual or ostensible partnership was chargeable to the act or culpable negligence of the appellant, and we have grave doubts whether such a case was made. Indeed, the great mass of the testimony was so largely devoted to proving the issuance of the circular and the reputation or belief existing in Kelley, and in the minds of the depositors, of appellant's interest in the bank, that it is difficult to avoid the conviction that the jury must have become impressed with the thought that these were of paramount consideration in determining plaintiffs' right of recovery. In our judgment, the door in this direction was opened too wide, and much which was clearly hearsay admitted without connecting the same with any culpable act or omission on part of the appellant, to make it competent for any purpose.

IX. The appellant requested the court to instruct the jury peremptorily to return a verdict in his favor, because of the insufficiency of the evidence to justify a verdict against him. The request was denied, and error is assigned thereon. The point is made by appellees that, if there was any error in this ruling, the appellant waived it by his own requests for instructions to the jury. Assuming that the point is well made, we are of the view that, as the case must be reversed on other grounds, and the issues may come on for trial anew, it is proper for us to express ourselves on a certain phase of the law not yet considered, except incidentally, but which will necessarily come up for consideration on a retrial.

As noted by us at the outset, there was

13. **PARTNERSHIP:** a manifest failure to prove anything like an
the relation:
partnership
by estoppel:
burden of
proof. actual partnership. It is equally clear and
undisputed that appellant at no time or
place held himself out as a partner therein.

That he was so held out by Penfield in the printed circular is true. To bind the appellant by this act, the burden is upon the plaintiffs to show that he assented to or ratified such act of holding out, or that he, by negligence so gross as to be tantamount to fraud, permitted such holding out to go on, and the depositors in the bank to be deceived thereby. The burden is upon the appellees to show facts of this character, and if they do not, their case fails. It is not argued that evidence of any positive act or word of acquiescence in or approval by appellant of Penfield's act was produced on the trial below, but the right to recovery is staked solely on the proposition that, when he was so held out as a partner by Penfield, he was in duty bound to do something to prevent the customers of the bank from being misled in the matter, and that, in this respect, appellant failed in his duty, and the depositors were thereby deceived. Upon the general principle of law so advanced there need be no controversy; and the dominant issue in the case is whether appellant was in fact advised of the action of Penfield, and if so, whether, as an honest man, upon such information as he had, he ought to have done more than he did do to put an end to the misrepresentation and prevent the depositors from being thereby deceived. It will be remembered that the evidence is without dispute that the appellant did not see the circular until this suit was in progress, and that his only knowledge of its existence or use was from a statement made to him by a nephew that he (the nephew) had heard there was a paper of some kind out in which the appellant was named as a partner or stockholder in the bank. Immediately upon re-

ceiving this information, he went to the bank, and, Penfield being absent, addressed the cashier, protesting against the use of his name, and was told that the matter would be rectified as soon as Penfield returned. On the third day, he saw Penfield in person, and, upon his demand for an explanation, was assured by him that the matter would be "straightened right up," and that the unauthorized use of his name would not be repeated—a promise which the record tends to show was kept; for, as we have said, none of the witnesses who received the circular or saw it in circulation fix the time at any later date than in the summer or fall of 1907. Just how long the circular had been out before appellant heard of it and disaffirmed it, as above stated, is not clear; but, according to the testimony of the cashier, who was in the best position to know, it must have been a very short time, and not to exceed a few days. After appellant's visit to the bank in this connection, he also saw the elder Penfield, whose name had also been used by the bank, and was told by him that he had consulted counsel, and that appellant need not bother any more about it. From this time on until the bank was closed, 3½ years later, he swears—and no one contradicts him—that he received no notice or information that he was being held out as a partner in the bank; and indeed there is no evidence that, during that period, he was in fact so held out by Penfield or anyone else. Nor is there any evidence that he was informed by anyone, or had information from any source, that "in Kelley and vicinity" he was reputed to be a partner in the bank, or that he was so regarded and relied upon by the depositors. Upon a record like this, would the jury be justified in finding that the appellant was guilty of such gross or wilful disregard of his duty as an honest man that he should be held to have forfeited his right to deny the alleged partnership? What more could he have done than he in fact did? Counsel do

not suggest, nor does the court in its instructions, what other or alternative expedients he might have employed to prevent further mischief on account of Penfield's wrong. Having gone to the source of the misrepresentation and forbidden the use of his name in that connection, and receiving assurance that his protest would be regarded,—as indeed it appears to have been,—did good faith require him to stand at the door of the bank and give personal notice to its customers? Should he have resorted to the newspapers? If so, then, as no paper was published in Kelley, where was he to go? Should he have notified the depositors and other patrons or prospective patrons of the bank in person? It does not appear that he knew who was doing business with the bank, and therefore likely to be deceived by the circular. It would seem to be a fair proposition, both of law and good morals, that if, on receiving notice of the misuse of his name, he at once put a stop to it, his responsibility therefor was at an end, unless possibly he should be held to the exercise of reasonable care to prevent a repetition of the misrepresentation.

The authorities cited by the appellee to the effect that one who holds himself out to be a partner becomes liable as such, to one who credits the supposed partnership on the faith of such representation, are not in point, for the very good reason that there is no pretense in evidence that appellant ever held himself out as a partner in the bank. So, too, of the authorities for the proposition that like consequences obtain where a party has permitted himself to be held out as a partner, and credit is thereby obtained for the alleged firm; for it is here conclusively shown that Penfield's act was not only without the appellant's knowledge or authority, but was promptly repudiated by him. The case of *Smith v. Hill*, 45 Vermont 90, on which reliance is placed, is in marked contrast with the one before us. In that case, the defendant was informed that one Harring-

ton was holding him out as a partner in the staging business under the name of Hill & Co., and, instead of forbidding it, simply said to Harrington, "You must not use that name to hurt me." This, the court very properly interpreted as an acquiescence by Hill in the use of his name, on Harrington's assurance that he would save him harmless. The opinion, holding him liable on a note given in the name of Hill & Co., says:

"The risk of Harrington's neglect to redeem this pledge was upon Hill, and not upon those to whom Harrington should * * * thus pledge the credit of Hill."

That this holding is not a precedent for plaintiffs in the instant case is too clear for argument. Many other authorities stating the rule most nearly in accord with plaintiff's contention are cases in which a partner retires from a firm, but, failing to give notice thereof, is held liable to creditors who continued thereafter to deal with such firm, not knowing that his relation therewith had been severed. It seems to be as clear as it is reasonable that the duty resting upon a partner in fact to give notice of his withdrawal from a firm is much more imperative than is the duty of one who has been held out as a partner without his authority or consent to give notice to the world of his denial of that relation. *Culligan v. Alpern*, (Mich.) 125 N. W. 20; *Southwick v. McGovern*, 28 Iowa 533. So, too, in *Fletcher v. Pullen*, 70 Md. 205, also cited by appellee, where the court held that the question of an ostensible partnership was properly left to the jury, it appeared not only that the alleged partnership was regularly advertised in two local papers, but also that defendant was a subscriber, regularly receiving both papers. There was, moreover, other proof that he had actual knowledge of the advertisements while they were being published, but he took no step to deny their authority. Under such circumstances, the propriety of submitting the issue to the jury is very

manifest; but the facts we have here to deal with are so widely different that the decision is of little value as a precedent in disposing of this appeal. More nearly in point upon the principle involved, though dissimilar in its facts, is *Downie v. Savage*, (Wash.) 129 Pac. 1096. There had been a partnership between Charles G. Savage and a brother, under the name of Savage Brothers. The last-mentioned brother died, and a third brother, Howard, took over the firm business and continued it in the same name, Savage Brothers. It was quite generally supposed that Howard and Charles constituted the firm, although Howard alone appeared in its conduct and management. Of the record made, the court says:

"While there is ample evidence in the record to establish the fact that many persons, including appellant and other creditors, * * * regarded and generally understood the brothers were partners, we can find no instance in the record where any holding out of the existence of such a relation was done by Charles, or with his assent, express or implied. * * * It also appears that mail came to the camp addressed to 'Savage Brothers,' and that Charles knew of such fact, and that he also knew that supplies came to the camp with a like direction. From this it is urged that it must be held there was an implied, if not an express, holding out. It does not appear to us, however, that this can be taken for anything more than a consent on the part of Charles that Howard might do business under the name and style of 'Savage Brothers,' which fact alone we do not think is sufficient to indicate that Charles was a partner, until he did something or said something that would indicate to others he was to be so regarded, especially in view of the undisputed fact that at the mill and in the camp where these creditors were employed, Charles never assumed to act as a proprietor, gave orders, nor took charge as such."

This holding is followed by these remarks, which are very applicable to the case at bar:

"Nor did any of these creditors ever address him as a partner, make inquiries of him as such, nor when they failed to receive their wages, and thus knew of the failure of the business, did they make any demand on him for payment, nor in any way treat him as having any responsibility in the matter. To all intents and purposes, notwithstanding they now say they regarded him as a partner, they then did nothing nor said anything that would indicate such an understanding on their part."

The facts there held insufficient to sustain a finding of ostensible partnership will be seen to be much more persuasive and formidable than those on which it is here sought to sustain such a conclusion. In *Munton v. Rutherford*, 121 Mich. 418, someone without authority caused it to be published in a local newspaper that the defendant, Mrs. Rutherford, had entered into a partnership with one Beckwith. On learning of it, Mrs. Rutherford went to Beckwith about it and asked that he contradict it. No denial was published, but Beckwith sent out a circular saying that he would continue to conduct business under the firm name of Beckwith & Co. Later, Mrs. Rutherford was sued upon a debt contracted by Beckwith & Co., and it was insisted that her failure to publish a denial of the newspaper item estopped her to deny her partnership in the firm. The trial court instructed the jury on that theory. On appeal, this was held error, the court saying:

"Mrs. Rutherford was under no legal or moral obligation to publish a denial of this newspaper story. Anyone who saw fit to deal with Mr. Beckwith, relying on this item, did so at his peril. If she had been shown the article, had assented to it, and credit had been given her on the strength of such assent, the rule of estoppel would have applied. There being no evidence that she authorized or

assented to it, there is no room for the application of the rule."

Quite directly in point, also, is *Rittenhouse v. Leigh*, 57 Miss. 697, where it is held that, if a person who is falsely held out as a partner by another at once disaffirms and forbids it, and does not thereafter know that such prohibition has been disregarded, he is not estopped to deny the partnership. See, also, *Rouss v. Rackett Store*, (Ariz.) 164 Pac. 1182. In a recent case of our own, the general doctrine of estoppel upon an issue of alleged partnership has been quite fully discussed. *Farmers' Exch. Bank v. McDonald*, 167 Iowa 582. There, Finley McDonald, Sr., and his son John kept deposits in the same bank. John McDonald made deposits in the name of Finley McDonald & Sons, while Finley McDonald made deposits in his own individual name. In settlement of overdrafts in the former account, John McDonald gave promissory notes, signed, "Finley McDonald & Sons." There was evidence tending to show that the notes, or some of them, were made in the presence of the father. There was evidence that the father said to an officer of the bank, when questioned about John's transactions, "whatever John did was all right;" but he at no time said to anyone that he was a partner with John, nor was it expressly shown that he knew that John was using the name of Finley McDonald & Sons. In holding that no partnership liability was shown, the court, speaking by Gaynor, J., says that one cannot be held liable as a partner by estoppel—

"Where, from the facts and circumstances within his knowledge * * * he (the creditor) had no reason to believe that the party sought to be charged was in fact a partner at the time of the transaction; * * * Belief, to justify an estoppel, must be founded upon facts and circumstances known to the creditor at the time; that supposing him to be a man of ordinary prudence and judg-

ment was sufficient to justify that belief. * * * Where one is sought to be held as a partner on the ground that he held himself out as such, it must appear not only that he held himself out as a partner, but that the other, in good faith, believed him to be a partner, * * * but the belief must be induced by the conduct of the party sought to be charged. He cannot be held liable as a partner because held out to be such by others, unless it affirmatively appears that such was done with his knowledge or consent or concurrence, or by silence amounting to acquiescence."

And it is there further said, as to a creditor invoking an estoppel and "thereby enforcing a liability which would not exist except for the estoppel, it must appear that he exercised due diligence in ascertaining the truth of the facts upon which he predicates" it. The application of these rules to the present case is obvious.

The tedious length to which this opinion has already been drawn out forbids further review of the authorities or consideration of several of the minor propositions argued by counsel, and we conclude the decision by adding the following citation of authorities bearing very directly upon the question as to when a party who is guilty of no wrong on his part must speak or act for the protection of others, at the peril of estoppel against himself: *Hunt v. Reilly*, 24 R. I. 68; *Viele v. Judson*, 82 N. Y. 32, 41; *Williamson v. Jones*, 43 W. Va. 562; *Rigelow on Estoppel* (6th Ed.), 661, 662; *Hollins v. Hubbard*, 165 N. Y. 534; *Collier v. Miller*, 137 N. Y. 332.

No man should be put to the hazard of being stripped of his earthly substance to satisfy a debt contracted by another without his authority and without his knowledge, and without the slightest consideration moving to him, except upon clear and satisfactory showing of facts and circumstances which in all good conscience should close his mouth to a denial of his liability therefor. We have said that the

doctrine of estoppel *in pais* "must be applied in strictness, and the admission or act relied on must clearly appear to have been made or done by the party who is sought to be bound thereby. Hence, estoppels must be certain to every intent, for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts." *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa 325, 335.

"There must be a certainty about the alleged estoppel. The misrepresentation must be plain, not doubtful or matter of mere inference or opinion; for the courts will not suffer a man to be deprived of his property or security where he had no intention to part with it." *Blodgett v. Perry*, 97 Mo. 263.

"Every fact essential to an estoppel *in pais* must be clearly and satisfactorily proved." 16 Cyc. 812.

"Estoppels must be certain to every intent, and are not to be taken by argument or inference." 11 Am. & Eng. Ency. of Law, p. 388; 1 Greenleaf on Evidence, Sec. 22.

It is true that, in some of the cases cited for the plaintiffs, there are expressions to the seeming effect that the question of an ostensible partnership is always one for the jury; but such expressions cannot be presumed or construed to mean that this rule is applicable to all such cases, without regard to the state of the evidence. The true rule in this, as in the trial of other jury issues, is that, at the close of all the testimony, if, to the judicial mind, the evidence, tested by the law of the issues and the rules of evidence, is not sufficient to justify a jury fairly and reasonably in finding a verdict for the plaintiff, the court should so direct the jury. *Pleasant v. Fant*, 89 U. S. 116 (22 L. Ed. 780). The burden of proof in this case was at all times upon the plaintiffs, and, in our opinion, the record, tested by the rules of law applicable to the issues, fails to show a case for the jury.

For the reasons stated, the judgment below is reversed, and the cause remanded. In the absence of any showing to the trial court of new or additional evidence in support of plaintiffs' claim, it is our opinion that the case should be dismissed; but if showing be made which, in the judgment of the court, affords reasonable ground for belief that a recovery may be sustained under the rules of law herein approved, a new trial may be ordered.—*Reversed.*

GAYNOR, C. J., EVANS, PRESTON and STEVENS, JJ., concur.

FRED BABCOCK, Appellee, v. CITY OF DES MOINES et al.
Appellants.

SOLDIERS' PREFERENCE ACT: Discharge—Reduction of Salary

1 —**Abolition of Position—Bad Faith—Effect.** One entitled to a preference in appointment or employment under the Soldiers' Preference Act may be legally deprived of his position (a) by a reduction in salary or (b) by the abolition of the position, *provided such reduction or abolition is not made with the intent to bring about the discharge of the incumbent.* Evidence reviewed, and held insufficient to show that an office or position had been abolished with the intent to bring about the discharge of the soldier incumbent. (Section 1056-a15, Code Supplement, 1913).

APPEAL AND ERROR: Parties Entitled to Allege Error—Error

2 **Favorable to Appellant—Non-appellants.** Principle recognized that a non-appellant may not complain of errors detrimental to himself, nor may an appellant complain of errors favorable to himself.

SOLDIERS' PREFERENCE ACT: Discharge—Abolition of Position—Evidence.

3 Evidence consisting of certain acts and proceedings of municipal authorities reviewed, and held to show that a certain office or position had been abolished.

SOLDIERS' PREFERENCE ACT: Discharge—Abolition of Office—

4 **Bad Faith—Burden of Proof.** One entitled to a preference as

der the Soldiers' Preference Act, and suffering a discharge by reason of the abolition of the position held by him, has the burden to show that such abolition was in bad faith,—that is, with the intent to bring about his discharge.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

MONDAY, MAY 14, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

SUIT in equity, involving whether defendants have acted in contravention of what is known as the Soldiers' Preference Law.—*Reversed.*

H. W. Byers, Guy A. Miller and Thos. Watters, Jr.,
for appellants.

O. M. Brockett, for appellee.

SALINGER, J.—I. The plaintiff is with-
in a class who may invoke the so-called Sol-
1. SOLDIERS' diers' Preference Law. He claims, and the
PREFERENCE ACT: discharge: reduction of sal-
ary: abolition of position: bad faith: ef-
fect. district court found, that he was unlawfully
discharged, in violation of that law. Its
provisions are found in Sections 1056-a15
and 1056-a16, Supplement to the Code, 1907. In effect, and
so far as material here, they are: That, in every public
department of cities, certain persons shall be entitled to
preference in appointment, employment and promotion
over other persons of equal qualifications. A refusal to
allow the preference, or a reduction of compensation in-
tended to bring about the resignation or discharge of one
entitled to the preference, gives a right of action. No one
entitled to the preference shall be removed save after hear-
ing upon due notice upon stated charges, and with right of
review.

As we understand it, no refusal to allow a preference

is involved here; that is to say, it does not seem to be claimed, and, at any rate, is not established, that anyone was preferred over plaintiff in an original giving of employment. The most plaintiff claims on this head is that he was employed, was discharged, and that others than he have since been doing the work which he could and would have performed had he not been discharged. While such discharge and permitting the work to be done by others might, in some circumstances, violate the statute, the violation would not be undue preferment in employing, but unjustified discharge. It should be added that, at all events, there is no evidence that those now doing the work aforesaid are not, as well as plaintiff is, honorably discharged soldiers, and, as much as he, entitled to the benefit of the Soldiers' Preference Law.

On careful examination, the contention of the plaintiff narrows to two claims: First, that his discharge was forced upon him by a reduction of salary, made in bad faith, and unjustifiable. He presents, and it is true, that no charges were filed against him, and we assume that no charges were justified. But the salary of an employee, even one entitled to the benefits of said statute, may be reduced without violating that statute, and it is only a reduction which is intended to bring about a resignation or discharge that the statute condemns. His compensation was reduced. But the decree of the district court finds expressly:

"That the evidence in support of that part of the plaintiff's petition which complains of reduction of his salary, and charges that the same was had and done by the defendants in bad faith, and for the purpose of bringing about the resignation or discharge, is not sustained by the evidence."

2. **APPEAL AND RE-
SON: parties
entitled to al-
lege error: er-
ror favorable to
appellant:
non-appellants.**

The appellants, of course, do not com-plain of this finding, because, so far as it goes, it is in their favor. The appellee has not appealed, and is in no position to have this finding, or rather the decree upon such finding, set aside or disregarded. It there-fore becomes the law of the case on this appeal, though the appeal is triable *de novo*; and we must find that the statute was not violated in reducing the salary of the plaintiff.

II. The plaintiff charges further that he was unlawfully discharged by the agency of a pretended abolition of the position he occupied in the employ of the city. As we understand him, he says: First, that said position was never abolished; that, notwithstanding, the city insists that what action was taken does abolish the position; and second, that, if there was an abolition, it was in bad faith, and a violation of the statute, as much so as if resignation or discharge had been brought about by a colorable and unjustified reduction of compensation.

The statute prohibits reducing compensation with intent to bring about resignation or discharge, and, so far as its terms go, stops there; that is to say, it does not in words prohibit the bringing about a discharge by the agency of an abolition of place made in bad faith to work a discharge. But the statute is highly remedial, and intended to give special and deserved privileges to one class of our citizens in consideration of services rendered the country in time of need. We should construe it, when within reason possible, so that its evident purpose may be accomplished. So construing, we hold that a bad-faith abolition, intended to bring about the discharge of one within the Soldiers' Preference Law, is within the spirit of that law and prohibited by it. If a city that had through its officers expressed ill will towards an employee, and so declared an avowed purpose to accomplish his resignation or discharge, should one

day abolish the position occupied by that employee, and the next day re-create it and fill it with someone not within the Soldiers' Preference Law, not more competent than the former and soldier employee, and should pay the new incumbent of the re-created position a larger compensation than had been paid before, no one should contend that the mere going through of the ceremony of abolishing the place or office would avoid the law. The supposed is an extreme case. Others differing in degree only may present an abolition that the law condemns. The vital questions, then, are whether the position occupied by the plaintiff was abolished, and, if so, whether the abolition was in bad faith and made with intent to force the discharge of the plaintiff.

2-a

8. SOLDIERS' PREFERENCE ACT: discharge: abolition of position: evidence. If the position once occupied by plaintiff has been abolished, the abolition was effected by the adoption of a resolution about April 28, 1914, wherein the governing body of the defendant city resolved that certain salaries, with certain exceptions, be fixed at the same figures that prevailed the year preceding, one of the exceptions being "the clerk in the record room, which is hereby abolished." Since the adoption of this resolution, and by reason of the interpretation thereof on part of the city, the plaintiff has not been permitted to work for the city, and has received no payment for services, though he has tendered such services, and may be assumed to be ready, able and willing to perform them. As we gather it, the plaintiff contends that the foregoing things did not work the abolition of the position held by him, because it deals in terms with "the clerk in the record room," and that he has never been such clerk, if it be assumed that anyone has been. To deal with this contention, we are required to give consideration to so much of the record as discloses or tends

to disclose just what position the plaintiff held under employment by the appellant city. This employment began in the spring of 1904, and then consisted of examination of the city's records and accounts of the various offices of the city, and at this time, according to his petition, plaintiff became regularly employed as a clerk in the office of the city auditor, entering his duties as such on June 1, 1904. At the time he thus began work, such work was limited to assisting the auditor and his deputy in the work of their office, such as looking after the bills, checking schedules, checking and entering warrants, and making the proper entries in the various records of the office. In the course of a few months, the care of the requisite printing for the various offices of the city, and of the office supplies, and of the work of preparing and altering various blanks and forms used, was assigned to plaintiff. About April 1, 1910, his salary was raised to \$100 a month, and at this time, the classification and organization of the work assigned to him had assumed the character of a distinct department or position under the immediate charge of the auditor's department, and under the general supervision of the superintendent of the department of accounts and finances.

When, about this time, the city adopted what is known as the commission plan of government, the duties of the position occupied by plaintiff came under the supervision of the superintendent of accounts and finances, but still continued to be a subordinate position in or department of the work of the office of the city auditor. The work assigned to plaintiff developed, and by his help became classified and systematized, and he finally became the custodian of the room devoted to the deposit of records and filing appliances, wherein supplies for the various offices of the city government were kept, and where requisitions therefor were honored and supplies issued thereon. In addition, he was put in charge of keeping the accounts for printing

and binding incidental to the business of the various offices of the city government, the filing of bills, and work of like kind. An amendment to petition claims that the services aforesaid were merely a part of the duties and work of the office of the city auditor, and that such services did not, in and of themselves, constitute an independent department; that no distinct office has been created, either by law or ordinance, which is known as either clerk of the record room or clerk of the record hall, but it is conceded that such designation has been sometimes applied to the plaintiff, solely by way of convenient distinction and to indicate in a general way the character of the duties assigned to him by the auditor, under whose supervision he was rendering his services. He kept some of the records for the purchasing agents.

It was stipulated that there was no ordinance creating the office of clerk of the record hall or custodian of the record hall, and that, so far as reference in the appropriation ordinances is concerned, the plaintiff occupied no office under the city except a mere clerkship in the office of the city auditor, and that there is no ordinance defining the position to be other than that. The witness Hanna testified that it was his recollection that, when he went into the office of mayor, one member of the council introduced the plan of assigning one of the clerks in the auditor's department to the charge of the record hall, and that it was then understood that plaintiff was to have charge of the record room and assist in taking care of minor supplies and records; that the plaintiff's work was done in a room by himself, which room was kept open, and wherein was allowed access to the records by any who desired to enter, without getting a key, and that, since the alleged abolition, the record room has been closed and the work of the plaintiff transferred; that plaintiff was in charge of the record room.

The witness Van Hosen says that he is an employee in the department of accounts and finances; that this is the department in which the auditor is, and that, so far as he knows, the work performed by the plaintiff in 1913 was to have charge of the record room and the filing of the auditor's bills, namely, all of the bills of the city, and having charge of the printing and supplies. The plaintiff himself testifies that in the beginning his duties were checking rolls and accounts, handling warrants, placing these on the record, making different reports, and framing up the different record books, and that he did this kind of work all the way through.

It appears, too, that, in an appropriation ordinance adopted on the 31st day of March, 1913, \$900 was appropriated to pay for the services of "clerk record hall," and that, subsequent thereto, the plaintiff accepted payment for his services at the rate of \$900 a year, and that, if this ordinance does not appropriate for his services, no appropriation therefor was made.

We are irresistibly led to the conclusion that the resolution which abolished "the clerk in the record room" was intended to abolish the position occupied by this plaintiff at the time said resolution was adopted, and that all parties, including himself, so understood. And if no bad faith or prohibited ulterior motive taints what was done, the position once held by the plaintiff has been abolished, and he may not complain. The Soldiers' Preference Law is not intended to take from municipal governments the power, in the honest administration of their affairs, to do away with positions created by the municipality.

2-b

The question remains whether there was any bad faith. On solving it, we are not helped by the finding that the salary reduction was made in good faith. The statute provides that the burden of proving incom-

4. SOLDIERS' PREFERENCE ACT: discharge: abolition of office: bad faith: burden of proof.

petency or misconduct shall rest upon the party alleging the same. But that is not equivalent to a requirement that the burden is upon the appellant city to show not only that it abolished a place occupied by plaintiff, but did so in good faith, and without any ulterior motive condemned by the statute. As to this last, the burden rests upon this plaintiff, and we have to determine whether he has discharged it. Unless we find that he has done so, the decree below is not sustained by the evidence.

The trial court found that the reduction of salary was justified; also that all allegations of the petition, except one, charging reduction of salary in bad faith, were true. It found, of necessity, therefore, that plaintiff had discharged the burden of proving that the abolition was in bad faith. We are constrained to say that we find no warrant for this conclusion in the evidence. Putting it at its strongest for the plaintiff, it can be found that, up to a certain point in his service, the same was eminently satisfactory, and that his compensation was voluntarily increased. It can be found that the work performed by him in the past has been and is increasing in volume, and that it must be and is being performed by others, and that, at the time when he was compelled to stop, he was doing more work than ever before, and as satisfactorily as ever; and that at one time, one Needham, a member of the defendant city's council, intimated that it would be better if plaintiff were out of there.

On the other hand, plaintiff states, in amendment to his petition, that in the past the duties of the office of the auditor and work done under its immediate supervision have required five persons. It appears without dispute that it is now done by four persons; that is to say, while before it required four persons and plaintiff, the work is now done by four without plaintiff. The witness Hanna testifies that it was his idea, and he urged strongly, the

year before the abolition, there should be four men instead of five. It is stipulated that the entire work as done when plaintiff was connected with it is still performed, and by these four; and that, since April 1, 1914, the department of accounts and finances is conducted at a decrease in annual expenditure of \$1,100.

The witness Hanna testifies that the work of plaintiff was created by a classification of work in the auditor's office and parceling to plaintiff a certain part of that work, and that now special assignment of the work is done away with, and it is done along with all the other work, and without separate classification. And Van Hosen says that it has been distributed among the various employees of the department. Mr. Hanna adds that the particular duties of Mr. Babcock have been transferred and done in a different room, in which the auditor and four clerks do their work.

In the last analysis, it is made manifest that the city found that, under a separation of work in one department, and assigning part thereof to plaintiff, it required five men to do all the work of that department; that, by abolishing a position to which part of this work was thus assigned, all of the work could thereafter be done by four persons; that, therefore, the position of the plaintiff was abolished, and all the work, including that which he had heretofore done, reassigned and transferred, so that it now is being done by four men instead of five, as theretofore, and that an annual saving in expenditure has resulted. We are unable to see how, by showing this, the plaintiff has proven that abolishing the position occupied by him was a mere subterfuge and pretense. There is nothing in the Soldiers' Preference Law, or any other law, which compels a municipality to do its business less efficiently and economically than it is able to. When a position exists, the honorably discharged soldier has preferential rights to filling it. There is no law

that commands that, when such position is once filled by him, the position must be maintained.

Had the four men now doing all the work and plaintiff each occupied the position of clerk of the record room, and, in reducing the force, four non-veterans been retained or put in, and were there proof that these four were less qualified than plaintiff, a different question would be presented. The question we have and decide is that, where a veteran alone occupies a position which is the subdivision of a department, and that subdivision is abolished, and all the work of the department transferred to others, there being no evidence of qualifications, absolute or relative, the veteran who filled that subdivision may not complain that others are doing the entire work of the whole department without his help.

The authorities cited for the appellee do not run counter to this, and in fact we fail to see that they have much bearing on anything involved here. The essence of *Kitterman v. Board of Supervisors of Wapello County*, 137 Iowa 275, is that, where an original appointment to be janitor was for an indefinite time, an arbitrary fixing a definite term, declaring a vacancy, and appointing another to fill it, is, in effect, a removal without compliance with the statutory provisions on the subject. Much of the opinion is devoted to the question whether the position of janitor of a court house is one to which the Soldiers' Preference Law applies, and it is held that it does apply thereto. The same case in 145 Iowa 25, sustains the appellant rather than the appellee. It is therein said:

"The fact that a soldier is employed to do work for the county creates no obligation upon the county to keep him upon its pay roll when that work is done and there is no longer any need of his services; but when the service is one of an indefinite or continuous character, the reasonable necessities of which require the employment of someone at all

times, and there is no statute designating or limiting the time for which appointment to such position may be made, we are not prepared to say that the board of supervisors can defeat the operation of the Soldiers' Preference Act by the expedient of dividing the time into 'terms.' By such plan the board is enabled to exercise an absolute power of removal, and Section 2 of the act, which provides that an honorably discharged soldier shall not be removed from such position except for due cause shown and after due hearing on formal and specific charges, is made of no practical effect."

After all, what the case deals with is where a position was confessedly retained, and someone other than a veteran chosen to perform its functions by the expedient merely of arbitrarily declaring that the position had a fixed and definite term, and that such had expired. The same position was kept, the same work was kept on; the only change was that the soldier occupant was, in effect, dismissed, and someone put in his place. It was an arbitrary declaration that the term of the soldier appointee had expired. Then came, in effect, an arbitrary removal and a substitution. This is a far cry from holding that, under an employment which is paid for by annual appropriation ordinances, there may not be abolished one subdivision doing part of the work of a department, and the department required to perform all the work theretofore done in the abolished subdivision, that work being done as efficiently with less help and at less expenditure.

Robertson v. Alberson, 114 N. W. 885 (not officially reported), is, in effect, that the determination of the council that a veteran applicant was not equally qualified would not be interfered with where the good faith of the action is not impeached. *Boyer v. Mayor*, 113 N. W. 474 (not officially reported), holds that, upon the appointment of a non-veteran, on hearing, the appointing will not be set aside by

reason of the preference statute unless there is a clear showing of abuse of discretion. *Ross v. City Council*, 136 Iowa 125, at 127, merely determines that, while mandamus will lie to compel the appointing power to act, it will not control who shall be appointed when the council does act. *Thurber v. Duckworth*, 165 Iowa 685, holds, so far as it can have any possible bearing here, that, in an action for the reinstatement of a janitor in the state house, a discharge will not avail which was without hearing; that the requirement that there may be no discharge without it is constitutional; and that the Soldiers' Preference Law is constitutional.

The decree and judgment below is reversed, except so much thereof as judges that the reduction of salary made is justified.—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

FRANK BISHARD, Senior, Administrator, Appellant, v. E. R. ENGELBECK, Appellee.

NEGLIGENCE: Acts Constituting Negligence—Automobile Accident—Evidence. Evidence attending the death of a boy by being hit by an automobile reviewed, and held insufficient to show any negligence on the part of the driver in operating the car or giving warning signals.

NEGLIGENCE: Acts Constituting Negligence—Automobile Accident—Failure to Give Signals. Failure of the driver of an automobile to give a warning signal on approaching another vehicle from the rear is not negligence when there was no apparent necessity for such warning until practically the instant of collision.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

MONDAY, SEPTEMBER 24, 1917.

APPEAL from a judgment for costs upon a directed verdict in favor of the defendant.—*Affirmed.*

F. T. Van Liew and *A. L. Garrey*, for appellant.

Brammer, Lehmann & Seavers, and *John L. Gillespie*, for appellee.

STEVENS, J.—On a clear day in October, 1914, about 12:45 P. M., the defendant was driving a Cadillac automobile south on East Twelfth Street in the city of Des Moines near the Henry Wallace school building, a short distance south of a railroad crossing. He turned his car to the left for the purpose of passing a vehicle drawn by one horse. There appear to have been no other vehicles and no pedestrians on the street in that vicinity. Immediately after the car was turned to the left, and when from 25 to 28 feet from a railroad crossing, it collided with Frank Bishard, Jr., a six-year-old boy, killing him instantly. The street at the point of the accident was paved with asphalt. The horse attached to the vehicle, which was a light wagon, was driven by Ben Biber, who testified that he was soliciting repair work, and that he did not see the accident nor know of the presence of deceased upon his wagon or in the vicinity until after the accident. The only eyewitness to the accident who testified was Walter Collings, a boy fourteen years of age, who stated, in substance, that, at the time of the accident, he was on Cleveland Street, to the north, going east, and that he saw the wagon and automobile in the street, and the little boy sitting on the rear end of the wagon box. We take the following extracts from the appellant's abstract:

1. NEGLIGENCE:
acts constitut-
ing negligence:
automobile ac-
cident: evi-
dence.

"He was on the end of the wagon, sitting up on the end. The next movement I saw him make, he kind of turned around and jumped off and started east towards the school ground. He kind of turned around and slid down and held on to his hands and jumped on the ground, and started to run east. * * * I heard the brakes when Mr. Engelbeck put them on; I noticed him rise from his seat a little bit when he put on the brakes, a little before he struck the boy. * * * The machine was not going so very awful fast. It slowed up pretty quick after it struck the boy. I noticed whether or not the wheels made a mark on the paving. The machine stopped on the east side of the street about four or five feet from the curbing. The machine did not run over the boy. The head of the boy's body was lying toward the west after he was struck by the machine. There was blood upon the paving there. The wagon was in about the middle of the street. Mr. Engelbeck was coming up about the middle of the street. Frank Bishard did not make any movement after he was struck."

On cross-examination, he further testified:

"Q. Where was the automobile when you think you first noticed it? A. About half way between Washington and the railroad track. Q. You saw it before it got to the track? A. Yes, sir. Q. And after it crossed them it struck the little Bishard boy? A. Yes, sir. Q. Did it cross those railroad tracks going at a very rapid rate? A. Not so very fast, no, sir. Q. You do not think it was going fast? A. No, sir. Q. And shortly after the automobile had crossed the railroad track did it overtake the wagon? A. Yes, sir. Q. That was also going south on the same street? A. Yes, sir. Q. When it got to the wagon, how did it attempt to pass the wagon, by going to the left or to the right of it? A. To the left of it. Q. It went to the left of the wagon? A. Yes, sir. * * * Q. And when he dropped off the wagon you say he started to run to

the east? A. Yes, sir. Q. And you say you saw him run into the right front fender? A. Yes, sir. Q. And fall back? A. Yes, sir. Q. He was not knocked a long ways south, was he? A. No. Q. He fell right back? A. Yes, sir. Q. Just before the automobile hit Frank you think you saw Mr. Engelbeck get the brakes on? A. Yes, sir. Q. Do you remember whether that—the street was smooth where it crossed the Northwestern tracks or was there a bump there? A. There is a bump on the north side of the track. * * * Q. Now, when little Frankie hit the fender he sort of fell over backwards? A. Yes, sir. Q. And you think his feet stayed just about the same place where they had been? A. Yes, sir. Q. And simply his head went back and down? A. Yes, sir. Q. So his feet just about marked the spot where he was standing when he was hit? A. Yes, sir. Q. And he fell practically due west? A. Yes, sir. Q. So he was stretched out east and west. Could you make a fair estimate as to how fast that automobile was going? A. No, sir; I don't believe I could. Q. You would not care to say how many miles an hour? A. No, sir. Q. You do not think it was going over ten miles an hour, do you? A. No, sir; I don't believe so. Q. You do not believe it was going that fast? A. No, sir. Q. You think that Mr. Engelbeck got the brakes on just about the instant the boy dropped from the wagon? A. Yes, sir; about the instant he was hit. Q. Got them on about an instant before he was hit? A. Yes, sir. Q. And about an instant before he dropped from the wagon? A. Yes, sir. Q. There was not very long between the two? A. No, sir. Q. Because the boy started to run? Court: Where did he hit the automobile, in front or on the side fender? A. The side fender. Q. He never got square in front of the car? A. No, sir. Q. He never did get over in front of the automobile? A. No, sir. Q. He ran into the side of the fender? A. Yes, sir."

He further testified that he was west of the car when the accident occurred. The evidence shows that there was a bump at the railroad crossing, and Collings testified:

"I heard the bell in the railway tower ring there about this time. The gates were not lowered; a hand car passed up the railroad at this time. That was immediately after Mr. Engelbeck passed. The bell in the tower began to ring before Mr. Engelbeck reached the track. He didn't seem to increase his speed very much that I could notice. He ran about the same speed until the brakes were applied."

He further testified that the front wheels of the car were 3 or 4 feet from the east curb when the automobile stopped. Another witness testified that he arrived at the scene of the accident very shortly thereafter; that the pavement was dry; and that the marks thereon showed that the wheels of the automobile had slid about 27 feet.

The driver of the wagon testified that he did not hear the tower bells or the railroad bells ring as he crossed the track; that the first thing he noticed was an automobile coming along to the left-hand side of him in the street; and that he did not know of the accident until after it was all over, and he looked back and saw the boy lying on the pavement. He further testified:

"The automobile was on the left side of me when it stopped, that is, the east side of the street. I did not see the hind wheels. Q. How much of the machine did go by you just as the accident occurred? A. About 5 or 10 feet ahead of me. Q. The front end of the automobile was 5 or 10 feet in front of your wagon? A. Yes, sir. Q. And it stopped, and you drove on a little ways to the engine house? A. Yes, sir. Q. Was that the front or back end of the machine was 5 or 10 feet in front of you? A. The front end."

C. M. Staves testified that the defendant called his attention to the accident; that he at once went to the scene

thereof, where he found the body of deceased lying on his breast, with the left side of the face down, his feet toward the west, and his head to the east. The witness Collings testified that the body lay in substantially the position as indicated by the witness Staves, except that he said that the head was to the west and the feet to the east.

The undertaker who prepared the body for burial testified that the skull was crushed, and a part of it driven into the brain; that the injuries were on the left side of the forehead; and that the skull was fractured all over the left side, extending from the temple back into the region of the ear.

Concerning the movement of the automobile, the witness Biber further testified that he saw a peculiar motion of the wheels of the automobile, as follows:

"I saw a peculiar motion of the wheels on the automobile: they jumped off, and a little bit later stopped. The automobile that struck the boy,—the wheels jumped off something, like they fell over a brick or something. I didn't see the wheels slide. The body of the boy lay on the left side of the street as you face the south. The wagon box I had that day is about 7 or 8 inches deep."

Counsel for appellant have furnished us an elaborate brief, collecting and citing authorities relating to the law governing the operation of motor vehicles upon the streets and in the public highways. In view of the conclusion reached upon the questions of fact, it is unnecessary for us to review the authorities. The court, in ruling upon the motion to direct a verdict, made some reference to the question of contributory negligence upon the part of the deceased. Its ruling was not, however, based thereon. Contributory negligence as a question of law is not involved upon this appeal.

The negligence charged in plaintiff's petition is: (a) That defendant was driving his car at a high, reckless and

unreasonable rate of speed, and on account thereof was prevented from having and did not have proper control thereof; (b) that he failed and negligently omitted to sound a horn or give other signal or warning to the deceased of his approach. Other allegations of negligence will be disregarded, as no evidence was offered to sustain the same.

As we understand the evidence, the deceased was sitting on the rear end of a wagon box, facing north and slightly to the east, looking in the direction of the school building, and the automobile was approaching from the north. At just what point in the street defendant first observed the vehicle and deceased does not appear in the evidence; but, as the body of deceased was lying about 25 or 28 feet from the railroad track, he must have turned the automobile to the left for the purpose of passing the wagon very shortly after crossing the railroad. The relative location of the automobile to the rear end of the wagon at the instant deceased dropped to the pavement is not shown; but, if the automobile slid approximately 27 feet after the brakes were applied, and the front end thereof passed the driver of the vehicle 5 to 10 feet, it may be assumed that the front end of the automobile was not far north of the north end of the wagon. Collings testified that the defendant applied the brakes an instant before he struck the boy. The time occupied by the boy in getting off the wagon to the pavement and running to the point where he collided with the automobile was undoubtedly very short.

The course taken by the automobile indicates that it continued southeast from the point where the driver started to turn out to go around the wagon until it stopped near the curb. The course of the automobile was apparently all the time away from the wagon towards the southeast. Collings observed the accident from the west side of the street. He testified that he saw the automobile strike the boy, and saw him fall. The fact that he was struck by the right-

hand or west fender shows conclusively that he was all the time on the west side of the automobile. The courses of the automobile and the boy, though at different angles, were in the same direction towards the east.

Walter Keefner, another school boy, testified that the pool of blood on the pavement where deceased was lying was very near the center of the street, and that, when he arrived, the automobile was on the left side of the street, towards the school house, the hind wheels thereof being from 20 to 25 feet from the pool of blood.

John Bishard said he did not measure, but guessing at the matter, would say that the distance from the pool of blood to the hind wheels of the automobile was about the same as the width of the street, which the evidence showed was 34 feet.

Biber testified that his wagon was within 3 or 4 feet of the west curb when the automobile attempted to pass him. The theory of the witness Collings is that the defendant applied the brakes an instant before he struck the boy. The boy must have been near the rear of the wagon at the time he was struck by the automobile, as Biber testified that he did not see him until after he had driven some distance south. The distance traveled by deceased from the rear end of the wagon to the point of the collision could not have exceeded a few feet. The time allowed the driver to set the brakes and stop the automobile after the boy climbed to the pavement was very brief.

According to the testimony of Collings, the boy was struck by the right fender of the automobile. The radiator and front end of the machine had therefore passed him before the collision, for the automobile was headed southeast, and the front end had passed deceased before the collision. It might be inferred that deceased was going toward the automobile at the instant of the collision. The course of the automobile was most favorable to avoid the

collision. It is possible that, an instant before he was struck by the automobile, deceased became confused, and was either standing still or running toward the automobile at the time of the collision; but in any event, the time that elapsed between the instant when deceased climbed from the wagon to the pavement and the instant of the collision afforded but little opportunity to the driver of the automobile to change the position thereof, or to do more than apply the brakes; and this the evidence shows he did. He could not have applied the brakes, guided the machine, and given a warning signal after the boy started from the pavement to the east, before the collision.

While the accident occurred in the vicinity of a school building, it was in the rear thereof, and at a time when no other school children, pedestrians, or vehicles, except the wagon above mentioned, were upon the street or in that vicinity. The right of defendant to turn to the left and pass the wagon is not in controversy; but, of course, in doing so he was bound to exercise a degree of prudence and caution commensurate with the circumstances surrounding him at the time, taking into consideration the character and high power of the machine he was operating. *Delfs v. Dunshee*, 143 Iowa 381; *House v. Cramer*, 134 Iowa 374; *Strand v. Grinnell Automobile Garage Co.*, 136 Iowa 68. He was not bound to anticipate or know the intentions or purpose of deceased, if he saw him sitting on the end of the wagon box, nor, indeed, could he know.

Taking into consideration all the facts and circumstances surrounding the transaction, it is difficult to see how greater care could have been exercised by the defendant to avoid the accident. He did not sound the horn or give other warning to the driver of the vehicle or to deceased of his approach; but, before the boy got off the wagon, there was no apparent necessity for his do-

2. NEGLIGENCE: acts constituting negligence: automobile accident: failure to give signals.

ing so, and, under the circumstances, it cannot be said that he was negligent in failing to give a signal of his approach and of his intention to pass the vehicle.

The doctrine of the last clear chance is argued by counsel, but we are unable to see how the same can be applied to the facts in this case.

Had a verdict been rendered upon the testimony offered, it could not have been permitted to stand. We think, therefore, that the court rightly sustained the motion of the defendant to direct the jury to return a verdict in his favor, and the judgment of the lower court is, therefore,—*Affirmed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

FLORENCE M. COTNAM, Appellant, v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Appellee.

INSURANCE: Non-Payment of Premiums—Right to Paid-Up Insurance—Deducting Loans. Loans distinctly standing, by agreement, *against a policy* of insurance on which two full annual premiums had been paid prior to default in paying premiums, should be subtracted from the net value of the policy at the time of default, and the amount of insurance which the remainder would then buy in the way of paid-up insurance represents the full liability of the company. So held on a policy issued under the laws of Massachusetts governing such a condition.

Appeal from Polk District Court.—CHAS. A. DUDLEY, Judge.

WEDNESDAY, MAY 16, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

ACTION at law upon a policy of life insurance. Jury waived. Trial to the court. The opinion states the facts.—*Affirmed.*

J. G. Myerly, for appellant.

A. H. McVey, for appellee.

STEVENS, J.—On April 18, 1898, appellee issued to Perry Cotnam a policy of insurance on his life in the sum of \$1,000. On April 18, 1903, said policy was surrendered, and the policy in suit, naming appellant herein as beneficiary, was substituted therefor. On March 21, 1903, the assured executed to appellee a loan certificate as follows:

INSURANCE:
non-payment
of premiums:
right to paid-up
insurance: de-
ducting loans.

“LOAN CERTIFICATE.

“Springfield, Mass., March 21, 1903.

“This certifies and acknowledges that the Massachusetts Mutual Life Insurance Company has loaned Seventy-one and 64/100 Dollars, this amount being for part of premium to change policy to Life 20, due March 21, 1903, on Policy No. 130120 issued by said Company on the life of Perry Cotnam; and the said Company is hereby authorized to evidence in writing on the back of this certificate, the said loan, and to add thereto such other sums as it may from time to time loan and place to the credit of premiums due on said policy. It is understood that such shares of surplus as may hereafter be assigned to said policy are to be applied to the reduction of said loan so long as any part thereof remains unpaid; otherwise they are to be used in payment of premium, or, if the policy is fully paid up, they are to be paid in cash. And it is agreed that interest is to be paid to said Company semi-annually at the rate of six per cent. per annum on said loan or any unpaid balance thereof, which loan or balance (as shown by the back of this certificate, and also at any future time on the premium receipt then last given) is hereby acknowledged to be an indebtedness against said policy.

“Witness, J. J. Ahern. (Signed) Perry Cotnam.”

And, on March 21, 1904, the following obligation was executed:

March 21, 1904.

"In the settlement of premium due March 21, 1904, on policy No. 130120 in The Massachusetts Mutual Life Insurance Company on the life of Perry Cotnam I request the privilege of having \$22.55 added to the premium loan standing against said policy, in place of paying cash for the same amount.

"Witness, J. J. Ahern.

(Signed) Perry Cotnam."

Six identical instruments, except as to date, were subsequently executed by assured to appellee for \$22.55 each. These several sums represent the semi-annual premiums due the company, and, together with the \$71.64, were endorsed on the back of the loan certificate above referred to as provided therein.

The assured died June 23, 1914. The law of Massachusetts in force at the time the policy was issued is, by its terms, made a part of the policy, and, so far as the same is applicable, is as follows:

"No policy of life or endowment assurance hereafter issued by any such company (that is, life insurance company) shall become forfeit or void for nonpayment of premium after two full annual premiums, in cash or note, or both, have been paid thereon; but in case of default in the payment of any subsequent premium, then, without any further stipulation or act, such policy shall be binding upon the company for the amount of paid-up insurance which the then net value of the policy and all dividend additions thereon, computed by the rule of Section Eleven, less any indebtedness to the company on account of said policy, and less the surrender charge provided herein will purchase as a net single premium for life or endowment insurance maturing or terminating at the time and in the manner provided in the original policy contract." Acts and Resolves of Massachusetts, 1887, Ch. 214, Sec. 76.

It is also agreed by counsel that, at the time the policy lapsed, assured was indebted to the company in the sum of \$186.63 on above loans, and that the cash surrender value of the policy was \$281.58. The controversy arises on the construction of the policy and the Massachusetts statute, and is whether the \$281.58 cash surrender value of the policy should be applied as a net single premium to the purchase of paid-up insurance, and the indebtedness deducted therefrom and judgment entered for the balance, or whether the indebtedness admitted to be due the company at the time the policy lapsed should first be deducted from the cash surrender value thereof, and the balance due the assured applied as a net single premium to the purchase of paid-up insurance.

If the contention of appellant is sustained, appellant, at the time of the death of assured, was entitled to recover on said policy the sum of \$534, less the amount due the company, and, if the theory of appellee is applied, and the amount due the company deducted from the cash surrender value of the policy at the time it lapsed, and the remainder of \$97.95 applied as a net single premium to the purchase of paid-up insurance, the amount due appellant at the time of the death of assured was \$186, the amount found by the trial court.

It is contended on behalf of appellant that the indebtedness evidenced by the loan certificate and the several premium notes is a general indebtedness, and not an indebtedness against the policy within the meaning of the Massachusetts statute quoted above, and several cases are cited to the point that, where notes are given in payment of premiums, the same is equivalent to the payment of the premium in cash, and that the liability on the part of the assured to the company is thereafter on the note. This

is undoubtedly the holding of the cases cited, but is not applicable to the case at bar.

The loan certificate provides that same "is hereby acknowledged to be an indebtedness against said policy," and each of the premium notes requests the amount named to be "added to the premium loan standing against said policy, in place of paying cash for the same amount."

Under the law of Massachusetts, if the policy was permitted to lapse after the payment of two full annual premiums, such policy was binding upon the company for the amount of paid-up insurance which the then net value of the policy, together with dividend additions thereon, less any indebtedness to the company on account of said policy, and other designated deductions, would purchase as a net single premium for life or endowment insurance maturing or terminating at the time and in the manner provided by the original policy contract. In a sense, perhaps, the policy in suit stood as security for the payment of the indebtedness owing it by the assured, but the indebtedness, by the terms of the instruments executed, stood against the policy and arose out of and on account thereof. Under the above provisions of the Massachusetts statute, such indebtedness was properly deducted from the cash surrender value of the policy, and the balance applied as a net single premium to the purchase of paid-up insurance. The amount due, counsel agree, on this theory is \$186. This being true, the finding and order of the court below was correct, and must be—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

GUY O. DAGGY, Administrator, Appellee, v. IRA MILLER et al., Appellants.

HIGHWAYS: Use of Highway—Automobile Accident—Negligence

1 —**Insufficient Lights.** Evidence reviewed, and held to clearly present a jury question on the charge of negligence based on the insufficient lighting of defendant's automobile.

NEGLIGENCE: Imputed Negligence—Common Enterprise—Auto-

2 **mobile Accident.** The owner of an automobile and his minor son as driver, while returning to their home from a visit to a city, are engaged in a common enterprise, and the negligence of the son in operating the car with defective lights, or at a dangerous rate of speed, or in failing to discover a vehicle or properly avoiding it after it was discovered, will be imputed to the father, even though the father was passive, and did not assume to exercise his *presumed* control and dominion over the car.

ACTIONS: Joinder—Parties Guilty of Concurrent Negligence.

3 Parties may so situate themselves that, while they are not engaged in a common enterprise, in such sense that the negligence of one will be imputed to the other, the negligence of both may be so concurrent that both may be joined as defendants in the same action.

✓ **PRINCIPLE APPLIED:** Two neighbors, on a dark night, and in separate automobiles, started home from a city. The lights on one car were defective. The lights on the other car were in order. It was agreed that the car with the good lights should follow the car with the defective lights, and thus give the forward car the benefit of the rear lights. Both cars were running at least 25 miles an hour. They overtook two parties riding in an ordinary buggy, and on the right-hand side of the middle of the traveled way. When the driver of the forward car discovered the buggy, he, to avoid a collision, turned his car to the left, but the right hub on his rear wheel caught the left hub of the rear buggy wheel, and threw one of the occupants of the buggy out and upon the ground. The driver of the rear car saw the occupant of the buggy when she was thrown to the ground, and was then some 50 yards in the rear, and tried to stop, but was unable to do so until he had gone a distance of 200 feet. In so doing, he ran over and killed the

party who had been thrown from the buggy. The driver of the forward and defectively lighted car was negligent (a) in the speed at which he was operating the car, (b) in not sooner discovering the buggy, and (c) in not taking sufficient space in which to pass the buggy. *Held*, the separate negligent acts of the drivers of the two cars were so far concurrent that the drivers were properly joined as defendants in the same action. ✓

NEGLIGENCE: Evidence—Sufficiency—Automobile Accident. Evidence reviewed, and held sufficient to establish the negligence of the driver of an automobile in running over a party who had been thrown from a buggy on account of the prior negligence of another party.

INFANTS: Actions—Defense Without Guardian—Arresting Entry of Judgment. Judgment may not be rendered against a minor in the absence of a defense by a guardian. The entry of judgment without such defense will be arrested on motion when made within the statutory time after verdict, even though the fact of such minority was not pleaded, but was revealed during the course of the trial, and neither party then asked for the appointment of a guardian. Sec. 3482, Code, 1897.

Appeal from Polk District Court.—LAWRENCE DEGRAFF, Judge.

TUESDAY, MAY 22, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

THE opinion states the nature of the case and the material facts.—*Affirmed in part; Reversed in part.*

Clark, Byers & Hutchinson, Miller & Wallingford, Roy E. Curray, and Mulvaney & Mulvaney, for appellants.

Dowell, McLennan & Zeuch, for appellee.

WEAVER, J.—The plaintiff brings this action at law to recover damages on account of the death of his intestate, Lena L. Daggy. As ground for charging the defendants with liability for the death of deceased, the petition alleges that, on the night of August 29, 1914, deceased was riding along

the public highway in a buggy driven by her husband, and that, without fault on her part, and by reason of the negligence of the defendants, the buggy was overturned, throwing her to the ground, where she was run over by an automobile and fatally injured. Specifying the alleged negligence of the defendants, the petition avers that, as deceased and her husband were driving along the public road as aforesaid, they were overtaken by two automobiles, the one in advance being driven by the defendant Ira Miller, accompanied by his father, William Miller, the owner of said car, while the other, closely following, was driven by the defendant Wagner; that the Miller car was not furnished with sufficient or proper lights; and that, by agreement among all the defendants, the two cars were being driven together, the Miller car in the lead, to afford it the benefit of the lights carried on the Wagner car. It is further alleged that, by agreement of the defendants, both cars were to be driven at an excessively high rate of speed; and that, in pursuance of such agreement and common purpose and understanding, they did operate such cars at a high, dangerous and reckless rate of speed, without due regard for the safety of others using the public way; and that, in so doing, the Miller car overtook and ran into the buggy in which deceased was riding, in such manner as to violently throw her out into the road, directly in front of the Wagner car, which ran over her; and that, from the injuries so inflicted by both cars, she then and there died.

The Millers answered jointly, and Wagner separately, each denying all allegations of negligence made in the petition, and alleging that the injury and death of the deceased were brought about by purely accidental causes. There was a trial to a jury, and verdict returned for plaintiff against all the defendants for \$5,742, and from the

judgment entered thereon, the defendants have severally appealed.

Before attempting a consideration of the several appeals, we will recite a few of the facts which are either conceded or have some material degree of support in the evidence. The deceased and all the defendants lived in the country north of the city of Des Moines, and had all been in the city on the afternoon in question. In the evening, after dark, all moved along the same road homeward, though there was no immediate association between the defendants and deceased. The latter evidently left the city first, and had not been seen or overtaken by the defendants until the moment of the collision hereinafter mentioned. The Millers concede that the lighting apparatus on their car was weak or defective, though they insist that their lamps were not extinguished, and that the light so afforded was reasonably sufficient. The evidence would justify the finding that, because of the unsatisfactory condition of the lights on Miller's car, there was an agreement between the defendants that Wagner should follow it with his car, on which the lights were in order. Concerning the rate of speed at which they were moving at the time of the collision, the defendants unite in estimating it at not to exceed 15 to 20 miles an hour. There is evidence, however, of statements and admissions on their part, soon after the accident, indicating that they were running at 25 miles or more an hour. It appears quite conclusively that defendants came upon the buggy without discovering it until collision was imminent, when Miller made a quick turn to the left, and, in attempting to pass, the hub of the right rear wheel of his car caught the left rear wheel of the buggy, tossing it in such a manner that the woman was thrown to the ground, where, as the evidence fairly tends to show, she was almost immediately struck by the Wagner car. Plaintiff's evidence also tends to show that the buggy,

when struck, was on the right-hand side of the middle of the traveled way, and that deceased was not guilty of any contributory negligence on her part.

I. We give first attention to the appeal of the defendant William Miller.

1. HIGHWAYS;
use of high-
way: automo-
bile accident:
negligence: in-
sufficient lights.

Concerning the charge of negligence in the manner of lighting the Miller car, and its management and rate of speed at the time of the collision, it is argued in behalf of this appellant that there is no evidence of any insufficiency of light, and that, although this defendant was the owner of the car and riding therein, he had no hand or part in driving it, and is, therefore, in no wise liable for the consequences of the collision. Neither contention is sound. It is true that the defendants' witnesses unite in saying that the lights on this car were not extinguished, and were of sufficient strength to light the road in front of them in the manner required by law; but on the other hand, the husband of the deceased, who was driving the buggy, swears that, as he approached the place where the collision occurred, and was about to turn to the left to take a cross road, his wife said to him, "Don't turn. There's an automobile coming;" whereupon he looked back, and saw only what appeared to be a dim lantern light, when almost immediately the buggy was struck by the passing car, and he and his wife thrown out. Had the car lights been shining in the manner claimed by the defendant, it is quite inconceivable that the husband should not have recognized their meaning; and while it is possible that he is mistaken, or does not testify truthfully, the question of fact so raised was for the jury. Moreover, the plaintiff's case in this respect is strengthened by the well established fact that the lighting equipment of the car was defective, and that because thereof it was agreed that the Wagner car should follow, and thereby lend the benefit of its lights,

in case it was needed. Added to this is the further fact that, although the buggy was in the road, where the lights of the Miller car, if reasonably sufficient, would naturally have revealed it to the defendants in time to prevent the collision, yet neither Ira Miller, who was driving the car, nor his father, who was riding with him, discovered it until almost the instant of the crash. Altogether, the fact as to whether this car was lighted was a question for the jury.

Neither can this appellant escape legal

2. NEGLIGENCE: responsibility for the consequences of the
imputed negli- collision by proof that he was himself whol-
gence: common ly passive, and took no part in the driving
enterprise: or management or control of the car. He
automobile acci- dent.

was admittedly the owner of the car, clothed with the right and authority to control it. He was present where, had he been so minded, he could have exercised such control. The driver was his own minor son, a boy of 17 years, subject to his authority, and presumably engaged in his service. If the car was driven without proper lights, or if it was being operated upon the public highway in the night-time at a reckless speed, or without due care for the safety of others lawfully using such public way, the appellant was consenting thereto, tacitly at least, and the driver's negligence was his negligence.

The legal principles thus applied are of such familiar and elementary character as to forbid the extension of this opinion for the discussion or review of precedents. *Carpenter v. Campbell Automobile Co.*, 159 Iowa 52. The case of *Withey v. Fowler Co.*, 164 Iowa 377, cited in this connection by the appellant, is not in point, either in fact or in principle. In that case, the plaintiff was an invited guest, riding in a car over which she neither exercised nor had any authority or right of control, and it was held that the negligence, if any, of the driver would not be imputed to her. The distinction between the cases is manifest.

It is conceded, in support of this appeal, that the evidence would justify a finding that the defendant Ira Miller was negligent in not taking sufficient room to pass the buggy without a collision, and in our opinion, it also justifies a finding that he was negligent in the matter of speed and in failing to discover the buggy in time to prevent the collision; but, under the rule already stated, the concession or proof of negligence on his part in either or all of the several respects mentioned is concession or proof of the negligence of his father.

Many errors are assigned upon the instructions given the jury, and upon the refusal of the trial court to give other instructions requested. Most of the assignments are not argued. Other exceptions relate to the sufficiency of the evidence to justify the submission of the question of negligence on the part of this appellant, a question we have already considered, and ruled against the appellant's contention. We find no ground upon which to disturb the verdict against William Miller, and the judgment thereon is affirmed.

II. For the appellant Roy Wagner, counsel argue but two propositions: First, that there is a misjoinder of parties defendant; and second, that the verdict against him is without support in the testimony.

With reference to the first point here made, it is the position of this appellant that plaintiff wholly failed to show that Miller, in operating the car in front, and Wagner, in operating the car in the rear, were engaged in any common enterprise, or that either driver had any control over the car driven by the other, or was in any way responsible for the negligence of the other. Counsel are clearly mistaken in saying that there is no evidence of any agreement or understanding between the drivers to operate the cars together, with the Wagner car

3. ACTIONS:
Joinder: parties guilty of concurrent negligence.

behind, to afford light for both, if needed. The coroner holding the inquest testifies that Wagner there said it was agreed "that Miller would start in the lead and Wagner would come along and follow behind, and in case Miller's car went bad, they would have plenty of light." According to the same witness, the defendant William Miller also said, on the same occasion, that he told Wagner to follow on behind, so that, if the lights in the car in front grew dim, they would not be left in the dark. These admissions appear to be nowhere denied. It may be conceded, we think, that the running of the cars in close succession under such an agreement would not show such a common enterprise that the negligence of Miller in managing the car in front would be imputable to Wagner in the rear car; but if, while the two cars were being so operated, pursuant to such agreement or understanding, Miller negligently collided with the buggy, throwing the woman into the road and injuring her, and Wagner, following closely, negligently ran his car upon or over her, thereby contributing to her injury and death, we see no good reason why this negligence on the part of both was not of that concurrent character which will sustain a recovery against both in a single action. This, in substance and effect, was the holding of the trial court, and we concur therein.

4. NEGLIGENCE:
evidence: sufficiency: automobile accident.

The further point, that there is no evidence to sustain a finding that Wagner was negligent, is not borne out by the record. There is testimony clearly tending to show that Wagner, as well as Miller, was driving recklessly and without reasonable care for the safety of others having an equal right with him in the use of the road. According to his own showing, he was 50 yards behind Miller when the collision occurred; he saw it; saw the woman thrown into the road; and, though he tried to stop, did not succeed in doing so until he had passed the

wreck a distance of 50 feet. In other words, he shows himself sending his car over the road in the nighttime at such a speed that, although he acted promptly, and his brakes were in good order, it required a distance of 200 feet to make a stop. This estimate is perhaps exaggerated or inaccurate, but even when liberal allowance is made therefor, the fact that he was unable to avoid striking the prostrate form of the woman fairly indicates that the car was moving with great momentum. True, he does not admit that the car did strike her, but the best that he can say for himself in that respect is, "I do not think I struck or came in contact with any of the persons that were in the buggy as I went by." There was other testimony that, on the evening of the accident, and in the presence of the wreck, this defendant admitted that his car "ran over something. He felt it give and came back to see." Indeed, it is difficult to read the record and come to any other conclusion than that the two cars were being run very close together, at a high rate of speed, and that the drivers failed to discover the buggy until too late to turn out and pass in safety, with the result that Miller's car caught and tossed the buggy in a way to throw the deceased violently to the ground immediately in front of the car driven by Wagner, who was following so closely and so rapidly that it was scarcely possible for him to avoid striking her as he went by. The jury evidently adopted this theory, and its verdict cannot properly be overruled by the court. The judgment of the district court as against the defendant Wagner must, therefore, be affirmed.

III. As against the defendant Ira Miller, what we have already said makes it sufficiently clear that he was culpably negligent, and, if this were the only point to be considered, we should promptly affirm his appeal, without other or further discussion. Objection is

5. INFANTS: actions. defense without guardian: arresting entry of judgment.

made, however, that this appellant is a minor, and was not represented or defended by guardian, as required by statute. There was no plea of infancy by appellant, nor was any objection raised on that ground in the course of the trial, but the fact of his age was disclosed in the testimony. The verdict having been returned, the defendant Wagner separately, and the defendants William Miller and Ira Miller jointly, moved the court for a new trial, because of alleged errors appearing in the record, but did not include therein any question as to the minority of the said Ira Miller. This motion having been overruled, Ira Miller moved that judgment on the verdict be arrested and that he be granted a new trial, because of his minority and because no defense had been made for him by guardian. This motion was also denied, and error is assigned thereon.

The question thus presented is the only one upon which there is room for serious debate. Our statute, Code Section 3482, provides that "the defense of a minor *must* be by guardian," and that "no judgment can be rendered against a minor until after a defense by a guardian." Though this matter was not pleaded, it was shown upon the trial that the young man was but 17 years of age. Upon this disclosure's being made, no request or motion for appointment of a guardian for him was made by either party, and the action proceeded to a verdict before any advantage was taken of the omission. Were the defendant of adult years, this omission could well be treated as a waiver of the error, but the same theory or principle which makes an infant incapable of conducting a defense in his own right would seem to necessitate a holding that he is also incapable of waiving the benefit of the statute which provides in mandatory terms that his defense must be by guardian, and that without such defense, judgment shall not be entered against him. This case does not fall within the rule of *Reints v. Engle*, 130 Iowa 726, cited by the appellee. There, the de-

fendant sought to obtain the advantage of an objection of this nature by petition for new trial, filed after the term at which judgment had been rendered against him, and we held that the petition was properly denied, because of his failure to make a showing that he had a good defense to the plaintiff's claim. Code Section 4096. The motion in this case was filed before entry of judgment and within the statutory time after return of the verdict. We see no way to avoid a reversal of the judgment against this defendant. As to him only, the cause will be remanded, with direction to the trial court to appoint a guardian *ad litem* for the said Ira Miller, and proceed to a new trial. The fact of his minority will not, of course, constitute a defense to the plaintiff's claim if the charge of negligence on his part be sustained by the evidence on the retrial; for an infant, no less than an adult, is liable for damages occasioned by his torts.

For reasons stated, the judgment is affirmed as against the defendants William Miller and Roy Wagner, but reversed and new trial ordered as to defendant Ira Miller,
—Affirmed in part; reversed in part.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

CARL DARE, Appellant, v. FRANK FOY, Appellee.

REFORMATION OF INSTRUMENTS: Evidence—Weight and Sufficiency. Reformation of instruments is granted only when the evidence justifying such reformation is clear, satisfactory, conclusive, and practically beyond a reasonable doubt. Evidence held insufficient.

CONTRACTS: Legality of Object and Consideration—Restraint of Trade, Etc.—Inferential Restraint—Sale of Good Will. Permissible restraint on trade must be provided for by specific agreement—may not rest on inference only; therefore the simple sale of a business and the good will attending the same,

without more, does not preclude the seller from engaging in a *separate and independent* business of the *same kind*, and from soliciting the customers of the old business, especially at a point remote from the location of the business sold.

TRADE MARKS AND TRADE NAMES: Unfair Competition—Sale of Business—Continuance at New Location. The gist of "unfair competition" is that the guilty party is expressly or impliedly representing that his product is in fact the product of another; therefore, one who has sold his business, good will, catalogues, etc., employed therein, without restraint on his future activity in the same line of business, is not guilty of unfair competition by operating in a new location a *separate, new, and independent* business, identical in nature with the one sold, and by operating said business by means, in part, of catalogues and circulars intentionally similar in design to those sold, especially when there was a time limit on the purchaser's right to use said catalogues, etc., and said time limit had expired.

Appeal from Clinton District Court.—A. P. BARKER, Judge.

MONDAY, SEPTEMBER 24, 1917.

SUIT in equity to reform and to compel specific performance of the terms of a written contract. The facts are stated in the opinion.—*Affirmed.*

L. F. Sutton and O. M. Slaymaker, for appellant.

Wolfe & Wolfe and F. L. Holleran, for appellee.

STEVENS, J.—I. Prior to June 16, 1913, Frank Foy, appellee herein, was engaged at Des Moines in the business of raising, buying and selling chickens, ducks, geese, pigeons and poultry of all kinds for breeding purposes. He also sold eggs and poultry remedies, incubators, et cetera. He annually distributed a catalogue for the purpose of advertising his business, which was conducted under the name of "Frank Foy," and "Crescent Poultry Farm Co., Incorporated." On the date above mentioned, he entered into a contract in writing with Carl

1. REFORMATION OF INSTRUMENTS: evidence: weight and sufficiency.

Dare, appellant herein, by the terms of which he sold the capital stock of the Crescent Poultry Farm Co., Incorporated, and all poultry, pigeons, poultry remedies, appliances, office fixtures, stationery, desks, other office furniture, files, baskets, coops, boxes, and other items of personal property used by him in the conduct of a mail order business. The contract further provided:

"The party of the first part further transfers and conveys to the party of the second part the good will of the business of the party of the first part, together with all catalogues, stationery and advertising matter, which said advertising matter may be continued as now run, for a period of not to exceed two years, at which time the business may be incorporated as 'F. Foy Co.,' the party of the second part to hold the party of the first part harmless by reason thereof."

In May, 1914, appellee moved to Lyons, Iowa, and in December of that year mailed a catalogue announcing his entrance into business at that place, under the name of "Frank Foy Poultry Co." February 4, 1915, appellant brought this suit, asking reformation of the written contract between the parties, and an order restraining the defendant from further using the name "Frank Foy" in his business, and from imitating plaintiff's catalogues and other advertising matter, and from acts of unfair competition, and prayed judgment for damages in the sum of \$15,000, and general equitable relief. The court below dismissed the plaintiff's petition, and judgment was rendered against him for costs.

Reformation of the contract was sought upon the ground that, by oversight or mistake, there was omitted therefrom a provision previously agreed upon that appellee would not again engage in a similar business for a period of five years. The evidence justified an inference that, prior to the execution of the contract, both parties contem-

plated that a provision restricting appellee from entering into a similar business for five years should be included therein; but the evidence is very conflicting as to how the same came to be finally omitted therefrom. Appellee testified positively that he at no time consented to a provision in the contract limiting his right to again engage in business, but, on the contrary, claims that he at all times refused to consent to such an arrangement.

It is unnecessary for us to set out or discuss the testimony in detail. To justify the reformation of a contract, it must be clear, satisfactory, conclusive, and practically beyond a reasonable doubt. *Beck v. Umshler*, 139 Iowa 378. No such showing was made in this case.

II. Appellant claims that the property

2. **CONTRACTS:** legality of object and consideration: restraint of trade, etc.: inferential restraint: sale of good will.

actually turned over to him by appellee under the contract, for which he paid \$5,500, outside of the good will of said business was not worth to exceed a few hundred dollars, and that the business was largely con-

ducted by mail, and covered a large territory. For the purpose of advertising the business, it was the custom of appellee to issue and distribute, to prospective customers and to the public, catalogues, circulars and other advertising matter. These catalogues contained descriptive matter relative to the different varieties of poultry which he had for sale, and included colored cuts, pictures, symbols, et cetera, illustrative of the different breeds or varieties of birds and poultry.

While at Des Moines, appellee bought and sold eggs and poultry in his own name and sometimes in the name of Mathew Mertz. After he moved to Lyons, Iowa, he began to advertise and carry on a business similar to that which he sold to appellant. Appellant claims that he adopted and used advertising matter, illustrations, catalogues, et cetera, in imitation of the catalogues and advertising mat-

ter previously circulated by him at Des Moines, and after he purchased appellee's business, good will, et cetera; and that he continued to buy eggs and poultry in the name of Mathew Mertz, and to advertise in his name in a Des Moines periodical, notwithstanding the fact that the said Mertz was at the time employed by appellant at Des Moines. The similarity between the advertising matter, and some of the contents and illustrations used by appellee in his catalogue and on his circulars, tends strongly to indicate that he was seeking to thereby call attention to the fact that he had changed his business from Des Moines to Lyons, Iowa.

The definition of good will adopted by this court in *Millsbaugh Laundry v. First National Bank*, 120 Iowa 1, is as follows:

"The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity."

See also *Bradbury v. Wells*, 138 Iowa 673.

Definitions similar to the foregoing are adopted and applied in the following cases: *Kennebec Water District v. City of Waterville*, (Me.) 54 Atl. 6; *Didlake v. Roden Grocery Co.*, (Ala.) 49 So. 384; *Bloom v. Home Ins. Agency*, (Ark.) 121 S. W. 293; *Brown v. Benzinger*, (Md.) 84 Atl. 79; *Haugen v. Sundseth*, (Minn.) 118 N. W. 666; *See v. Heppenheimer*, (N. J.) 61 Atl. 843; *White v. Trowbridge*, (Pa.) 64 Atl. 862; *Consolidated Gas Co. v. City of New York*, 157 Fed. 849; *Prescott v. Bidwell*, (S. D.) 99 N. W. 93, 94; *Lindemann v. Rusk*, (Wis.) 104 N. W. 119; *Gordon v. Knott*, (Mass.) 85 N. E. 184; *Cottrell v. Babcock Printing-Press Mfg. Co.*, (Conn.) 6 Atl. 791; *Williams v. Farrand*, (Mich.) 50 N. W. 446; *Ranft v. Reimers*, (Ill.) 65 N. E. 720.

In *Cottrell v. Babcock Printing Co.*, supra, the Supreme Court of Connecticut said:

"By purchasing the good will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good will was in his mind. * * * At any rate, the express contract is the measure of his right; and, since that conveys a good will in terms, but says no more, the court will not, upon inference, deny to the vendor the possibility of successful competition, by all lawful means, with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and, by advertisement, circular, card, and personal solicitation, invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him, being very careful always, when addressing individuals or the public, either through the eye or the ear, not to lead anyone to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor of the firm of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars, courts are substantially agreed, we think. But some have drawn the line here, and barred personal solicitation. They permit the vendor of a good will to establish a like business at the next door, and, by the potential instrumentalities of the newspaper and general circulars, ask the old customers to buy at the new place, and withhold from him only the instrumentality of highest power, namely, personal solicitation. * * * Other courts have been of the opinion that no legal principle can be made to rest upon

this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not, upon inference, to bar him from trade either totally or partially; and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law."

We quote also from *Fish Bros. Wagon Co. v. La Belle Wagon Works*, (Wis.) 52 N. W. 595:

"Notwithstanding the good will of an established and successful business may be sold in connection with the property and assets, so as to entitle the purchaser thereof to a certain limited protection, yet such transfer will not of itself alone be sufficient to preclude the seller from engaging in a separate and independent business of the same kind, and to solicit the customers of the old business, even in the same city or village, much less in a city or village 200 miles or more distant."

Applying the foregoing authorities to the evidence in this case, it is our opinion that the contract should not be construed or applied so as to restrain appellee from engaging in a similar business in a city more than 200 miles distant from Des Moines. He did not, by the contract, agree not to engage in business again in Des Moines or elsewhere, though probably, as an inducement to make the contract, he led appellant to so believe; but that is of no avail in this

case.

8. TRADE MARKS
AND TRADE
NAMES: unfair
competition;
sale of busi-
ness; con-
tinuance of
new location.

III. Appellant charges appellee with unfair competition, also. The basis of this charge is the alleged attempts of appellee to circulate and distribute catalogues so similar in shape, size, cover design, and general arrangement and appearance, to those formerly issued by him as to deceive his former customers and the public generally.

It is claimed that the illustrations of the fowls advertised in his catalogue are similar to or identical in color, variety, grouping and descriptions with those used by appellant. On the other hand, appellee maintains that the illustrations used by him are of a stock variety, and that they were purchased by him of a publisher selling the same to anyone desiring to buy.

It is quite apparent from the evidence that appellee has sought, in a measure, to give the catalogues and advertising matter circulated by him the same general appearance as the catalogues and advertising matter formerly issued by him and sold to appellant. The similarity of the arrangement, the illustrations, et cetera, are well calculated to call the attention of his former customers thereto. It does not appear from the evidence, however, that he has made any effort, by advertising, correspondence or personal solicitation, to induce his former trade to believe that he is conducting the same business at the same place, or that he has removed it therefrom to Lyons, Iowa. His stationery and advertising matter all apparently show correctly his place of business; but in some of it, he styles himself as "The Original Frank Foy." As above stated, much of the business of appellant is done by mail, and his catalogues and advertising matter are widely distributed throughout the country.

Appellant apparently proceeds on the theory that he is entitled to the exclusive use of the advertising matter purchased by him of appellee, and that any attempt on the part of the latter to simulate the same is a violation of the contract under which he purchased the business at Des Moines. Of necessity, persons advertising the breeding and raising of identical birds and varieties of fowls would, if they undertook to use colored illustrations, to some extent imitate the advertising matter of each other. Appellee conveyed to appellant "all catalogues, stationery and advertising matter, which said advertising may be continued as now

run for a period of not to exceed two years, at which time the business may be incorporated as 'F. Foy Co.'" The two-year limitation expired before this case was tried below. By implication at least, the exclusive right of appellant, if such were intended by the terms of the contract, expired at the end of two years after its execution. *Hanna v. Andrews*, 50 Iowa 462. It may be that appellant understood that he was buying the advertising matter and business of appellee in consideration, in part at least, of appellee's agreement not to again engage in a like business; but, as no such provision appears in the contract, and same cannot be reformed, under the evidence before us, to so provide, we must be guided by the provisions thereof, as executed.

Unfair business competition may consist of the adoption, imitation or simulation of the advertising matter or symbols used by another in such a way as to mislead the customers of a competitor and the public into believing that the goods offered by him for sale are the goods of another. In *Motor Accessories Mfg. Co. v. Marshalltown M. M. Mfg. Co.*, 167 Iowa 202, we said:

"It consists in the conduct of a trade or business in such a manner that there is an expressed or implied representation that the goods or business of the one man are the goods or business of another, * * * and applies in cases where one simulates the particular device or symbol employed by another in such a way as to deceive the ordinarily prudent person, thereby leading him to believe, by the marks thus simulated, that the goods are the goods of another, and thus practicing a fraud upon the person whose goods he simulates, and upon the general public dealing in those goods."

Also, in *Sartor v. Schaden*, 125 Iowa 696, we further said:

"[The action] is all bottomed on the principle of com-

mon business integrity, and proceeds on the theory that, while the primary and common use of a word or phrase may not be exclusively appropriated, there may be a secondary meaning or construction which will belong to the person who has developed it. In this secondary meaning there may be a property right."

While the similarity in the appearance of the catalogues and other advertising matter issued by appellee to those used by appellant is well calculated to attract the attention of former patrons of appellee, and to identify him with the person formerly in the same business at Des Moines, yet he does not pretend to be conducting the same business nor to be in any way connected therewith. The catalogues and advertising matter used by appellant were purchased of appellee for use for a limited period, and that time has expired. The advertising matter, catalogues, et cetera, sold by appellee to plaintiff were of appellee's original production, and the use thereof by appellant was, by the terms of the contract, for a period of not to exceed two years.

IV. It appears from the evidence that appellee engaged in business at Lyons, Iowa, and put out the catalogues complained of within two years after the execution of the contract. Appellant claims damages in the sum of \$15,000, but the trial court rightly found that the evidence offered did not furnish the necessary data for determining the amount of damages, if any. Without expressing an opinion upon the merits, or upon appellant's right to damages, we refrain from passing upon this question, and leave plaintiff to pursue any remedy which he may have against appellee therefor.

For the reasons pointed out, the decree and judgment of the lower court are—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

LAWRENCE DRAKE et al., Appellees, v. S. E. BRICKNER et al.,
Appellants.

EXECUTION: Levy—Indorsement of Levy on Writ. Principle recognized that it is essential to a valid levy under execution that the sheriff enter the *fact of levy* upon the writ when such levy is made, and that the entry of such matters in the incumbrance book will not satisfy this requirement.

EXECUTION: Levy—Excessive Levy. When a judgment defendant owns an undivided interest in separate and distinct tracts of land, it is the duty of a sheriff to levy only upon the interest of the defendant in that tract which will, as nearly as practicable, realize the exact amount due under the judgment. Held that, under an execution for some \$320, a levy upon the defendant's \$6,000 undivided interest in a tract of land, instead of a levy upon the defendant's \$600 undivided interest in another tract, was excessive.

EXECUTION: Sale—Manner, Conduct and Validity—Sales En Masse. Principle recognized that a sale of tracts of land en masse which could advantageously have been sold separately may be set aside, either by motion or by proceeding in equity

EXECUTION: Sale—Manner, Conduct and Validity—Adjournment —Inadequate Bids. A sheriff, charged as he is with the duty to be absolutely fair and impartial between the plaintiff and defendant in execution, abuses the discretion lodged in him by not adjourning a sale when the bids on the property are *grossly inadequate*. So held where the property levied on, under an execution for some \$320, was worth \$6,000, and the highest bid was \$800 by a stranger to the execution.

EXECUTION: Sale—Manner, Conduct and Validity—When Inadequate Bid Nullifies Sale. The rule that a sale of property on execution for a grossly inadequate price does not *necessarily* work a setting aside of the sale, does not apply when the sale is a non-redeemable one, and the judgment defendant has property subject to execution other than that levied upon, out of which, had levy been made thereon, the amount due on the execution might have been made without great disparity between bid and the value of the property. So held where, under an execution

for some \$320, property worth \$6,000 was sold for \$800, when another tract worth \$600 was subject to execution.

EXECUTION: *Sale—Manner, Conduct and Validity—Inadequate*
6 *Price Combined with Unfairness—Effect.* Inadequacy of price, plus circumstances indicating a purpose on the part of the successful bidder to unfairly take advantage of the judgment defendant's financial embarrassment, may be sufficient to stamp a sale as fraudulent.

EXECUTION: *Sale—Manner, Conduct and Validity—Sale Without*
7 *Redemption—Essentials of Notice.* Principle recognized that notice of the sale of real estate on execution must distinctly state that such sale will be made *without the right of redemption*, when such is the fact.

JUDGMENT: *Entry, Etc.—Correction.* Principle recognized that,
8 if the entry of a judgment upon the record book is incomplete, the court has authority to order a correction.

Appeal from Winneshiek District Court.—W. J. SPRINGER,
Judge.

SATURDAY, JUNE 23, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

SUIT in equity to cancel and set aside a sheriff's sale and to enjoin the execution of a sheriff's deed. Decree as prayed. Defendant appeals.—*Affirmed.*

E. W. Cutting, for appellant.

E. R. Acres, for appellee.

STEVENS, J.—The undivided one-twenty-first interest of Lawrence Drake, plaintiff in this case, in a tract of 227.08 acres of land, was sold on general execution to satisfy a judgment for \$319.75 entered against him for costs in a criminal prosecution. A sheriff's certificate of purchase was issued to S. E. Brickner, appellant, who bid the land in at the sale for \$800. Shortly thereafter, this suit was commenced by Lawrence Drake to set aside and cancel

the sale and enjoin the sheriff from executing and delivering deed to the purchaser. Some time after the trial of this case, the plaintiff died, and his mother, administratrix of his estate, and his heirs at law were substituted as plaintiffs and appellees herein.

It is claimed on behalf of appellee: (a) That no levy was in fact made of the execution, for the reason that the sheriff did not make the entries on the execution at the time, as required by statute; (b) that the levy was excessive; (c) that the price at which plaintiff's interest was sold was grossly inadequate; (d) that the transaction was fraudulent in law and fact; (e) that no judgment was ever entered upon the record book of the clerk's office against the defendant for costs, and that the purported judgment upon which execution was issued is wholly void; and (f) that the land should have been offered for sale in smaller tracts instead of *en masse*, and that a much larger quantity was sold than was necessary to satisfy the judgment.

The trial court found the interest of Lawrence Drake in the real estate sold to be worth approximately \$6,000, and that the sale and levy were unlawful, unjust and inequitable, and not only a fraud in law, but that same operated as a fraud in fact.

I. Section 3965 of the Code, 1897, provides:

"The officer to whom an execution is issued shall indorse thereon the day and hour when he received it, the levy, sale or other act done by virtue thereof, with the date thereof, the dates and amounts of any receipts or payment in satisfaction thereof; which entries must be made at the time of the receipt or act done."

In a legal sense, there can be no levy on real estate, until the fact thereof is entered upon the execution. The making of required entries upon the encumbrance book is not sufficient. *Mullaney v. Cutting*, 175 Iowa 547.

The clerk of the district court, who issued the execu-

tion, called as a witness on behalf of the plaintiff, testified, in substance, that he made the entries upon the encumbrance book for the deputy sheriff to whom he delivered the execution, and that no entries then appeared upon the execution; that it was not the custom to enter the fact of the levy thereon until final return thereof. When recalled as a witness, he was somewhat uncertain as to whether a memorandum of the levy appeared upon the execution at the time the entries were made upon the encumbrance book.

The full return on the execution was offered in evidence, from which it appears that the date and hour when received by the sheriff were made a part thereof. The return, in language and form, has the appearance of being a continuous, narrative statement of the proceedings under execution, and of having probably been made after the sale.

The deputy sheriff to whom the execution was delivered, and who conducted the sale, was not called as a witness; hence, the only direct testimony bearing upon the question is that of the clerk. It is by no means certain that the entries, without which the levy was invalid, were made upon the execution as required by Section 3965.

II. The court below held the levy excessive. The statute prescribing the duty of the officer levying an execution is Section 3970 of the Code, 1897, and is as follows:

2. Execution: levy; excessive levy.
"The officer [with the execution] shall in all cases select such property, and in such quantities, as will be likely to bring the exact amount * * * to be raised, as nearly as practicable, * * *"

The execution in this case was levied upon the undivided interest of Lawrence Drake in a tract containing 227.08 acres, which interest was of the fair value of \$6,000. The land in question was encumbered by the life estate of the mother of the plaintiff and of the wife of appellant.

The sheriff did not offer the land for sale in separate subdivisions or parcels, but only the interest of the judgment debtor in the whole tract was offered. The amount of the judgment appears to have been bid by the county attorney, but appellant offered \$800, and the sheriff sold the land to him without further bidding.

It is the contention of appellant that the sheriff was bound to levy upon the undivided interest of the judgment debtor in the whole tract; that he could not sell his interest in a subdivision thereof, and that, even though the levy was excessive and the price obtained at the sale inadequate, the same could not be set aside on that ground alone. The claim here made is based upon our holding in *Jonas v. Weires*, 134 Iowa 47, as follows:

"The plaintiff had only an undivided interest in the tract of land involved, and this interest was subject to a life estate. It would have been impossible for the sheriff to levy upon and sell plaintiff's undivided interest in a portion of the tract, for plaintiff was not seised as a tenant in common of an undivided interest in each of the parcels, but only an undivided interest in the whole. A tenant in common may make a valid sale of an undivided fraction of his undivided interest, but he cannot sell his interest, or any portion thereof, in a part of the premises by metes and bounds, because this would interfere with his cotenants' right of partition, and for this reason an execution sale of the interest of a tenant in common in a portion of the premises subject to the common ownership cannot be made."

It is stated by appellant in his abstract that appellee was the owner of a like interest in another tract composed of several small subdivisions, but aggregating 117.5 acres. It is not quite clear from the evidence what was the fair market value of the smaller tract, but it must have been in the neighborhood of \$12,000. If so, the interest of the judgment debtor was approximately worth \$600, and should

have been sufficient to satisfy the judgment in question.

It has been held in other jurisdictions that, where the judgment debtor is the owner of an undivided interest in separate parcels or tracts not situated or used in common, his interest in any one or more parcels is subject to execution and may be levied upon and his interest in enough parcels sold to satisfy the execution, but that less than his whole interest in each parcel cannot be sold. Freeman on Cotenancy and Partition (2d Ed.), Section 216; *Butler v. Roys*, 25 Mich. 53; *Starr v. Leavitt*, 2 Conn. 243.

It appears to be the theory of appellant that the tracts above referred to were so situated that it was proper, under the holding in *Jonas v. Weires*, supra, to sell the interest of the judgment debtor in each separately. If so, it was the duty of the sheriff, if possible, to levy only upon such interest of the judgment debtor in property subject to levy as would be likely to bring the exact amount to be raised, as nearly as practicable.

It is the settled doctrine of this court that a sale *en masse* of tracts of land which could advantageously have been sold separately may be set aside either by motion or proceeding in equity. *Boyd v. Ellis*, 11 Iowa 97; *White v. Watts*, 18 Iowa 74; *Bradford v. Limpus*, 13 Iowa 424; *Lay v. Gibbons*, 14 Iowa 377; *Copper v. Trust & Savings Bank*, 149 Iowa 336.

It has, however, been held that, if the land cannot be sold in separate tracts for want of bidders, it is then proper to sell it *en masse*. *Connecticut Mutual Life Ins. Co. v. Brown*, 81 Iowa 42. This right, however, is subject to the provisions of the statute hereinafter referred to. It did not appear, in the cases referred to, that the debtor possessed other property subject to levy.

It would seem that the interest of Lawrence Drake in the smaller tract should have been sold for enough to sat-

8. EXECUTION:
sale: manner,
conduct and
validity: sales
en masse.

isfy a judgment of \$319.75, but if the sheriff, at the time of levying the execution, believed his interest in the smaller tract insufficient, then he might have levied upon both the 227.08-acre tract and the 117.5-acre tract and offered them for sale separately, the smaller first, and, if it brought sufficient to satisfy the judgment, then the levy would be released upon the larger tract; but it is our conclusion that notwithstanding the fact that the judgment debtor owned only an undivided interest in the tract levied upon, yet, as he possessed other property sufficient to satisfy the execution, the same should have been levied upon and first offered for sale, and that the levy was excessive.

III. Section 4029 of the Code, 1897,

4. **EXECUTION:** authorizes the sheriff to adjourn a sale on
sale: manner,
conduct and
validity: ad-
jourment: in-
adequate bids. execution where there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the date advertised. The discretion of the sheriff as to adjournment should be exercised with a fair and impartial regard as to the interests of all parties concerned, and where, on the day fixed, there are no bidders at all, or when the amount bid is grossly inadequate, he shall ordinarily postpone the same. *Sicortzell v. Martin*, 16 Iowa 519. The discretion herein vested in the sheriff should be exercised with a fair and impartial attention to the interest of all parties concerned, and a failure to do so may be ground for setting aside the sale. *Copper v. Trust & Savings Bank*, supra. It was, therefore, not only the duty of the sheriff to levy only upon such property as would be likely to bring the amount to be raised, but also to adjourn the sale if the amount bid was grossly inadequate. The value of the interest levied upon, as above stated, was approximately \$6,000. It was sold for the insignificant sum of \$800. This would seem to have

been a case in which the discretion of the sheriff should have been invoked and the sale adjourned.

It is true that this court has held that

5. EXECUTION: mere inadequacy of price does not necessarily render the sale voidable, but, as was said in *Mullaney v. Cutting*, supra, this holding rests in part upon the fact that the sales under consideration were subject to redemption. In this case, the judgment under which the execution was issued had been appealed from, and the judgment debtor had no right to redeem from the execution sale. It has been held that:

"The holder of a judgment is not to be deprived of his right to satisfy his judgment out of the property of the judgment debtor because the only property which he can find is an indivisible parcel greatly exceeding in value the amount of the judgment; nor is there any fraud in bidding only the amount of the judgment and costs." *Jonas v. Weires*, supra.

This case, however, is distinguished from the cited case by the fact that the judgment debtor was possessed of other property subject to levy, out of which the judgment could have been satisfied. In exercising the discretion required of a sheriff acting with an impartial regard to the interests of all parties concerned, the sale might well have been adjourned to a later date by him.

IV. As above stated, the court found the levy "unlawful, unjust and inequitable * * * and not only a fraud in law, but that same operated as a fraud in fact." It is quite earnestly contended by counsel for appellant that this finding was not sustained by the evidence.

It appears from the evidence that ap-

6. EXECUTION: appellant married the sister of plaintiff, who is the owner of an undivided interest in the tract sold; that, shortly prior to the sheriff's sale, appellant employed an attorney to

procure for him an assignment of several small judgments against the plaintiff; that, on the morning of the day of the sale, the said attorney ordered out an execution in three judgments against plaintiff and placed the same in the hands of the sheriff; that the county attorney and himself were bidders at the sale; that plaintiff had served a brief term in the penitentiary and was not possessed of good credit in the community where the land is situated; that he did not know that he was not entitled to redeem from the sheriff's sale; that he had made an effort to borrow the money to pay the judgment, offering to pledge his interest in the land for that purpose, but that he was unable to make a loan in an amount sufficient to satisfy the several judgments against him.

Numerous witnesses were called on behalf of appellant to testify to the market value of the land and its value as security for a loan. It also appears from the evidence that appellant probably knew that plaintiff could not raise the money with which to satisfy the judgment, and that he did not have the right to redeem from the sheriff's sale. The evidence does not show that appellant was instrumental in causing execution to be issued on the old judgment for costs, but it does show that he was deputy clerk of the district court at the time the costs were taxed.

The court, in *Copper v. Trust & Savings Bank*, supra, reiterated the prior holding of the court that gross inadequacy of consideration, while insufficient in itself to justify the setting aside of the sale, nevertheless may be a "very important fact in connection with other circumstances tending to establish fraud, either actual or constructive. Where other circumstances are shown which excuse the plaintiff's failure to redeem, gross inadequacy of consideration may be sufficient to establish an inference of fraud."

Again, in *Fortin v. Sedgwick*, 133 Iowa 233, the court said:

"Even in the absence of other circumstances characterizing the case, the enormous disproportion between the value of the property sold and the sum to be raised is, in itself, ground from which the inference of fraud is legitimate."

"From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud." *Graffam v. Burgess*, 117 U. S. 192.

It is also claimed by appellant that notice was served upon the plaintiff of the execution sale; that he did not attend, and that he made no effort at the sale to protect his interest. The evidence quite satisfactorily shows that he was unable to raise funds with which to pay the judgment and thereby prevent the sale. We do not find copy of the notice in the record, but, as plaintiff testified that he did not know that the appeal destroyed his right of redemption, it may be assumed that the notice did not apprise him of that fact.

7. EXECUTION:
sale: manner,
conduct and
validity: sale
without redemp-
tion: essentials
of notice.

It was held, in *Mullaney v. Cutting*, supra, that it is the very essence of a notice of sale that it state, where that is the fact, that the sale will not be subject to the right of redemption.

Without discussing the evidence in detail, but viewing the same in the light of the authorities cited, we reach the conclu-

sion that there were other facts and circumstances besides mere inadequacy of price that should be considered by the court, and that the sale was properly set aside and the sheriff permanently enjoined from executing a deed to the purchaser.

V. In view of the conclusion reached upon the other questions involved, it is not necessary to pass upon the questions as to whether the judgment was properly entered upon the record book. If the entry upon the record book was incomplete, the court had authority to order the correction thereof. *Lambert v. Rice*, 143 Iowa 70.

It is our conclusion that the judgment of the lower court should be, and is,—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

E. C. FISH, Appellant, v. E. C. WHITE et al., Appellees.

CORPORATIONS: Transfer of Shares—Stock Issued for Other Than

1 **Money—Violation of Statute—Fraud—Rescission.** The sale, by the original incorporators, of corporate shares of stock which have been issued for property *other than money*, to one ignorant of such fact, is of itself a representation that such shares were issued:

(1) Only after due application had been made to the executive council for permission to so issue;

(2) Only after due appraisement of such property by said council;

(3) Only after the said council had authorized said issuance; and

(4) Only in the amount so authorized.

Section 1641-b, Code Supplement, 1913. And if such representation be false, a rescission of the sale may be had.

CORPORATIONS: Shares of Stock—Issuance for Property Other

2 **Than Money—Conditions.** Stock issues to the amount of the money invested in a partnership whose general assets were turned over to the corporation are unauthorized, without obtaining the consent of the executive council to such issue after

due application to and appraisement by such council. Section 1641-b, Code Supplement, 1913.

CORPORATIONS: Shares of Stock—Full Payment to Corporation

3 —Burden of Proof. One contending that shares of stock were issued only after full payment in money or its full equivalent to the corporation has the burden to so show.

CORPORATIONS: Transfer of Shares—Sales—Fraud—Evidence.

4 Evidence reviewed, with reference to alleged false representation concerning the financial condition of a corporation and attending a sale of stock, and held to present a jury question.

Appeal from Polk District Court.—W. H. McHENRY, Judge.

TUESDAY, MAY 22, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

ACTION at law to recover damages alleged to have been occasioned by the fraud and deceit of the defendants in the sale to plaintiff of certain shares of corporate stock. There was a directed verdict and judgment for defendants, and plaintiff appeals.—*Reversed and remanded.*

J. G. Myerly, for appellant.

W. L. Ryan, for appellees.

WEAVER, J.—The defendants are moth-

1. **CORPORATIONS:** er and son. Prior to the dealings between
transfer of them and the plaintiff which are the sub-
shares: stock
issued for other
than money: ject of this controversy, the son, A. C.
violation of
statute: fraud: White, entered into partnership with one
rescission. Cline for the manufacture and sale of ice
cream cones. Cline, who claimed to have invented a ma-
chine for the making of the cones, undertook on his part
to secure a patent for his invention, which, when issued,
was to become the property of the partnership, together
with all the tools, auxiliaries and furniture; also to build
and complete four additional machines. White undertook

on his part to furnish \$5,000 in money, payable \$2,500 down and an equal share at a later date. The money to meet this obligation on White's part was apparently furnished or advanced by his mother, who seems thereafter to have had an active hand in the management of the business. A year or more after the formation of the partnership, the business was incorporated under the name of the Ameri-Cone Company. The limit of authorized capital is not stated, but shares of stock to the amount of \$15,000 were issued as follows: 50 shares, or \$5,000 par value, to Cline for his rights as inventor of the machine and for the machinery, tools and property furnished by him; a like amount to A. C. White to cover the amount he had contributed to the partnership; and the remainder to E. C. White to cover the amount of other money she had contributed to the business. Whether this money was advanced by her before or after the incorporation is by no means clear, the evidence being such that a jury might easily find either way upon the question. Mrs. White says the money went into the new machine and running expenses. She further says that a good share of it was expended in experimenting and in salaries. It should be said here that, beginning at a time not clearly shown, Cline began the construction of a new and larger machine, and that the necessary cash expense of it was supplied by the Whites, and this is the machine to which the witness refers. No money was in fact paid into the company treasury when the stock was issued, nor was any appraisalment of the property and assets taken for the stock made by or for the state executive council, nor any application made to said council for leave to issue paid-up shares of stock therefor, as the statute requires. See Code Supplement, 1913, Section 1641-b. Before the corporate business had proceeded very far, differences arose between Cline and the Whites, which ended in his withdrawal from the concern, taking out with him the

new machine and returning his 50 shares of stock. No patent has ever been issued upon these machines, but an application therefor was pending at the time of the trial below. The incorporation was had in the early part of the year 1914. In the summer of that year, the plaintiff, a former intimate friend of the Whites', then residing in Oregon, came to Des Moines, and while there, learned something about the enterprise in which the Whites were engaged. After plaintiff's return to Oregon, there was some correspondence between him and A. C. White, in the course of which plaintiff suggested an inclination on his part to buy one of the cone-making machines and attempt to build up a business in the west. This developed into negotiations looking to the return of the plaintiff to Des Moines and the purchase by him of an interest in the Ameri-Cone Company. An indefinite and more or less tentative arrangement was agreed upon, and plaintiff returned. He says that, when he first met defendants at this time, they showed him the company's books and records, together with a statement showing the assets of the company, over and above liabilities, to be over \$13,000. In a letter previously written him by A. C. White, it was stated that they had "baked over five million cones this year and could have baked more had we not put in our time building the new machine." He also said, "Now if you want to go into the cone business, I would like to have you for a partner, and I know that we would work together so that we would both get rich." In their interview after plaintiff's return, the evidence reveals very little in the way of definite or specific representations of fact by the defendants, but it is reasonably clear that they impressed plaintiff with the belief that the company was financially sound, with a promising business and a favorable outlook for the future. The result was that plaintiff took 3 shares of the stock, paying therefor \$300, and very shortly afterwards he took and paid for 9

other shares at the same rate. At this time, the defendants were respectively president and secretary of the company. The certificate for the first 3 shares was delivered to him, and the certificate for the remainder was made out, but left in the company's stock book, from which plaintiff did not remove it, though he had the opportunity. A few months' experience led plaintiff to the conclusion that the business was a failure, and that the stock which he had purchased was of little value, and, claiming that he had been deceived by the defendants, he withdrew from the concern and brought this action to recover damages, tendering a return of the stock issued to him. The defendants deny all allegations of fraud and deceit, and allege that plaintiff bought the stock with full knowledge and notice of the facts concerning its issuance and the actual condition of the business. At the close of the trial, the defendants moved for a directed verdict in their favor, on the ground that the evidence was insufficient as a matter of law to sustain a verdict for the plaintiff. The court adopted this view, and verdict and judgment were entered accordingly.

Did the trial court err in holding as a matter of law that there had been an entire failure of proof on plaintiff's part? We think this must be answered in the affirmative. We reach this conclusion on the following grounds:

I. It appears without dispute that the
2. CORPORATIONS: shares of stock were issued without author-
shares of stock: ity. The offer of such stock for sale was in
issuance for property other than money: itself a false representation that the shares
conditions. had been issued in accordance with law and
that the amount thereof had been, in good faith, paid
into the company's treasury. *Sykes v. Pure Food Cider Co.*, 157 Iowa 601. That such representation was untrue is not denied. The fact, if it be a fact, that the defendants put an amount of money equal to the par value of the stock into the original partnership or partnership

business is no answer to the proposition that the stock was issued without authority. What the partnership turned over to the corporation was not the money which the partners had invested, but the property for which that money or a part thereof had been expended. Indeed, so far as Cline's stock was concerned, he does not appear to have paid a dollar, except in the form of a more or less nebulous prospect of a patent not yet granted, and his labor (the amount and value of which is not shown) in the construction of the baking machines. The property turned in as payment for the defendants' stock may have been worth what the defendants had put into it and what they had paid for "experiments," "salaries" and running expenses; but, if ordinary human observation and experience be any criterion, it was worth much less. But in any event, the burden of proving that the stock issued represents full payment therefor—not to the partnership but to

the corporation—in money or its full equivalent, was upon the defendants. The only answer made by counsel to this ground of complaint is that, whatever be the truth in this respect, the facts were known to the plaintiff at the time he purchased the stock. This, however, is not conceded by the plaintiff, nor is it conclusively proved. If plaintiff's contention at this point be true, it was his undoubted right to tender a return of the stock and demand repayment of the purchase money, and this would be none the less true though the corporation as he found it was entirely solvent and held property equal to or in excess of all its liabilities, including its capital stock. We regard it as very clear that upon this issue defendants were not entitled to a directed verdict.

3. CORPORATIONS:
shares of stock:
full payment
to corporation:
burden of proof.

II. Upon the other question of false representations concerning the business and financial condition of the company, the case for the plaintiff is much less clear, but it is not without evidence in its support

4. CORPORATIONS:
transfer of
shares: sales:
fraud: evi-
dence.

For example, in a letter by A. C. White stating his desire to have plaintiff come into the business, he stated, as we have already quoted, that the company had baked over 5,000,000 cones and could have turned out more, but for the time which had been spent in building the new machine. This the plaintiff could rightfully regard as a representation of the amount of business done by the company in the first year of its existence, but Mrs. White testified on the trial that the cones sold were "perhaps a couple of thousand." The selling price of cones, as stated in the abstract, was \$3.50 per thousand. At this rate, a production of 5,000,000 cones would indicate a business of \$17,500, as against the wholly negligible amount of \$7 in actual sales. Plaintiff also testified that defendants represented to him that the stock was selling at par, while we think it a fair inference from the entire record that none of the stock had ever been sold at any price. It is true that defendants claim, and there is evidence tending to show, that they submitted to plaintiff their books and made full disclosure to him of the condition of the company and its business. To some extent these claims are admitted by plaintiff, but his admissions are not so broad as to take this issue from the jury.

What we have said sufficiently indicates that the motion for a directed verdict in defendants' favor should have been denied. For the error in sustaining the motion, the judgment below is reversed and the cause will be remanded to the district court for a new trial.—*Reversed and remanded.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

ALEX. FONTANA, Appellee, v. FORT DODGE, DES MOINES & SOUTHERN RAILROAD COMPANY, Appellant.

RAILROADS: Accidents at Crossings—Negligence—Evidence. Evidence reviewed, and held to present a jury question: (a) Whether plaintiff, injured on a crossing, was guilty of contributory negligence; and (b) whether defendant was guilty of negligence in operating the car at a high rate of speed.

Appeal from Polk District Court.—WILLIAM S. AYRES, Judge.

TUESDAY, MAY 22, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

ACTION to recover damages for personal injuries sustained by plaintiff as the result of the collision of one of defendant's cars with an automobile, in which plaintiff was riding with another person. The accident happened January 10, 1915. The automobile was struck by a north-bound car on defendant's track, and it is claimed by plaintiff that the automobile had stopped when it was upon the railway track. Plaintiff alleged that he sustained a double fracture of the lower jaw and other bruises and injuries; that he has suffered mental and physical pain and loss of wages. There was a trial to a jury, and a verdict and judgment for plaintiff in the sum of \$925. Defendant appeals.—*Affirmed.*

George E. Hise, S. R. Dyer, J. W. Jordan, and W. R. Dyer, for appellant.

Thomas J. Guthrie, Miller & Wallingford, and Oliver H. Miller for appellee.

RAILROADS:
accidents at
crossings:
negligence:
evidence.

PRESTON, J.—Plaintiff alleged that defendant was negligent in the following particulars: First, in operating its car at the highway crossing where the automobile was struck at a high and dangerous rate of speed; second, in approaching the crossing without giving the signals required by law; and third, in not maintaining a proper and safe crossing at said point, in that it failed to have the same properly planked with boards of sufficient length, and failed to have sufficient boards between the rails, and failed to have an approach to the rails, all of which caused the automobile to become stalled upon the railway track when the wheels went down between the rails, and the engine of the automobile died. The answer of the defendant was in general denial, and also pleading that plaintiff was guilty of contributory negligence.

The principal argument of appellant in this court is that the plaintiff was guilty of contributory negligence, and that, had he exercised ordinary care, and used his senses of sight and hearing, there being nothing to obstruct his view at the crossing, he would not have failed to see the approaching car in time to avoid the accident and injuries; and that the proximate cause of his injuries and damage was not the alleged negligence of the defendant, but the plaintiff's own acts and negligence.

No evidence was introduced on behalf of the defendant. There was some conflict in the testimony of plaintiff's witnesses, and doubtless some of the testimony is exaggerated to some extent. The credibility of the witnesses was for the jury, and we think the question of defendant's negligence in operating the interurban car at the time in question, whether it was at a high and dangerous rate of speed under the circumstances, whether signals were given, whether the defendant maintained a proper crossing, and whether plaintiff was guilty of contributory negligence, was

for the jury, and that the verdict is sustained by the testimony.

Without going into the evidence as to the three alleged grounds of negligence, it is enough to say that there was evidence to sustain all three grounds, and, unless it be held that plaintiff was guilty of contributory negligence, then the jury could have found that the negligence alleged was the proximate cause of the injury. As said, the principal ground relied upon, apparently, in this court for a reversal, is the alleged contributory negligence of the plaintiff. It is true, as contended by appellant, that plaintiff could have seen up the track from the crossing some 2,000 or 2,036 feet, and if that was all there was to it, there would be force in appellant's contention; but there is evidence tending to show, and from it the jury could have found, that the automobile engine died, as the witnesses put it, when on the railroad track. The automobile side curtains were up, also the wind shield, and plaintiff was attempting to unbutton the curtains to get out when he was struck by the interurban car. The testimony is that he took hold of the curtains to open the door for getting out, and could not see anything more, for that "knocked him out," as he puts it. It would not take the interurban car very long to go 2,036 feet, going at the rate of 45 miles an hour. There is testimony tending to show that the parties in the automobile were noticing up the track when approaching the crossing in question.

The place where plaintiff was injured was the first highway crossing south of Oralabor, a small mining village on defendant's line of road in Polk County. Counsel for appellant and appellee do not agree exactly as to the statement of the facts shown by the record, each taking the view most favorable to his contention. If the evidence was as contended by appellant, and the jury had so found, a finding for the defendant would have been sustained; and

so, too, if as contended by appellee. We shall set out the record in a general way, without going too much into detail. It appears that, at Oralabor, the tracks of the Chicago & Northwestern Railway run north and south, and just east of said tracks and parallel thereto are the interurban tracks of the defendant company. The defendant's tracks at this point consist of a main track, just east of which is a switch track. Some 275 or 300 feet south of the Northwestern depot at Oralabor is the public highway, running east and west, and the crossing at which plaintiff was injured. The automobile was being driven west upon the highway at the same time a southbound Northwestern passenger train was making the station stop at the depot. There is evidence that the auto was first stopped within 50 to 75 feet east of the main track of the interurban line; that the plaintiff and the driver of the automobile were observing the Northwestern train at the depot some 300 feet or so north, and were awaiting its passage south before crossing the Northwestern track, about 60 feet or more west of the main track of the interurban.

Plaintiff employed the driver to run the machine, which belonged to the driver, Bartoletti. Plaintiff got into the automobile at house No. 17 in said village, and took a seat on the right-hand, or north, side of the car, the car being a left-hand drive, plaintiff occupying the same position until a moment prior to the collision. Plaintiff and the driver drove from house No. 17 to 19, west along the main street of the village, then turned to the left, and drove south along the highway for a distance of 275 feet, then turned west to the right at what plaintiff calls the corner. This corner where plaintiff turned is 96 feet east of the crossing where the accident occurred. When the auto was upon the switch track of the interurban company, it was passed by one Antonio, who was on foot, and about to cross the Northwestern track ahead of the southbound train.

As he crossed the interurban main track, he looked north and south, but did not see any car on defendant's track. While this witness was continuing westward toward the Northwestern track, the automobile was stopped 10 or 15 feet east of the main interurban track, according to the testimony of some of the witnesses, and they say that, during all the time they were progressing westward, both plaintiff and the driver were looking north and south for an interurban car, but none was in view. As the Northwestern train started from the depot, the automobile had been again started west, and, as witness Antonio reached the Northwestern track, he testifies that he turned, and saw that the automobile had stopped upon the defendant's main track. According to the testimony of plaintiff, from the time they started up this last time until the auto got on the defendant's main track, plaintiff had been on the lookout for an approaching interurban car, both from the north and south, as had the driver. Plaintiff, after looking to the south and then to the north, had turned around to unfasten the north curtain, in order to get outside to start the engine of the auto, which had died. At the time Antonio observed the auto standing upon defendant's main track, the Northwestern train was coming from the depot. He then looked to the south, and saw an interurban car just coming into view, 2,036 feet away. Another witness testifies to standing upon the ground between the Northwestern and the defendant's tracks, and that he had seen the automobile come to a sudden stop upon the defendant's main track, and at that time had seen the interurban car just coming into view. The jury could have found from the testimony that the interurban car of the defendant which struck the parties had been in view at the instant the automobile stopped upon defendant's main track, and that the sudden stop and the killing of the engine had been caused by the front wheels' dropping between the

planks between the rails. A witness testifies that, as near as he could tell, the head end of the Northwestern train was just over the crossing at the time of the collision. Another witness says that he saw the auto on defendant's track, and that, from the time he saw the interurban until the collision, was about one half a minute. Some of these witnesses testified that the defendant's interurban car was going at the rate of 45 miles an hour. There is evidence that, after striking the automobile, the car went past the crossing 150 feet. Some of these witnesses say that they did not hear any whistle or bell, although one witness says that he had heard a whistle.

It is said by appellant that, had plaintiff looked for the approaching car at any time when within 50 feet of the track, he could, under the evidence, have seen it, and that plaintiff had a clear and unobstructed view of the approaching car at any time he was within 96 feet of the track, for over half a mile, and that, therefore, as a matter of law, under the evidence, plaintiff was guilty of contributory negligence; and, in support of these propositions, they cite *Powers v. Iowa Cent. R. Co.*, 157 Iowa 347; *Reeves v. Dubuque & S. C. R. Co.*, 92 Iowa 32, 35; *Bloomfield v. Burlington & W. R. Co.*, 74 Iowa 607; *Landis v. Interurban R. Co.*, 166 Iowa 20, 32; *Wilson v. Illinois Cent. R. Co.*, 150 Iowa 33; *Duggan v. Chicago, M. & St. P. R. Co.*, 179 Iowa 1072; *Rupener v. Cedar Rapids & I. C. R. & L. Co.*, 178 Iowa 615; and other cases.

Counsel, we think, misapprehend the record to some extent, under the evidence before referred to. The defendant's interurban car was not in sight at the instant the automobile became stalled upon defendant's track,—at least the jury could have so found, and it could also have found that plaintiff and the driver had been diligent in looking for a car on defendant's track, looking both north and

south at that time, and that, about half a minute later, and while plaintiff was endeavoring to unfasten the curtains on the north side and open the door to get out of the car to crank the engine, the interurban car struck the south side of the automobile; and, as said, the jury could have found that the interurban car was going at the rate of 45 miles an hour, and that no attempt was made to slacken the speed when approaching the stalled automobile.

In argument, appellee refers to the interurban car as coming around the curve 2,036 feet from the crossing, and refers to appellant's blue print; but, as we understand the blue print, it does not show a curve. One witness speaks about a turn. But, however this may be, counsel for both plaintiff and defendant concede that the car came within view 2,036 feet from the crossing, and that it would travel that distance in about half a minute. Under this record, the question of plaintiff's contributory negligence was for the jury. Appellee cites, as bearing upon this proposition, among other cases: *Lockridge v. Minneapolis & St. L. R. Co.*, 161 Iowa 74; *Wiar v. Wabash R. Co.*, 162 Iowa 702; *Dusold v. Chicago, G. W. R. Co.*, 162 Iowa 441; *Platter v. Minneapolis & St. L. R. Co.*, 162 Iowa 142; *Bruggeman v. Illinois Cent. R. Co.*, 147 Iowa 187; *Case v. Chicago, G. W. R. Co.*, 147 Iowa 747, 752.

We think, also, that the question of the alleged negligence of defendant in operating the car at a high rate of speed, under the circumstances, was for the jury. Appellee cites on this point the *Platter*, *Wiar*, and *Lockridge* cases, *supra*, and *Morgan v. Iowa Cent. R. Co.*, 151 Iowa 211, at 214.

Appellee cites the four last named cases also, to sustain his proposition that the defendant was, under the evidence, negligent in approaching the stalled automobile without giving the signals required by law, and that this was a jury question also; and cites also, *Wesley v. Chicago, St.*

P. & K. C. R. Co., 84 Iowa 441, and *Morgan v. Iowa Cent. R. Co.*, supra, to the point that the case was properly submitted to the jury on the question as to the alleged negligence of defendant in not maintaining a proper crossing. Without going into the evidence more in detail, and without reviewing the cases cited further, it is enough to say that, under the record, these were all jury questions.

The more important propositions raised and relied upon have been noticed, and we think those already noticed are decisive of the case, but there is one other matter we may refer to briefly. Appellant complains that Instruction No. 5 may have stated the law correctly, but that it is inapplicable to this case, because there is no evidence to warrant such an instruction. This has reference to the statutory duty of the defendant to sound the whistle on its car and ring the bell, and further, states that, if the jury should find that, on account of the situation and condition at the crossing, and the rate of speed of the car, ordinary care required that defendant's employees operating the car should have given the additional warnings of its approach and failed to do so, and because of such failure the collision occurred, such failure would constitute negligence on the part of the defendant. But the exception taken to this instruction at the trial was that "it is incomplete and prejudicial; that the same limits the element of plaintiff's negligence, the contributory negligence or the negligence of the driver of the automobile; and that the law is that, even though the defendant was negligent in the respects charged, still defendant would not be liable because of the contributory negligence of plaintiff or his driver."

At the time of the exception, the court informed counsel that this matter so referred to in this exception is covered by other instructions of the court on contributory negligence, and we think this is so.

It is our conclusion that there is no prejudicial error shown, and the judgment is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

MARGARET FRANCIS, Appellee, v. HENRY A. FRANCIS et al., Appellants; MELVIN FRANCIS et al., Appellees.

WILLS: Contract to Devise—Contract for Property at Death—Evidence. Evidence reviewed, and held sufficient to establish the making of a contract between a brother and sister by which all property accumulated by the brother should belong to the sister on the death of the brother.

EVIDENCE: Weight and Sufficiency—Testimony Impossible of Contradiction. Reasonable testimony from a credible witness may not be disbelieved simply because it is not and cannot be contradicted.

CONTRACTS: Parties, Proposals and Acceptances—Proposal with Implied Acceptance. A contract between a brother and sister may be sufficiently shown by evidence that the brother stated the terms of the proposed contract to his mother, in a conversation in which the sister took no part, and that the sister thereafter acted on such stated terms, especially where the fact that such contract was made is supported by disinterested corroborating testimony.

WITNESSES: Competency—Transactions With Deceased—Burden of Proof. The court will not presume that certain testimony constitutes or is a part of a personal transaction with a deceased person, within Section 4804, Code, 1897. Such fact must appear from the circumstances, or the objecting party must show it.

PARTNERSHIP: Creation and Requisites—Profits and Losses. A sharing of profits and losses is necessary to the creation of a partnership.

Appeal from Calhoun District Court.—E. G. ALBERT, Judge.

TUESDAY, MAY 22, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

THIS is an action in equity to have all the property

that Smiley Francis, deceased, had at the time of his death, declared to be the property of plaintiff, under an oral contract which plaintiff claimed to have had with the deceased, and, failing in that contention, to have the court award her such an amount from the estate of deceased as would compensate her for services performed by her for deceased during his lifetime, and to have certain property declared hers that was taken possession of by the administrator, and which she claims was owned by her as her separate property. There was a trial on the merits, and a decree for plaintiff awarding her all the property, subject to the payment of debts against the estate and encumbrances on the land. A part of the defendants appeal.—*Affirmed.*

M. W. Frick, and Brammer, Lehmann & Seevers, for appellants.

Gray & Gray, for appellee.

PRESTON, J.—Plaintiff's claim is substantially this: That, about 19 years prior to the death of her brother, Smiley Francis, deceased, she had an oral contract with him to the effect that, if she would go with him on a farm and assist him in his farming operations, her brother was to support her, and at his death, all his property of which he died seized should belong to her; that her brother died intestate on November 20, 1914; that deceased never married, left no widow, child or children or father or mother surviving him, but left brothers and sisters and nephews and nieces, who are defendants in the petition; that said contract was reiterated and told by deceased to divers persons and at frequent times in the presence and hearing of plaintiff up to the time of his death; that plaintiff relied thereon, and went on the farm with him, worked, labored, kept books, kept house, hired and discharged hands, settled

1. WILLS: contract to devise: contract for property at death: evidence.

accounts, paid the men, and had the general supervision of the farm, and that she continued and performed her part of the agreement up to the time of her brother's death; that certain personal property which belonged to plaintiff individually was taken possession of by the administrator and sold and reported as part of the assets of the estate. She also alleged that, in addition to the property plaintiff owned separately, she and deceased were in partnership, and that she owned an undivided half of the property. She asked that a decree be entered declaring her to be the owner of the property, whether real, personal or mixed, of which her brother died seized; that, if she fails in her proof that she is the owner under the contract, then she be awarded a reasonable compensation for her services to the deceased; that it be declared, if she fails in her proof of her ownership, that she was the owner of an undivided one half of the property of which deceased died seized; and that she have an award declaring that her individual property was hers, and an order on the administrator to turn the proceeds of the same over to her, and for general equitable relief.

Defendant admitted the relationship of the parties, and that deceased died seized of the real estate and personal property described in the petition, and denied all other material allegations.

The trial court, in a written opinion filed, found as follows:

"The following facts are either admitted or fairly satisfactorily proven by a preponderance of the evidence:

"That Smiley Francis, who for many years was a resident of Calhoun County, Iowa, was killed in an automobile accident on or about the 20th of November, 1914; that he was never married; that he left no children surviving him; that he left no father or mother surviving him; and that he left no will. The plaintiff was a sister of said Smi-

ley Francis, and she, together with her brothers and sisters and the descendants of a deceased sister, all of whom are made defendants, constitute all the legal heirs of the said Smiley Francis. That the said Smiley Francis died seized of certain real estate and certain personal property described in plaintiff's petition. That, subsequent to the death of Smiley Francis, one F. P. Huff was duly appointed administrator of the estate of said Smiley Francis in Calhoun County, Iowa, and that he duly qualified and is now acting as such administrator. That about March 1, 1896, the said Smiley Francis, having previously bought an eighty-acre tract of land, became financially embarrassed, and felt that he was unable to successfully meet the financial distress without help; that about the 1st of March, 1896, plaintiff went to the home of the said Smiley Francis, and from that time until the time of his death, she did the housework, worked on the farm, did chores, employed and discharged farm hands, and generally aided and assisted in the management of his farm and business. The court further finds that, at about the time the plaintiff went to live with the said Smiley Francis, that a contract was made, by the terms of which, in consideration of the services to be performed by the said plaintiff, the said Smiley Francis agreed that, at the time of his death, the plaintiff was to have all of his property of which he died seized and possessed; that the plaintiff acted and relied upon said contract; and that she carried out her part of the same in all its terms. This matter thus resolves itself, therefore, into the simple question of the specific performance of the contract. The court having found that the contract was made, and that the plaintiff has performed her part of the contract, it is therefore ordered that the same should be specifically enforced, and it is further ordered that the said Huff, as administrator of the estate of Smiley Francis, shall complete said administration, paying all debts, costs of administration,

etc., and, upon the completion of his duties as administrator, shall turn over to the plaintiff any and all property of whatsoever kind and nature left in his hands as such administrator, and take her receipt therefor. The court further finds that, subject to the necessity of any part of said land being required for the payment of debts, that the plaintiff should be and is decreed to be the owner, in fee simple, of the land described in plaintiff's petition. Plaintiff to draw decree in accordance herewith and submit same for signature."

A decree was entered in accordance with the opinion and findings of the court.

The question presented is largely one of fact as to whether the findings and decree of the district court are sustained by the evidence. It is not our custom to attempt to set out the evidence in detail in such a case, where there is a long record. It would be impracticable to do so within the proper limits of an opinion. It appears that, at the time of the making of the alleged contract, plaintiff was about 21 or 22 years of age, unmarried, and that she has never married; that, at that time, her brother, the deceased, owned 80 acres of land, which at that time was doubtless not as valuable as now. That, at the time of the death of Smiley Francis, he left 320 acres of land in Calhoun County, subject to mortgages aggregating \$7,800; also, a 212-acre farm in Minnesota, subject to an encumbrance of \$17,200; also, real estate in Rockwell City and Jolley; and personal property which the administrator sold for \$13,536.13. In addition to the encumbrances against the farms, claims amounting to \$18,721 have been filed against his estate.

Perhaps it will be as good a way as any for us to state the claims of each party for the testimony introduced, and then give our conclusions, without attempting to set out in detail the testimony. It is claimed for appellee:

"That Smiley Francis, who for many years was a resident of Calhoun County, Iowa, was killed in an automobile accident on or about the 20th day of November, 1914; that he was never married; that he left no children surviving him; that he left no father or mother surviving him; that he left no will. The plaintiff was a sister of said Smiley Francis; that she, together with her brothers and sisters and the descendants of a deceased sister, all of whom are defendants, constitute all the legal heirs of said Smiley Francis, deceased; that the said Smiley Francis died seized and possessed of the property mentioned. That, about March 1, 1896, the said Smiley Francis, having previously bought an eighty-acre tract of land, became financially embarrassed, and felt that he was unable to successfully meet the financial distress without help; that, about the 1st of March, 1896, the plaintiff went to the home of the said Smiley Francis, and from that time until the time of his death, she did the housework, worked on the farm, employed and discharged farm hands, and generally aided and assisted in the management of the farm and business, and they rented land and farmed about four hundred acres, a part of which was rented by them. That, previous to the plaintiff going to live with the said Smiley Francis, the plaintiff testifies, the said Francis agreed with the mother of the plaintiff that, if the plaintiff would go and live with him, that he would see that she had a good living, and that when he was gone, that plaintiff should have everything."

In response to a question which asked plaintiff to state how it happened that she went onto the place where she now is, over objection by appellants that the testimony and the witness were incompetent under Section 4604 of the Code, she testifies:

"A. I was living out here with my father and mother, and Smiley came down one evening, and he was talking to my mother and told her that, if he did not have someone

to help him, that he would lose what he had put into the place, and wanted to know whether I could go with him. And she told him that I could if I wanted to, and she asked him why he didn't keep Charles and his wife there with him. He said he couldn't get along with them, and he told her if I would come and go with him, that he would see that I had a good living, and that, when he was gone, that I should have everything; and I went with him."

She further testified that this conversation between her brother and her mother occurred one evening, and that she took no part in it; that her brother stayed at the mother's house that night, and she went with him to his own farm the next day, and stayed there until his death.

Appellants concede that this testimony is not denied and cannot be denied, because her brother and mother are dead; but they contend that it may yet be tested by its own inherent improbabilities. They also contend that this does not constitute a contract between plaintiff and defendant. This matter will be referred to later.

Continuing appellee's claim for the testimony, they say further:

"That, had she not heard this conversation between Smiley Francis and her mother, that she would have gone to Illinois. That she had previously intended going to Illinois. That there were acquaintances in Illinois that desired her to live with them and care for them during their life; that she knew of their financial condition; that these old people owned land and were well to do. Plaintiff did the house work in general, milking, cooking, looking after hogs, worked in the field husking corn and such as that; looked after cattle and horses and worked in the fields late at night, churned butter, did the shopping, made garden, kept books of accounts and hired hands. She showed a disposition to take charge of things and do as much as possible herself; she was manager and bookkeeper on the farm;

settled store accounts, hired and discharged men, and doctored sick horses; and defendant Willie Lamb said Smiley left everything there for her to look after, and she always attended to all the stuff and had the general management of the farm."

Frank Reed, who worked for Smiley Francis from 1905 to 1910, testified that he never heard Smiley say anything about the way Margaret was working there, but at several times, he said that, "when he died, Maggie should have everything he had. I remember, when Maggie threatened to quit working so hard and go home, Smiley said when he was gone, she should have the rest of it, what was left. Maggie threatened to leave several times, and I know he always said that if she stayed there, that when he died, everything was hers."

On cross-examination, he said that, when Maggie threatened to leave, "Smiley did not tell her that if she did stay he would make a will, but he said that, when he died, everything would belong to her." Again, "Smiley said the property was owned by 'me and Maggie,' quite a number of times. Maggie said she had a notion to quit. Smiley said if she would stay with him, when he died everything was hers. He said when he died everything would be hers;" and he said the property was just as much Maggie's as it was his. On re-cross examination, he testified that Smiley had promised Maggie that, when he died, everything would be hers.

John Hensley testified that Smiley said, in speaking of Maggie, "She has stayed with me during all these years, and she is a partner of mine, the only partner I have."

"We talked several times about his affairs; he stated that, 'if anything should happen to me, I expect Maggie to have everything we have there.'"

On cross-examination, he said that Smiley did not say

there was a will or a contract for a will, but he said he had made a contract.

Fred Gillman, who worked on the farm in 1911, 1912, 1913, testified that Smiley told him twice that Maggie was to have his property when he died.

James Brown testified that Smiley told him more than once that, when he was through with his property, he intended Maggie to have it, for she was the one who helped to make it, and stayed with him. She stayed there 18 or 19 years. The last time he talked with Smiley was about a month before he died.

The witness Roy Laird testified that Smiley said that "Maggie and him had an understanding of 50 to 50; that they were in half and half. He said that there was an understanding between them that the one that was living should have all the property." On cross-examination, he said: "No, sir, he didn't say they had ever made a contract, just a mutual understanding."

Joe Dinkin testified that Smiley said to Maggie, after they returned from Melvin Francis' house on a Sunday when they were discussing their treatment, "I want you to have everything that I have got when I am gone."

Mrs. Willie Lamb, a defendant who took no part in that conversation, testified that Smiley said to Maggie that he had everything fixed so she could have the property, and their money would not go that way any more, and he said that, when he died, she should have the property. Plaintiff complained to deceased that some of the persons deceased was helping financially were spending money for beer.

Willie Lamb, another defendant, said, in reference to this same conversation, that Smiley said to Maggie, "I have it all fixed so will get it all," and Smiley always said he had it fixed so she would get it all.

D. E. Laird, who had known Smiley Francis since 1894,

testified that Smiley told him time and again what he expected to do with his property, and—

“He said that he and Maggie were working together, and that they made it up between themselves that, when they were done with it, they were to will it to one another. He said he would fix it so none of them would have a dollar, except Maggie; and he said that the agreement was between Smiley and Maggie that, if one should die, the other should have the property.”

The plaintiff testified that she heard a conversation between Dr. Noland and Smiley, within a short time after she went on the farm, with reference to his property at the time he was sick, in which she took no part, wherein Smiley informed the doctor that everything was to be hers except his watch, which he wanted Melvin to have. The plaintiff heard a conversation in reference to property between Frank Reed and Smiley, in which she took no part, in which Smiley stated that, when he was gone, every bit would be hers. The plaintiff heard a conversation in reference to property between Fred Gillman and Smiley, in which she took no part, in which Smiley stated that Maggie was to have everything when he was gone. She heard a conversation in reference to property between Joe Dinkin and Smiley in 1914, in which she took no part, in which Smiley said, “Every dollar that has been made on this farm is Mag’s when I am gone.” The plaintiff believed these statements and relied thereon, and never married because of the statements.

“He told so many different ones that everything would be mine when he was gone, and I thought if I stayed there it would be as good a thing as I could have, and said work was performed under these promises.”

O. E. Crabtree, a witness for the defendants, testified on direct examination that there was an agreement between Smiley and Maggie in regard to the property. The agree-

ment was what they talked about, "that the rest of them would not get any, but that he was willing for Melvin to have his share, and I understood him to mean that Melvin should have one-seventh, and that Maggie should have the rest."

As corroborating the fact that there was a contract between the plaintiff, Margaret Francis, and the deceased, Smiley Francis, and that she is entitled to the things asked for in her petition, we show the following facts:

Smiley Francis stated to J. P. Moore, "What we have got, Maggie and me made it." When speaking of his property, he said "ours" lots of times. When he talked of doing things, he would say "we." Smiley said the property was owned by "me and Maggie" quite a number of times, in speaking to Frank Reed. To John Hensley, Smiley said Maggie was a partner of his. Joe Duncan testified that he heard Smiley say, in the presence of Maggie, in speaking of his relatives, "They won't get a cent of our money, we have worked for. We have worked hard for this money, and I am not going to give them a cent. We have worked hard all our lives, and the rest of them will not get to spend our money;" and, referring to the property, he said he was going to give it to Maggie. On cross examination, he says: "They should not get a damned cent he had," and he intended Maggie should have it all. Smiley, in speaking to Clyde Gustlin about his and Mag's property, said, "What he had was hers, and what she had was his." Ed. Hurdell said he wanted to buy some land from Smiley, and he would not sell until he had consulted Maggie, and he did not buy because they had concluded not to sell. He talked about his property to him, and said he was going to will it to Maggie. Harry Snyder testified that Smiley stated to him and Mrs. Wallace, in the presence of Maggie, that he intended to will all his property to Maggie, because she helped to make it. Mrs. Wallace testified that Smiley said

to her, in presence of Snyder and Maggie, concerning making a will and his property, that what he had was Mag's.

O. C. Walters testified that he talked with Smiley about his property and why he was accumulating more, and he stated that Maggie could use it when he was through with it, and at another time, when being joshed about building an orphan asylum, he stated "that Maggie could build what she wanted to with it." Thomas D. Conroy testified that Smiley told him none of the family would get any of his property, with the exception of his sister Maggie and Melvin.

Bert Reynolds testified that Smiley told him, when talking about his property and a will, that he had enough to keep him, and he expected Maggie to have enough to keep her, and he believed he ought to look after it right away; that "Mag and him had earned the property."

The plaintiff relied upon her contract, as is shown by the testimony of Wellington Francis, a defendant, who testified that, before the petition of administration was signed, and while they were all gathered at the home of B. F. Owens, another defendant and he offered to give the plaintiff the home place. "She said we were gathered there to beat her, and she was going to have it all or she would not have anything." Charles Francis, another defendant, testified that plaintiff said at the bank, the day the petition for administration was signed, she wanted it all or none. Also at Frank Owens' house, and before she commenced suit, Charles and Wellington told her they had nothing to give her.

The undisputed evidence shows that plaintiff worked on the farm between 18 or 19 years, and, according to Thomas D. Conroy, her services were worth \$100 per month, and according to W. R. Owens, \$75.00 per month, the only evidence that was given in the trial as to value of services.

Such, in a general way, is the claim of appellee for the testimony on the trial.

Appellants' statement of the facts, as they claim them to be from the evidence, is substantially this: That, prior to 1896, Smiley Francis was a young, unmarried man, living upon and working his own farm; that, about March 1, 1896, Margaret moved to his place and began keeping house for him; that the brother and sister continued to live together and to work the farm until his death. They concede that she did work substantially as claimed by appellee, evidence as to which we shall not now repeat; that she also kept the farm and household accounts, and signed her brother's name to checks in payment of bills incurred; that, in short, she did the work which a woman living upon a farm ordinarily does; and that the brother did such work as a man living upon a farm ordinarily does; and that they lived and worked much as other people on Iowa farms live and work. They refer to the fact that plaintiff had two or three spells of sickness during the 19 years, and that her brother paid the expenses for doctors, hospital and medicine; but the record shows that she spent about \$350 for one operation, and the record also shows that the deceased was sick a part of the time. Appellants say that, in return for the services which plaintiff rendered, deceased furnished her board, lodging, clothing and other necessities, hired her whatever girls or other assistants she desired, and gave her driving horses and buggy, an automobile, an insurance policy, and whatever spending money she needed; that the brother and sister lived pleasantly together; that the farm was large, and undoubtedly the work was hard, but that, on the other hand, the farm was prosperous, and plaintiff could and did obtain whatever she required or desired; that, in 1910, the First National Bank obtained a small judgment against plaintiff, and, as it was not paid, called her upon the stand and examined her under pro-

ceedings supplementary to execution, and that she there testified that she had no contract or arrangement with her brother for pay for the work she did; that she further testified that, at that time, she owned no live stock or other personal property. They say, also, that, on November 23, 1914, plaintiff joined her brothers and sisters in petitioning for an administrator, and that thereafter, she helped the administrator prepare an inventory of the real and personal property; that this inventory did not include driving horses and certain other property which plaintiff claimed as her own; that she then claimed as her own the driving horses and some household furniture, and that this was given to her; and that she also claimed about 40 sheep. They say, also, that, during the time plaintiff was preparing this inventory, she was negotiating with her brothers and sisters, and claiming that, as she had helped Smiley manage the property, she should have more than her share, and that this claim was recognized by her brothers and sisters, as various concessions were offered her; that, no agreement on this subject being reached, she brought this suit.

There is no dispute between counsel as to the quality and quantity of proof required in such a case. After examining the record, we are satisfied that the decree is sustained by the evidence, giving, as we do, some weight to the finding of the trial court, because of his superior situation to weigh the testimony of the different witnesses. In doing this, we take into consideration all the facts and circumstances in the case, not only the testimony of plaintiff herself, but the testimony of all other witnesses, wherein deceased stated, with some variation, but substantially, that there was a contract or agreement substantially as claimed by plaintiff, and that plaintiff fully and faithfully performed her part of the contract.

2. EVIDENCE:
weight and
sufficiency:
testimony im-
possible of con-
tradiction.

As before stated, it is conceded by appellants that much of the testimony is not and cannot be, from the very nature of the case, contradicted, and they contend and cite authorities that, in such cases as this, the courts are not compelled to believe the testimony of witnesses simply because the witnesses so testify; that the evidence should be closely scrutinized and weighed in accordance with its reasonableness and inherent probability. The rule is wholesome, and is adhered to; but it does not follow that, if the witnesses are credible, and the stories they tell are reasonable, the courts are required to disbelieve, simply because it is not contradicted.

We shall refer to some of the circumstances relied upon by appellants which they claim tend to weaken some of the testimony, particularly that of the plaintiff herself. They refer to her testimony given on her examination in proceedings supplementary to execution. She did testify there that there was no arrangement with her brother for her salary or pay for the work that she was doing; that she never received any pay from him; that, if she asked for money, she always got it, but that she never had wages or anything like that; that, at that time, 1910, she did not own any stock on the farm nor a horse and buggy; that she had never taken anything from her brother for any work or labor she performed for him, and that there had never been anything said about pay; that she never had any cattle or hogs. It is thought and argued by appellants that this squarely contradicts the story she now tells, and it may be true that there was some equivocation on her part at the time of such examination. But she did not at any time deny that she had such a contract or arrangement as she now claims to have had with her brother. We must keep in mind the purpose of that examination. It was for the purpose of discovering whether plaintiff then had any

property that could be reached on execution, to satisfy the judgment of the bank which had instigated the proceedings. The questions were so framed, and the answers were such as to show that she was not receiving pay or wages for the work she was doing. This, it seems to us, is not inconsistent with the claim that she now makes that there was a contract by which, at her brother's death, she was to have the property. It is doubtless true, as contended by appellants, that, had she told what the real contract or arrangement was, it would develop nothing which could be reached on execution. She was not asked that question, but was asked what the arrangement was as to pay or wages. Plaintiff was not represented by counsel at that hearing, and the entire situation was not developed. As stated, counsel for the bank were seeking to find out whether she then had any property which could be reached on execution, and the questions were framed with that in view. It does appear that, at her brother's death, she claimed some of the personal property, but the record does not clearly show just when she acquired such property, whether before or after the examination in 1910. Appellants state in argument that it was then five years prior to the death of Smiley. Conceding that, and, if the case depended entirely upon the testimony of plaintiff, her evidence given on the examination in 1910 would weaken her testimony, still we must keep in mind that there were a large number of other witnesses who were disinterested, whose testimony, taken altogether, shows that there was such a contract as plaintiff claims.

It is next contended by appellants that.

3. CONTRACTS :
parties, pro-
posals and ac-
ceptances :
proposal with
implied ac-
ceptance.

if plaintiff's testimony as to what the contract was is believed, it is insufficient to constitute a contract, because the conversation with the mother was not a contract with the daughter; and that, if the daughter took no part in the

transaction, she was neither bound nor benefited by it; that it does not show a contract with plaintiff, and no contract for plaintiff's benefit. They say that the conversation between deceased and his mother, who was also plaintiff's mother, is the nearest approach to any direct evidence of plaintiff's alleged contract with deceased. They contend, on the other hand, that, if the conversation constitutes any contract at all, it was a contract between deceased and plaintiff, and therefore a personal transaction. Their conclusion from this is that plaintiff either participated in the entire conversation at the time, or that no such conversation took place. But they concede that the purpose of deceased was to get Margaret to keep house for him; that the mother, plaintiff and deceased were alone together, and deceased broached the purpose of his visit to the mother; that the mother took no dominant part, but, on the contrary, that she definitely left the decision to plaintiff, by saying, as Margaret puts it, "She said I could go if I wanted to;" and they say further that deceased, having learned that plaintiff could go if she wanted to, was satisfied. Plaintiff did, however, accept the offer, and went to defendant's home and stayed there for 19 years, and performed the services before referred to. Such contracts between relatives are often made, without being reduced to writing and without being made as specific as to details as strangers would make them. It would be better many times if they were more particular about it. But the testimony of plaintiff which we have before set out was in response to the question as to how she happened to go to her brother's, and she gave the conversation as stated. Plaintiff at that time was living with her mother, and we think it is not unnatural that the son should talk with his mother before asking the daughter to leave her. Strictly speaking, perhaps, the conversation between deceased and the mother would not constitute a contract between plaintiff and the

deceased, and yet, as conceded by appellants, the purpose of deceased was to have plaintiff go with him and keep house for him, and if she acted upon that, as her testimony shows, and that of other witnesses, relying on such statements, we think this, in connection with the other evidence of other witnesses, who testify that deceased said that such was the contract, shows that the contract was made. As before stated, the case does not depend upon the testimony of plaintiff alone.

It is thought by appellants that, even though plaintiff testifies that she took no part in the conversation, still, if her testimony taken together shows that she did participate in the conversation, it and the witness were incompetent under Section 4604 of the Code. Plaintiff testifies that she took no part in the conversation, and she was not interrogated by counsel for appellants further as to this. As said in *Scott v. Brenton*, 168 Iowa 201, the defendants being the objecting parties, the burden is upon them to show that the matter referred to was a personal transaction or communication, and the evidence and witness are not incompetent merely because an inference may be drawn that it was a personal transaction or communication.

It is thought by appellants that plaintiff's conduct was inconsistent with the claimed contract. It seems to us from the entire record that this cannot be so; that her conduct during the 19 years, and that of the deceased himself, was consistent with such a contract, and that it is not unreasonable to believe, from the entire record, that there was such a contract. There is testimony that plaintiff stated, on one or two occasions, that, because the work was so hard, she was going to quit; but she did not. Had she done so, and failed to perform her part of the contract, she would not, of course, be entitled to the relief she asks.

There is testimony from some of the witnesses that deceased said he was going to make a will, and, as we understand plaintiff's position, there was some claim made that deceased was to vest the title in her by will. Other witnesses contradict this. We do not regard this as very material. If deceased agreed to vest the title in plaintiff by will, and failed or refused to do it, she would still be entitled to relief if the contract was made and performed as she claimed.

One or two witnesses testify that there

5. **PARTNERSHIP:** was some talk of a partnership, and plain-
creation and
requisites: prof-
its and losses. tiff makes such a claim as alternative relief
in her petition. But the record does not
show that there was a partnership, in the sense that they
were to share in the profits and losses. Under the law in
this state, this is necessary. See *Lingenfelter v. St. Clair*,
179 Iowa 11, and cases.

As said in 30 Cyc. 357, it is not enough to constitute a partnership that a party prove an agreement in which they call themselves partners; the term may have been used in a popular, rather than a legal, sense, or as a matter of business convenience, and hence no partnership may have been intended by the parties. And again, at page 414, same volume, it is said that the use of the word "partnership" by a person in his testimony, in describing the arrangement between himself and another, is not conclusive against him of the existence of a partnership; but he may show that he used it as a popular, and not as a technical, term.

There is some testimony from some of the defendants' witnesses that, in one or two instances, deceased expressed a desire that his brother Melvin should receive his share of the estate. But the same witnesses testify that there was a contract between plaintiff and deceased, and, as we have already stated, a large number of witnesses testify that

such was the fact. If there was such a contract, and it had been performed by plaintiff, Melvin could not inherit, nor could deceased have willed it to him, because the property would belong to plaintiff.

Some other points are argued, but we do not feel justified in prolonging the opinion. It is urged by appellants that evidence of verbal declarations and admissions is not the strongest kind of evidence. This is the rule where such admissions and declarations are denominated as loose and random conversations, as where the witness does not clearly understand or clearly remember, or the transaction has been so long before that he may have forgotten, and like circumstances. On the contrary, such evidence may be satisfactory evidence. In the instant case, there is a large number of witnesses, many, if not all, disinterested, who state positively their recollection of the testimony, and some of it extends down to a time within a short time before the death of deceased. We have endeavored to apply the rule in weighing the testimony of the different witnesses.

From the entire record, it is our conclusion that the decree of the district court was right, and it is, therefore,—
Affirmed.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

C. S. GUILFORD, Guardian, et al., Appellants, v. ALMENA
ELIZABETH GARDNER et al., Appellees.

WILLS: Nature and Extent of Testamentary Power—Defeasible

- 1 Fee. A testator may devise an estate in fee, and may, immediately in connection therewith, provide for the destruction of such estate and the passing of the same to a different devisee on the happening of a specified event. So held where the devise provided that, if the devisee died without living issue, the property should then pass to another.

WILLS: Construction—Conditions—“Dying Without Issue.” It is
2 not within the proper power of the court to place a strained
limitation upon plain, definite and unambiguous clauses of a
will. So held under a will wherein testator provided that a
devise should be defeated “if he (devisee) *should die without
living issue*,” and the court refused to hold that such condition
was limited to the death of the devisee *during the lifetime of
testator*.

WILLS: Construction—Words of Substitution. Principle recog-
3 nized that a testator may devise a fee, and in connection there-
with validly provide that, on the happening or not happening of
a specified event, said devise shall be defeated or terminated,
and some other devisee shall be substituted in lieu of the first
devisee.

**WILLS: Construction—Qualified or Defeasible Fees—Rule of Con-
4 struction.** The partiality of the law for *vested* or *absolute* es-
tates is a rule of construction only, and wholly inapplicable
when the testator has clearly and unequivocally provided that
a devise in fee shall be defeated “if *devisee die without issue
living*.”

WILLS: Construction—Conditional Fee—Power to Sell—Effect. A
5 devise which, by its terms, is a *conditional* fee, is not neces-
sarily converted into an *absolute* fee by added provisions which,
directly or indirectly, invest the devisee with power to sell and
convey.

WILLS: Construction—Practical Construction by Devisees—Effect.
6 The practical and reasonable construction of a will by devisees
is quite significant of the true meaning of said will.

**WILLS: Construction—Nature of Estate Created—Limitation Re-
7 pugnant to Fee.** A clear devise of a *conditional* or *defeasible*
fee may not be defeated by invoking the principle that a testa-
tor may not make two inconsistent or repugnant devises; for
instance, an *absolute* devise in fee and a subsequent devise re-
pugnant thereto.

Appeal from Decatur District Court.—THOMAS L. MAX-
WELL, Judge.

SATURDAY, APRIL 7, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

ACTION for the construction of the last will and testa-
ment of R. D. Gardner, deceased. From the finding and

judgment of the district court, the plaintiffs appeal.—*Affirmed.*

C. W. Hoffman and Ed. H. Sharp, for appellants.

V. R. McGinnis and Miles & Steele, for appellees.

WEAVER, J.—R. D. Gardner was a practicing physician, residing in the town of Leon, Iowa, for many years. At the time of his death, he was owner of over 1,200 acres of land in Decatur County and two residence properties in Leon, and was also possessed of some personal property, including moneys and credits to the value of over \$10,000. He died testate in the year 1912, leaving surviving him his wife, Almena Elizabeth Gardner, and one child, a son, Charles E. Gardner. The material provisions of the will (omitting merely formal parts) are as follows:

1. WILLS: nature and extent of testamentary power: defensible fee.

“Second. I will, bequeath and devise to my beloved wife, Almena Elizabeth Gardner, the following real estate, to wit: Lot Number one (1), in Block No. five (5), in Richardson’s Addition to Leon, Iowa, the same being the homestead now occupied by myself and wife. I also bequeath, devise and give unto her my beloved wife, one half in value of all the real estate and personal property, including moneys and credits of every kind and description of which I may die seized, saving and excepting the house and lot hereinafter bequeathed and devised to my beloved son, Charles Edgar Gardner.

“Third. I will, bequeath and devise to my beloved son, Charles Edgar Gardner, the following real estate, to wit: Lot No. two (2), in Block No. five (5), in Richardson’s Addition to Leon, the same being the property now occupied by him as a homestead. I also give, devise and bequeath unto my beloved son one half in value of all the real estate and personal property, including moneys and

credits of every kind and description, of which I may die seized, saving and excepting the house and lot hereinbefore devised to my beloved wife. Provided however, the portion of my estate herein willed, devised and bequeathed to my beloved son, Charles Edgar Gardner, is on condition, that if he should die without issue, living, then the portion of my estate devised and bequeathed to him shall revert and go to my beloved wife, Almena Elizabeth Gardner.

"Fourth. That at my death, in case my beloved wife and son cannot agree upon a division of the property of which I may die seized, then it is my will and wish that each shall select a good man to make division of my estate between my said beloved wife and son, and in case the two so selected cannot agree upon a division, then the two so selected shall select a third person who shall assist in making such division of property, but the persons so selected to make such division of my estate, as herein directed, shall before entering upon their duties go before the clerk of the court and take oath to discharge their duties as such referees to the best of their knowledge and understanding.

"Fifth. Having full faith and confidence in my beloved wife, Almena Elizabeth Gardner, and my beloved son, Charles Edgar Gardner, it is my will that they act as executrix and executor of my last will and that they so act without giving bond or taking out papers of administration, or being put to any expense save and except the probating of this my last will and testament.

"In Witness Whereof, I have bereunto signed my name this 6th day of November, 1886.

"R. D. GARDNER.

"Witnesses: Frank Gardner, Will Gardner.

"Codicil—After due consideration I have concluded to have my administratrix and administrator give bail for the

faithful performance of their duties, and take out letters of administration.

“R. D. GARDNER.”

Prior to the date of this will, the son, Charles E. Gardner, had married Carrie Guilford. The evidence tends to show that the relations between the testator and his son's wife were not altogether harmonious or pleasant, the testator being inclined to the view that the daughter-in-law was extravagant and wasteful. The son outlived his father, and died intestate and childless February 3, 1915, survived by his wife, Carrie Guilford Gardner. Some years before the death of the testator, Carrie Guilford Gardner became of unsound mind and has never recovered therefrom. Shortly before the son's death, a written contract was entered into between him and his mother, Almena Elizabeth Gardner. As this writing is in some respects obscure, and an abbreviated statement of its general effect is somewhat difficult, we extend this statement for its quotation in full, as follows:

“Agreement of Settlement.

“Know all men by these presents, that whereas, one R. D. Gardner, husband of the undersigned, A. E. Gardner, and father of the undersigned, C. E. Gardner, they being his sole and only heirs at law and legatees, did on the 6th day of November, 1886, make and execute his last will and testament, giving to the said A. E. Gardner, his widow, Lot one in Block five, Richardson's Addition to the Town of Leon, Iowa, the same being their homestead, and the undivided one half in value of all the real estate and personal property, including moneys and credits of every kind and character of which he might die seized, and whereas, the said R. D. Gardner did in said instrument give to his son, C. E. Gardner, Lot two in Block five of Richardson's Addition to the Town of Leon, Iowa, and the undivided one

half in value of all of the real estate and personal property, including moneys and credits, of every kind and description of which he might die seized, upon the condition that the part willed to the said C. E. Gardner should, if he should die without issue living, be devised, bequeathed and revert to his said wife, A. E. Gardner, and whereas, said will was duly probated on the 25th day of March, 1913, and recorded in Book 8, page 114 of the Probate Records of the District Court of Decatur County, Iowa, and whereas, the said C. E. Gardner is now in ill health and no settlement or distribution of said property ever having been made by and between the said A. E. Gardner and C. E. Gardner, and that the same consists of a large amount of real estate, to wit: 1,226 acres of land in Decatur County, Iowa; certain residence properties in the town of Leon, Iowa, and a large amount of moneys and credits amounting to about the sum of \$10,000.00 or more, and that said parties hereto are desirous of settling said matters amicably, and to the best interests of both,

"It is now therefore agreed that the said C. E. Gardner is to have and retain in his own right and name all of the property to which the title now stands in his own name, for his own use and benefit, and that all of the personal debts of the said C. E. Gardner shall be paid out of the estate and the proceeds thereof of B. D. Gardner. That the said A. E. Gardner is to have and retain Lot one, Block five, Richardson's Addition to the Town of Leon, Iowa, bequeathed to her in said will, and all of the lands now standing in her own name for her own individual use and benefit, and that the remainder of said estate shall be placed in the hands of Fred Teale, as trustee, or in case of his inability or incapacity to act as such trustee, then someone to be appointed by the court, providing however, at all times that the said C. E. Gardner is not able on account of ill health or other inability to look after and care for

said estate but that in case the said C. E. Gardner at any time is able to look after and care for said estate by reason of his physical health and strength then that the same is to be turned back into his hands for that purpose.

"That it is agreed that out of the said estate there shall be set aside a trust fund in the sum of two thousand dollars to be held by the said Fred Teale, as trustee, or in case of his inability to act, someone to be appointed by the court, and his successors, whoever they may be, and that the income therefrom is to be turned over to the Leon Cemetery Association for the purpose of caring for the lot and graves of the family of R. D. Gardner, including the parties hereto, and any other members that may be buried thereon, and, to care for the lot and graves of the mother of A. E. Gardner and others buried on said lot, and the remainder of said income to be used generally for the care and beautifying of said cemetery, said fund to be made a perpetual Trust Fund for that purpose. That the sum of one thousand dollars shall be set aside as a trust fund to be held by the said Fred Teale as trustee, or his successors as appointed by the court herein, the income from which shall be used for the purpose of caring especially for the lot and graves of the father and mother of Carrie Gardner, and others buried thereon, in the cemetery at Toledo, Iowa, and, any excess after caring for said lot and graves to be used for the general care and beautifying of said cemetery. Said fund to be perpetual, and the income therefrom to be used for the purpose above set out.

"It is estimated that the real estate belonging to said estate is of the reasonable value of eighty thousand dollars, and that the personal property belonging thereto is of the reasonable value of about ten thousand dollars, making a total in value of some ninety thousand dollars.

"That in case of the inability or incapability of the said C. E. Gardner to continue active charge of said estate

and property, that the said Fred Teale shall be chosen as trustee thereof, and shall continue and conduct the affairs of the same, but that in case the said C. E. Gardner at any time is able to look after the affairs of said estate, that the same is to be returned to his possession, custody and control to be continued as he and his mother may agree.

"That while the same is in the hands of said trustee there shall be set aside and used for the use and benefit of Carrie Gardner, wife of the said C. E. Gardner, in case she survives him, the sum of sixty-five dollars per month as long as she shall live, and, that the remainder of the income from said property shall be turned over to A. E. Gardner, after paying the expenses of said trusteeship, to be used by her as she may desire.

"That this agreement does not include any of the personal property or real estate actually belonging to the said A. E. Gardner or C. E. Gardner, and that the final disposition of said property shall be made by the parties C. E. Gardner and A. E. Gardner as they may hereafter agree, the same to be done by will or proper instrument as their attorney may determine.

"It being expressly agreed and understood that in case the said C. E. Gardner shall survive his mother, A. E. Gardner, that no will shall be made by her, willing or devising the property of said estate or her interest therein, excepting that may be made by the agreement of the parties hereto hereinafter entered into, but that the same shall revert absolutely to the said C. E. Gardner to be devised and disposed of by him as to him may seem proper and best at all times taking into consideration the arrangement that may be made between him and his mother with reference thereto.

"This agreement is made at this time on account of the illness of C. E. Gardner, and in case of his recovery and ability to take charge of and handle said estate, is to

be of no further force and effect, unless the same shall be approved or in any manner changed by the parties hereto.

"Witness our hands this 16th day of January, 1915.

"A. E. Gardner.

"C. E. Gardner."

After the death of Charles E. Gardner, differences of opinion having arisen between his mother, Almena Elizabeth Gardner, and the guardian of his widow, concerning the proper interpretation and legal effect of the will of R. D. Gardner, this action was brought to determine and settle the same.

The question presented to the court may be stated as follows: It is the contention of the guardian that, subject only to the death of the son without issue during the life of his father, the clear intent of the testator was to vest the son with an absolute and unconditional title to that share of the estate described in the third paragraph of the will. On the part of the widow of the testator, it is argued that, properly construed, the will vested the son with no more than a conditional or defeasible fee in the property devised, a title which could become absolute only upon the death of Charles E. Gardner leaving living issue; and that, it being conceded that he died without issue, the title then reverted or passed to his mother.

On the first theory, the guardian's ward, Carrie Guilford Gardner, as widow of Charles E. Gardner, is entitled to a statutory distributive share in the property which was thus acquired by her in her husband's lifetime. On the other theory, the condition of title in Charles E. Gardner having failed, the entire property passed under the will of his father to Almena Elizabeth Gardner, and the widow of the son has no dower or distributive share therein. The trial court sustained the latter contention, and the guardian appeals in his ward's behalf.

2. WILLS: construction; conditions. "dying without issue."

Stated in briefer terms, the rights of the parties turn first upon the question whether the words of the testator, "if he should die without issue living," are held to have reference solely to the death of the son in the lifetime of the father, or are held to be operative upon the death of the son without living issue at any time either before or after the death of the testator.

I. Appellant's brief has been prepared with entire disregard of our rules, but we have examined it with care to ascertain as clearly as may be the points relied upon for a reversal of the judgment below.

It is first argued that our prior decisions furnish controlling precedents for construing the condition in this will as having reference exclusively to the possible death of the son in his father's lifetime. Upon that point, our attention is called to *Blain v. Dean*, 160 Iowa 708, *Talbot v. Snodgrass*, 124 Iowa 681, and other cases of that class. None of these cases is quite in point. In the case at bar, while the initial sentence or clause of the third paragraph of the will is framed in general terms, which, standing alone, divorced from the modifying terms which follow in the same connection, would confessedly be sufficient to vest in the devisee an absolute fee, yet attached thereto, as part and parcel of the same paragraph, is a clear and unequivocal condition that the right and title so devised will become absolute only on the death of the devisee leaving living issue, and that upon failure of such condition the entire property shall vest in the testator's widow. In the *Blain* case, the provision was, "If any of my children shall have died leaving no issue, I direct that his share shall be divided among those leaving issue and among my other children then living." Here it is too clear for reasonable question that the words, "shall have died," and "then living," have direct reference to the time when the will became effective, that is, at the death of the testator. It provides nothing

but a plan or basis of distribution, and attaches no condition whatever to any gift or devise made by the will. The same may be said of the will in the *Talbot* case. Indeed, we think no case can be found—certainly none has been cited—where a condition which is attached to the substance of a devise, as distinguished from a provision designating a plan of distribution or designating the persons or classes to share in the estate, has been held to be satisfied or to become inoperative because the devisee has outlived the testator. The maker of a will, being competent to give or withhold his bounty, may attach thereto any reasonable condition, and provide that, upon failure of the condition, the title to the property or thing devised shall pass from the devisee first named to some other person. A devise conditioned for a reversion or change of direction upon the death of the devisee without living issue is not, as counsel for appellant seem to think, a devise of a mere life estate. Such a devise vests the beneficiary with a fee, conditional, it is true, but none the less a fee, and carries with it all the rights of possession and control which pertain to full ownership, subject, of course, to the possibility of reverter on failure of the condition.

That the testator in this case attached
3. WILLS: con- the condition for a reversion of the title
struction: (or perhaps, more accurately stated, the
words of sub- condition for the substitution of another
stitution. beneficiary) to the substance of the gift to his son, is hardly open to reasonable doubt. He had the undoubted right to attach such condition to his gift, and it would be difficult indeed to express such intent in clearer or more explicit terms. The meaning being plain and the intent being lawful, there is no room left for controversy. It is not for the court to question or consider the absolute justice of the condition; its only function is to ascertain the testator's intent and give it effect. The intentions being plainly

stated, the reasons or motives prompting it are not important. The testator may or may not have allowed himself to be influenced by dislike or distrust of his son's wife, or the condition attached to the devise may have had its origin in the desire, which is shown in many persons, to so hedge about his estate as to keep it as long as possible within his own immediate family; but whatever the fact in this respect may be, he did provide that the gift to his son was "on condition that, if he die without issue living," then such portion should "revert and go" to his own widow. The reference to the son's death without issue is accompanied by no words limiting its meaning to death in the lifetime of the testator, nor by other words by which such limitation can be fairly implied, and without such words or fair implication of such meaning, the devise must be given effect accordingly.

There is nothing in any other paragraph of the will nor in the instrument as a whole to give rise to any ambiguity, and the court is not authorized to override any of its provisions by construction. That such is the well settled doctrine of the law of wills, see *Collins v. Collins*, 116 Iowa 703; *Estate of James*, 146 N. Y. 78, 100; *Wilhelm v. Calder*, 102 Iowa 342; *Wilson v. Linder*, (Idaho) 110 Pac. 274; *Barratt's Estate*, (Neb.) 123 N. W. 299; *Britton v. Thornton*, 5 Sup. Ct. Rep. 291; *Spencer v. Spencer*, (Ill.) 109 N. E. 300; *Calvin v. Springer*, (Ind.) 63 N. E. 40.

4. WILLS: construction: qualified or defeasible fees: rule of construction.

Appellants invoke in support of their theory the proposition frequently announced by this court that the law favors that construction of a will which effects the creation of a vested or absolute estate as against one which is merely contingent or conditional. But it must be remembered in this connection that this is a rule of construction only, and rules of construction have no application where the devise is clear and unequivocal, and the intent therein

expressed is not inconsistent with any other provisions of the will.

5. WILLS: construction: nature of estate created: power to sell: effect.

Again, counsel say that the will, fairly construed, vests the son with authority to sell and dispose of the property devised to him, and that this is inconsistent with the idea that the testator intended to give him anything less than an absolute fee. But this argument involves a fundamental misconception of the law. It is not correct to say that the power to sell and dispose of property attached to a devise of anything less than a fee has the effect to convert such a devise into an absolute title. For example, a testator may, by appropriate language, devise a life estate, adding thereto power to the life tenant to sell and convey the fee, and, if the life tenant die without exercising the power, the remainderman succeeds to the title. It is true, however, that, if the construction of the devise be open to question or doubt, the power to convey is a circumstance of very material importance in ascertaining the real intent of the testator. Moreover, a life tenant to whom no power to convey has been expressly devised may still sell and dispose of his life interest, and his grantee will thereby be clothed with all the right and title of the grantor. So, too, the holder of a conditional fee may sell and convey such fee, vesting his purchaser with all the attributes of ownership, subject only, as we have already said, to the possibility of reverter or diversion of the title upon failure of the condition attached thereto.

We discover nothing in the will of Dr. Gardner which seems intended to vest the son with any other or greater power or authority than such as the law attaches to the ownership of a conditional or defeasible fee.

6. WILLS: construction: practical construction by devisees effect.

There is still another feature of this case which is not without material bearing upon the issue we are here considering. We refer to the practical construction which the

mother and son placed upon this devise, in the contract made between them after the will had become effective after the death of Dr. Gardner. If the appellant's contention be correct, the title to all property described in the third paragraph of the will had then become complete in the son, unincumbered and unrestricted by any condition in favor of the mother; yet we find them both here expressly recognizing the conditional character of the title devised to the son. In view of our conclusion of the clear expression of the testator's intent, it is unnecessary for us to decide how far, if at all, the parties to this contract are concluded by its terms upon the question of their respective rights under the will; yet if the construction of the devise were one open to any reasonable doubt, the fact that the son, the one person adversely affected by the condition attached thereto, survived the testator more than two years, and never in his lifetime, so far as the record shows, questioned the conditional character of his title, it is significant of the meaning and effect of the testator's language as it appeals to the ordinary mind.

II. As an alternative proposition, appellants rely upon the rule by which, when the testator has made a clear devise of a fee or absolute title, the estate in such property is thereby exhausted, and it is not within his power to control the course of the descent of the devised property after the death of the devisee. While there has been some division of opinion in this court as to the application of this rule to particular cases, the correctness of the abstract legal proposition is not open to dispute. Starting from this foundation, it is argued by counsel that, as the devise in the third clause of the will begins with the declaration, "I will, bequeath and devise to my son, Charles Edgar Gardner," the homestead property occupied by him, and again, "I give, devise and bequeath unto my son one-

7. WILLS: construction: nature of estate created: limitation repugnant to fee.

half in value of all the real estate and personal property,"—language which, standing alone, would undoubtedly vest the devisee with an absolute fee,—it must be given such effect without regard to the condition contained in the same paragraph. No precedent has been cited, and we think none is to be found, going to this extent. To sustain the position taken by counsel, the court must dismember the testator's statement of his intent and give effect to one clause or phrase thereof and deny any force or effect to the express qualification or condition attached to such devise. It should be kept in mind that, while a testator cannot make two inconsistent or repugnant devises and both be declared legally valid, it is undoubtedly within his power to devise a conditional or defeasible fee. In the case of a manifest repugnancy or inconsistency, the court may declare which, if either, of such provisions shall be held valid; but where a devise is made subject to a clearly expressed condition, it is not within the province of the court to sever the condition from the gift and declare absolute and unlimited the title which the testator has made limited and conditional. *Meek v. Briggs*, 87 Iowa 610; *Stivers v. Gardner*, 88 Iowa 307; *Wilhelm v. Calder*, 102 Iowa 342; *Mansfield v. Shelton*, (Conn.) 35 Atl. 272; *Canaday v. Baysinger*, 170 Iowa 414; *In re Barrett's Estate*, (Neb.) 123 N. W. 299; *Tyler v. Theilig*, (Ga.) 52 S. E. 606. To read this will as applicants would have it read, and totally disregard the condition attached to the devise to Charles E. Gardner, is to destroy, and not to construe. The sole justification and the only purpose of a judicial construction of a will is the development of the intent of the testator. In so doing, every provision of the instrument, if lawful in character, is to be given due effect. The court may not make a will for the testator, nor impose upon the will a forced or unnatural construction to accomplish what may seem to be a more just or appropriate distribution of his estate. The will in this case was made 25 years

before the testator's death. No question can be raised as to his testamentary capacity at that time. During the remainder of his life, he had abundant opportunity to reflect upon the disposition he had made of his estate and to determine whether he desired to make any changes therein. No change was made, and the will speaks as from the date of his death.

Much has been said in argument of the circumstances surrounding the testator and of the relations between himself and wife on the one hand and the son and son's wife on the other, but we find nothing therein which justifies us in giving to the language of his will any other than its plain and natural import and meaning, and this we think necessitates an affirmance of the conclusion reached by the trial court.

For the reasons stated, the judgment appealed from is —*Affirmed.*

GAYNOR, C. J., PRESTON and SALINGER, JJ., concur.

MINNIE HEIN et al., Appellees, v. WATERLOO, CEDAR FALLS & NORTHERN RAILWAY COMPANY, Appellant.

APPEAL AND ERROR: Findings of Facts, Etc.—Misconduct of Counsel—New Trial. The appellate court will not settle a war of affidavits as to just what did take place and what did not take place in the trial court on the subject of misconduct of counsel as a basis for new trial. *A finding of facts by the trial court is essential.*

Appeal from Linn District Court.—F. O. ELLISON, Judge.

WEDNESDAY, MAY 16, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

ACTION at law on an appeal to the district court from the award of a sheriff's jury upon the question of the dam-

ages to be paid plaintiff for the taking of a right of way through her land. There was a trial to a jury, which assessed plaintiffs' damages at \$3,050. The defendant appeals.—*Affirmed.*

Barnes, Chamberlain & Randall and Edwards, Longley, Ransier & Smith, for appellant.

Maurice P. Cahill and Redmond & Stewart, for appellee.

APPEAL AND
ERROR: find-
ings of facts,
etc.: misconduct
of counsel:
new trial.

PRESTON, J.—Three acres of land were taken for the right of way through 76 acres of land owned by plaintiff near Cedar Rapids. The right of way divided into substantially equal parts a timber pasture of about 35 acres, and this pasture was separated from the balance of the farm by a public highway. The highest witness for plaintiff placed the damages at \$3,080, according to appellant's claim, but appellee says \$3,420. Appellant claims that the witness for defendant placed the damages at approximately \$1,000, while appellee says that the average of the depreciation estimated by defendant's witnesses is \$1,339. As said, the award was \$3,050.

It is shown that the award by the sheriff's jury was \$2,200, and appellee says that this was before any dirt had been moved and before the real damage to the property by reason of a deep cut and curve became apparent. It is also shown that, on a former trial of the case, a jury awarded plaintiff \$2,900. This was done after hearing all the testimony and viewing the premises. It appears that both plaintiff and defendant appealed from the award of the sheriff's jury. As we understand the record, the \$2,900 verdict or award just referred to was upon the trial of defendant's appeal, although perhaps that is not very material. A new trial was granted in the first trial, and appellee says the court did so without giving any reason; at any rate it was not granted upon any alleged misconduct of counsel in argument to the

jury. Appellant's point here is that the award of the jury in the trial of the instant case was very nearly up to the highest estimate of the witnesses, while appellee says that there is so little difference between the last and the first verdict and the award of the sheriff's jury that this is important to be considered in determining the merits of this appeal, and as to whether there was any prejudice to appellant by reason of the alleged misconduct of counsel in argument to the jury. Appellant contends that there was misconduct upon the part of plaintiff's counsel in argument, and they say that the claim for reversal is based squarely upon the misconduct of counsel in closing argument to the jury. Appellant cites the following Iowa cases to sustain its position: *Henry v. Sioux City & Pac. R. Co.*, 70 Iowa 233; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa 150; *State v. Helm*, 92 Iowa 540; *Wheeler & Wilson Mfg. Co. v. Sterrett*, 94 Iowa 158; *Sullivan v. Chicago, R. I. & P. R. Co.*, 119 Iowa 464; *Almon v. Chicago & N. W. R. Co.*, 163 Iowa 449.

Appellee contends that the granting of a new trial on the ground of misconduct of counsel is a matter largely in the discretion of the trial court, and that this court will not interfere unless it affirmatively appears that such discretion was abused (citing *Deemer Pl. and Pr.*, Section 647, *Sundberg v. Babcock*, 66 Iowa 515); and contend, also, that it must be shown that prejudice resulted to the party complaining, citing *Hammond v. S. C. & P. R. Co.*, 49 Iowa 450; *State v. Miller*, 65 Iowa 60; *Hannestad v. Chicago, M. & St. P. R. Co.*, 132 Iowa 232; *State v. Gulliver*, 163 Iowa 123; *Spaulding v. Laybourn*, 164 Iowa 277; *Withey v. Fowler Co.*, 164 Iowa 377.

The language complained of, even though it were not in response to argument by counsel for defendant, is not as strong and could not be said to be as prejudicial as in some of the cases cited by appellant. But under the record in

the case, we are of opinion that the question cannot be considered because of the state of the record. The argument complained of is that of Mr. Redmond. It appears that Mr. Redmond's remarks were taken down by the official shorthand reporter and certified. The part of his argument printed in the abstract comprises nearly two pages of the abstract. In the first part of the argument or the remarks as printed, Mr. Redmond thought defendant and counsel were mean and villainous towards the plaintiff, and later asks a number of questions which indicate that it is in response to something which had been said by counsel for the defendant. He says: "Sympathy? Prejudice? Fairness? Liberality? Generosity?" etc. After nearly two pages of the statements of Mr. Redmond as set out in the abstract, we find this objection:

"Mr. Longley: I object to the statement made by counsel as highly improper and unwarranted.

"Mr. Chamberlain: And it is an untrue statement of the facts with reference to the proceedings in this case.

"Mr. Redmond: The record will show—

"Court: As to prior proceedings, there is only one part of them before the jury, and this must be determined from the evidence and proceedings had here, regardless of any former transaction."

We refer to this because the objection seems to be somewhat indefinite as to what of the prior numerous statements of Mr. Redmond were objected to. Mr. Redmond then continued:

"They say they had to go through there. Well, now did they? Did they? Now I am not an enemy of any railroad company, or any interurban railroad company. I am friendly to them, and I see many reasons for their development. My friends on the other side say they could not get through. I do not underrate this line. I would be sorry to think I was a man to be engaged in retarding the progress of

building interurbans. But when it comes to taking the home life too, destroy it for this woman and these children, for the purpose of getting down to the city of Cedar Rapids,—is there any reason why Cedar Rapids should demand that?”

Counsel again took exception to the remarks. Not all of this matter before referred to is set out in the motion for new trial. The part relied upon in the motion for new trial is as follows:

“(4) For the reason that counsel for plaintiff was guilty of misconduct in making the following statement to the jury: ‘Talk about fairness, liberality, generosity. There never was a case, a condemnation case—and maybe I have tried as many of them as my friend Longley—or that I was acquainted with, or had any knowledge of, that was so aggravated in its damages, so villainous in its prosecution, such faithless, villainous idiocy and meanness in the management on their part to pursue this woman as they did,’ and many other statements of like tenor and substance in his argument to the jury.

“(5) For the reason that the said counsel for plaintiff was guilty of misconduct in his closing argument to the jury, in that said counsel charged the defendant with gross unfairness in challenging all the farmers upon the jury except one, in peremptory challenges, which statement was not only untrue, as shown by the record of the jury selection in said case, but which was highly prejudicial and contrary to the rules of said court, under which the peremptory challenges are exercised privately by each party to the litigation, and in support of this ground, the defendant refers to the affidavit of William Chamberlain hereto attached.”

An affidavit of Mr. Chamberlain, one of the attorneys for the defendant, was attached to the motion, in which he sets out the practice in the Linn district court as to peremptory challenges. We do not find that this affidavit was

made a part of the record by a bill of exceptions; but, whether it is or not, there is no finding of fact by the trial court as to the dispute between counsel as to this affidavit and others which will be now referred to, as required by the cases before such a matter may be considered in this court. These cases will be referred to later in the opinion.

Plaintiff filed a resistance to the motion for new trial, supported by the affidavits of Mr. Redmond and Mr. Cahill, attorneys for plaintiff. We shall not set out the statements in these or the rebuttal affidavits of Chamberlain and Longley in full, but enough to show that there was a square conflict in the affidavits between counsel on either side as to what took place upon the trial. Briefly, Mr. Redmond and Mr. Cahill say in their affidavit that Mr. Chamberlain in his argument to the jury referred to the award by the sheriff's jury, and that it had been paid in and that the defendant did not appeal, and that he (Chamberlain) said to the jury that, at the rate plaintiffs wanted for a right of way through their land, a right of way from Waterloo to Cedar Rapids would cost defendant three quarters of a million dollars, and in other portions that it would cost a quarter of a million, and that this would be prohibitive; that counsel Longley said to the jury in his argument that the original cost and interest of the railroad would eventually be borne by the taxpayers and patrons of the road, and some other matters; and also that both Mr. Longley and Mr. Chamberlain made profession of fairness in behalf of the railroad company to the plaintiff, and, as they say, to be even generous, and that they reiterated such statements and professions many times in their talks to the jury. In response to the affidavits just referred to, Mr. Chamberlain and Mr. Longley filed counter-affidavits, in which they deny the statements attributed to them in the affidavits of Mr. Redmond and Mr. Cahill, or some of them. We said, in *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, at 641:

"This contest of affidavits between members of the profession is unseemly, and ought not to be tolerated. The law provides for perpetuating of record such matters by bills of exceptions by which the court below can show the facts, thus avoiding the necessity of resorting to affidavits. * * * We are now satisfied that correct practice requires that the court below shall certify the facts and language complained of as amounting to misbehavior on the part of counsel."

In *State v. McClure*, 159 Iowa 351, at 354, we said that the court made no finding of facts in regard to the alleged misconduct of counsel in argument, and that such matters cannot be considered without such a finding, because the trial court was in a better position to determine the facts than this court could be. In *Ricker v. Davis*, 160 Iowa 37, at 52, we said:

"It is quite important, in such cases, that the trial court make a finding of the facts attempted to be shown by affidavit, and to make this finding of record. Many times he alone can know the facts; and, in all cases of dispute, we are entitled to know upon what his final conclusion is based. So far as possible, appellate tribunals, in actions of law, should be relieved from settling disputed questions of fact; and, in the absence thereof, it will be assumed that the trial court was fully justified in its rulings, in so far as they involve purely fact questions."

There are numerous cases following the *Rayburn* case. We shall cite a part only of them. See *Frank v. Davenport*, 105 Iowa 588, 590; *Kinney v. McFaul*, 122 Iowa 452, 454; *State v. Clemons*, 78 Iowa 123, 125; *State v. LaGrange*, 99 Iowa 10, 12.

We shall not stop to cite authorities holding that, if the remarks of counsel in the closing argument are called out by and in response to remarks of opposing counsel,

there can be no just complaint. See, however, the case of *State v. Wilson*, 157 Iowa 698, at 722.

Under the authorities before cited, we are of opinion that the question as to the alleged misconduct may not be considered. We may add, however, and very briefly, that, if counsel for the defendant made the remarks claimed by appellee, then it was a case of "six of one and half a dozen of the other," or, as it is sometimes put now, "fifty-fifty." Of course we make allowance for the zeal of counsel on both sides in closely contested cases, and it is our experience that, as a rule, counsel pursue about the same tactics, and sometimes the one who is defeated thinks he has been abused. As said by Mr. Justice Weaver, in *State v. Gulliver*, *supra*, some allowances should be made and something left to the good sense and manly fairness of counsel themselves, as well as the discretion of the trial court, and the jurors must be supposed to have some capacity to distinguish between partisan oratory and analysis of testimony. Of course, where the trial court can see that counsel on one side is in good faith arguing his case according to the rules, and opposing counsel, for the purpose of seeking to obtain an advantage, goes out of the record, the court should on its own motion caution him, and if, on motion for new trial, the court is satisfied that the successful party has gained an advantage, and that the unsuccessful party has been prejudiced by remarks of counsel out of the record, then the court should promptly sustain the motion for new trial. The trial judge was on the ground and doubtless heard the arguments of counsel on both sides. He also heard the affidavits read, and it was his conclusion that no prejudice had resulted to the defendant in regard to the matters complained of. Of necessity, the matter is such that it must be left very largely to the good sense and discretion of the trial court. *Hannestad v. Chicago, M. & St. P. R. Co.*, *supra*.

For the reasons given, it is our conclusion that the judgment appealed from should be, and it is,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

JAMES C. HUME, Appellant, v. INDEPENDENT SCHOOL DISTRICT OF DES MOINES, Appellee.

SCHOOLS AND SCHOOL DISTRICTS: Government, Etc.—Unlawful Demand for Tuition—Remedy. Relief from an unlawful demand for tuition, based on an erroneous finding by the school board that the pupil is a nonresident, must be reached by an appeal to the county superintendent, etc. If said demand is accompanied by an order for the expulsion of the pupil if the tuition be not paid, injunction will lie, especially where a money demand exists for the return of tuition paid under protest. (Sec. 2818, Code, 1897.)

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

MONDAY, SEPTEMBER 24, 1917.

ACTION in equity to enjoin defendant from expelling Thomas D. Hatton, a nephew of plaintiff's, from the West Des Moines High School because of the nonpayment by plaintiff or anyone for said minor of tuition for schooling and instruction, and to recover \$50.75 already paid by appellant to defendant school board on account of tuition for said boy, which payment is alleged to have been made under protest and because of coercion and duress by defendant. There was a demurrer to the petition, which was sustained, and, plaintiff refusing to plead further, judgment was rendered against him, and he appeals. *Reversed*.

Cummins, Hume & Bradshaw, for appellant.

Charles Hutchinson, Robert J. Bannister, and Roy E. Cabbage, for appellee.

SCHOOLS AND
SCHOOL DIS-
TRICTS: govern-
ment, etc.: un-
lawful demand
for tuition:
remedy.

PRESTON, J.—So much of the petition filed March 25, 1915, as appears to be necessary to a determination of the case is substantially this: Plaintiff is, and for more than 30 years has been, a resident, citizen and heavy taxpayer of the city of Des Moines and the defendant school district; Thomas D. Hatton, a minor about 19 years of age, prior to August 29, 1914, lived with his parents in Humboldt County, Iowa, which is still the place of residence and domicile of his parents; at about the date last mentioned, said minor left Humboldt County, with the intention to remove permanently therefrom, and came to the city of Des Moines, intending to make Des Moines his permanent home, and with no present intention to return to Humboldt County to live, and he has no present intention to remove from Des Moines; the removal aforesaid to Des Moines was in pursuance of an arrangement made about January, 1914, by and between said minor and his parents and the plaintiff, whereby said parents, the minor concurring therein, agreed to surrender to plaintiff the personal custody, control and society of said minor during the rest of his minority, and the plaintiff agreed to take said minor into his home as a member of his family, and, so long as said minor conducted himself in a proper and satisfactory manner, to support and educate him; since said August 20th, said minor has been an actual resident of Des Moines, living with plaintiff, and is entitled to attend the free public school known as the West Des Moines High School; the terms of the agreement have been and will be fully kept; said minor was admitted to said high school about August 26, 1914, and has continued in attendance there and intends to so continue until the end of the school year of 1915; about February 4, 1915, defendant, by its board of directors and secretary, demanded of plaintiff payment of tuition for said minor for the school year 1914-1915, at the rate of \$7.25 per month.

under threat of expulsion of the minor unless payment was made, alleging as ground for said demand that the minor was a nonresident of the defendant school district, and that, under the laws of Iowa, he was liable for such tuition; about March 17, 1915, in compliance with a written demand of the secretary's, plaintiff paid to defendant, under protest, \$50.75, the amount claimed to be due for tuition of said minor for 7 months, ending March 26, 1915; plaintiff paid a large amount of school taxes in 1914, and would pay a large amount for the year 1915; plaintiff had no child or ward in attendance at the public schools of defendant district other than said minor, nor had he been advantaged personally or otherwise, except as a citizen of Des Moines, by the payment of said taxes. It is further alleged that, on March 26, 1915, the defendant claimed that another month's tuition of \$7.25 on account of said minor will be due, and a like amount on the 26th of each month thereafter during the balance of the school year 1914-1915; that, unless said installments of tuition are paid, defendant is threatening to, and unless restrained will, expel said minor from said high school and deprive him of his right to attend and receive instruction, to the irreparable injury of said minor and of the plaintiff, and that the action of defendant in coercing plaintiff to pay the said sum of \$50.75, and the acts of defendant in all the particulars mentioned, are illegal and an illegal exercise of power of defendant; that for plaintiff to yield to the demands aforesaid for the months commencing March 26th or suffer the expulsion of said minor will necessitate a multitude of suits at law to recover from defendant the amounts paid to it by plaintiff; that plaintiff has no plain, speedy or adequate remedy, save in a court of equity.

The demurrer to the petition was as follows:

"The defendant demurs to plaintiff's petition on the

ground that the facts therein stated do not entitle the plaintiff to the relief demanded, nor to any relief whatever; and on the further ground that it appears from said petition that this court has no jurisdiction to issue an injunction herein, but that the plaintiff's remedy, if any, is by appeal from the action of the board of directors of the defendant, and that plaintiff has no right to maintain this action."

The points involved are, therefore, whether plaintiff's remedy was by appeal from the action of the board of directors to the county superintendent and the state superintendent, and whether plaintiff was entitled to the relief demanded, because he had a plain, speedy and adequate remedy by such appeal.

A number of other questions are argued and claimed by appellant to be involved in the points just mentioned. These different points are elaborately and ably argued by counsel in their briefs of more than one hundred pages. Appellant's principal contentions, stated as briefly as may be, are: That Thomas D. Hatton is, within the meaning and intent of Section 2773 of the Code of Iowa, an "actual resident" of the defendant district, and as such, being a minor within the statutory school age, is entitled to free schooling in the schools of said district; that, even should the "actual residents" to whom said section grants free schooling be held to include only those who have acquired a technical legal domicile within the school district, nevertheless, having been surrendered by his parents to the plaintiff as stated, and having taken up his residence in the school district permanently, said minor acquired a domicile in Des Moines and is entitled to the freedom of its schools; that, even should said Thomas be held to be a nonresident of defendant district within the meaning of the statute referred to, the plaintiff, having assumed the position of parent or guardian of said minor, and become liable for his support and education, is, under Section 2804 of the Code, entitled to

deduct the amount of school taxes paid by him in defendant district from the amount of tuition required to be paid on account of said minor; that these taxes exceed the amount of tuition claimed; that this suit, being one to prevent a threatened irreparable wrong for which there is no speedy, adequate and complete remedy at law, is maintainable in equity, notwithstanding the provisions of Section 2818 of the Code, authorizing appeals from decisions of boards of directors to the county superintendent, etc; that, as incidental to the equitable relief, plaintiff is entitled to recover the tuition money wrongfully extorted, even though an injunction be not granted; and that, though the statute authorizing an appeal be held to take away plaintiff's remedy by injunction, still, under the allegations of his petition, he was entitled to some relief to recover the money alleged to have been wrongfully extorted; that, plaintiff having assumed the position of one standing *in loco parentis* to said minor, and the obligation incident thereto, it was plaintiff's right and duty to bring this action.

Appellant's propositions are disputed by appellee, which contends that the question of the residence of said minor and his liability, or that of plaintiff, for the payment of tuition, and like questions raised by the petition, were questions for the determination of the board of directors, and that, the board having passed upon and determined them, plaintiff's remedy was by appeal to the higher school authorities, if he claimed that the decision of the board was erroneous. The appellee also contends that there are large numbers of grandparents and other relatives and friends living in Des Moines who have young relatives residing in other parts of the state whom they would be glad to bring into their homes for the purpose of securing to such children the advantages of the finely equipped facilities provided by defendant district; that a determination against defendant in this case would deprive defendant school board of the

right to exact tuition from nonresident children attending its schools, and would cause an influx of persons of high school age whose parents are unable, on account of pecuniary circumstances or a geographical location, to furnish high school facilities to them, and thus burden the taxpayers of defendant district and require the building of other school buildings and the furnishing of additional school facilities, when the schools are already overcrowded.

As suggested, the arguments have taken a wide range, and some of them may be beyond the issues. Appellee strenuously insists, and cites numerous authorities to the point, that plaintiff may not maintain this action in equity, because, under the statute, he has a plain, speedy and adequate remedy by appeal to the county superintendent and the superintendent of public instruction; and we shall take up that question first.

1. It is appellant's contention that, had the defendant board expelled this minor, it would have cost him standing in his class and interrupted his education, and that the threatened injury would have been irreparable; that, therefore, there was no adequate and complete remedy save by an injunction in a court of equity. Cases from other jurisdictions under the statutes thereof are cited to sustain this proposition. It is also contended that public officers, including school directors, may be enjoined from the perpetration of irreparable injury by illegal acts, and that the wrongful exclusion of a pupil is such an injury,—again citing the same cases: *Mizner v. School District*, (Neb.) 96 N. W. 128 and 1006; *Cross v. Board of Trustees*, (Ky.) 89 S. W. 506. Counsel quote from the *Mizner* case as follows:

"It is urged that injunction will not lie; that, conceding the right of Ivy Bellinger to attend the school, and the denial of that right by the defendants, the proper action is mandamus, and that equity will not interfere to

afford relief. No one will attempt to deny the rule that, where an adequate remedy at law exists, equity will not interfere; but did the plaintiff have an adequate remedy at law in this case? Was there any legal remedy which offered the full, adequate and speedy relief to which plaintiff was entitled? Ivy was past sixteen. Her school days were nearly over. She was entitled to, and the plaintiff had the legal right to demand that she should, attend this school from day to day. * * * The only speedy and adequate relief offered to the plaintiff was a resort to the extraordinary remedy of an injunction. Under the circumstances, we think that he was entitled to appeal to the equity side of the court for this remedy. As before stated, no court of law could adequately measure the damage which he or Ivy might sustain by being expelled from the school, or by being denied an education."

In the *Mizner* case, it was a question whether the remedy for a pupil wrongfully expelled, or threatened with expulsion, was injunction or mandamus, and whether a court of law could adequately measure the damage which might be sustained by being expelled from the school. There appears to have been no question raised in that case as to whether the party had an adequate remedy by appeal to the county superintendent or to the superintendent of public instruction, and the rule was recognized in that case that, if there is an adequate remedy at law, equity will not interfere. Of course the rule is well settled and is elementary in regard to the law governing injunctions, that an injunction will not be granted if the complaining party has a plain, speedy and adequate remedy at law.

We have held in the *Preston* case, hereafter cited, that, under our statute, mandamus will not lie in cases of this character, but that appeal to the county superintendent is the proper remedy.

In the *Cross* case, *supra*, a mandatory injunction was

issued, compelling the defendant to reinstate a boy who had been wrongfully expelled from school. In that case, counsel for defendant admitted that it was the general rule that, where a child was unlawfully expelled from school, mandatory injunction was proper.

Appellant contends further that appeal to the county superintendent and the state superintendent is neither speedy, complete nor adequate. Appellant concedes that decisions and orders of the board of directors relating to school affairs cannot be controlled by the courts, and that the remedy afforded by appeal to the county and state superintendents is exclusive, and says that this rule applies where school boards have been granted discretionary powers. Cases are cited also to the point that, where positive official duty is enjoined upon a board of school directors, mandamus will lie to compel action, and that an injunction will lie in certain cases where the action of the board is unauthorized, illegal, or beyond the powers of the board.

Appellant quotes at some length from the opinion in the case of *Perkins v. Board of Directors*, 56 Iowa 476, 478, that, in one class of cases, appeals to the county superintendent are not the exclusive remedy for reviewing or assailing the decisions and orders of school directors; that this class includes cases wherein the jurisdiction and powers of the directors are brought into question, and wherein questions arise involving the construction of statutes conferring power upon school officers. There were two dissenting opinions in that case, and the case was explained in *State v. Thomas*, 152 Iowa 500, 503, where the *Perkins* case and other cases are referred to. In the *Thomas* case, it was further said that appeals may be taken in cases involving questions of fact before the board, and where the determination of such questions involves judgment and discretion.

Again, it is said by appellant, citing *Clark v. Board of*

Directors, 24 Iowa 266, and other like cases, that school directors have no discretionary power to exclude colored pupils. Counsel paraphrase some of the language in that case in this wise:

"Under our Constitution, which declares that provision shall be made 'for the education of all the youths of the state through a system of common schools,' which constitutional declaration has been effectuated by the enactment of Code Section 2773, providing that 'every school shall be free of tuition to all actual residents between the ages of 5 and 21 years,' is it not equally clear that all discretion is denied to the board of directors to exclude any such youths?"

The writer is of the opinion that the trouble with appellant's contention here is that it is not so much a question of discretion as it is a question of fact whether such youths are or are not actual residents of a school district. It is also urged by appellant, as a reason for saying that the remedy by appeal to the county superintendent is not adequate, that no stay of proceedings pending the appeal is authorized, and no way provided to maintain the *status quo*. It is doubtless true, as I think, that, if an appeal is taken from a decision of the board of directors to the county superintendent, the board will not execute its order, or possibly in such a case an injunction may lie until the appeal is determined; but there is no occasion to pass upon that question now, because no appeal was taken. We do not understand appellee to dispute these legal propositions of appellant's, but it contends that they are not applicable to the state of facts presented in the instant case.

Section 2804 of the Code vests in the board of directors the duty of determining the residence or nonresidence of a school child, and of fixing the terms upon which he may attend school in a district other than his residence. Plaintiff's petition shows that the defendant board has consid-

ered the residence of Thomas D. Hatton and found that he is a nonresident, and fixed the terms upon which he may attend the schools of the city of Des Moines. Section 2818 provides that any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may appeal therefrom to the county superintendent, etc. Section 2820 provides for appeal to the state superintendent, and reads, in part, that "the decision when made shall be final," and further that:

"Nothing in this chapter shall be so construed as to authorize either the county or state superintendent to render judgment for money;" etc.

Appellant's claim as to this last clause will be referred to later in the opinion.

No fraud is alleged in the petition, and it is quite clear, as I think, that the board of directors had jurisdiction to determine the fact question as to the residence of the minor, Hatton. Appellant's contention is that the board determined that question erroneously. Conceding that the petition alleges the conclusion, to some extent, at least, that Hatton was a resident of Des Moines, still the facts are stated, and, as said in *Preston v. Board of Education*, 124 Iowa 355, at 357:

"We have as the situation an erroneous conclusion of the board on a question of fact, which question the law had explicitly entrusted to its determination. The board, however, was acting within its jurisdiction, and the error of judgment, as we have seen, can be corrected by appeal."

Appellee further cites on this proposition *James v. Gettinger*, 123 Iowa 199; *Clark v. Board of Directors*, 24 Iowa 266; *Bogaard v. Independent District*, 93 Iowa 269; *Doubet v. Board of Directors*, 135 Iowa 95; *Kinzer v. Directors*, 129 Iowa 441. See also *Sweitzer v. Fisher*, 172 Iowa 266; *School Corporation v. Independent School District*, 162 Iowa 257; *Smith v. Blairsburg Ind. School Dist.*,

179 Iowa 500. The case last cited was a certiorari case, wherein it was held that certiorari would not lie, because there was a plain, speedy and adequate remedy by appeal to the county superintendent. The case just referred to in 162 Iowa 257 was an injunction case, holding to the same effect. The *Preston* case, in 124 Iowa, was a mandamus case, wherein it was held that the action of a school board in denying a pupil free admission to the schools on the ground of nonresidence cannot be reviewed in a mandamus proceeding, because the remedy is by appeal. As having some bearing, see *Ellyson v. City of Des Moines*, 179 Iowa 882, and cases therein cited, holding that in paving cases appeal is the exclusive remedy. The writer is of opinion that these cases rule the instant case, and that it is settled by the decisions of this court that such controversies as are here involved are for the determination of the board of directors, and that the remedy is by appeal to the county superintendent, and, if his decision is adverse, then to the state superintendent of public instruction,—at least that this is so in the first instance, and until the remedies provided by appeal have been exhausted, and in the absence of fraud. We deem it unnecessary to review the cases further. But a majority of the court think otherwise, and hold that the injury to plaintiff would be irreparable, and that, because of the greater flexibility of the injunctive remedy, all questions can be fully determined and adjusted, and further, that the case presented is not one strictly involving school matters alone, because it involves the payment of money, in which the board of directors are interested, and therefore are, in a sense, acting as judges in their own case. On these different propositions, the majority rely, to some extent at least, on the opinion of the state superintendent, as quoted and approved in *Wallace v. Independent School District*, 150 Iowa 711, 714, where it was held that, under the facts of that case, injunction was the exclusive remedy.

Reliance is also placed on the following cases, cited by appellant: *Mizner v. School District*, (Neb.) 96 N. W. 128, 129, and 1006, and *Cross v. Board of Trustees*, (Ky.) 89 S. W. 506, to the point, as contended for by appellant, that public officers, including school directors, may be enjoined from the perpetration of irreparable injury by illegal acts, and that the wrongful expulsion of a pupil is such an injury. And to the point that appeal is not an adequate remedy, and that the courts are not excluded from preventing or rectifying acts of school officers which are beyond the scope of their powers, or are an unreasonable exercise of the discretionary powers, they cite *Kinzer v. Directors*, 129 Iowa 441, 443; *Perkins v. Board of Directors*, 56 Iowa 476, 479, and cases cited; *Hinkle v. Saddler*, 97 Iowa 526, 536.

It is the conclusion of the majority that injunction will lie in this case, and that the trial court erred in not so holding.

Counsel for appellant in argument seem to concede that the case of *Preston v. Board*, 124 Iowa 355, is contrary to the decision in the *Perkins* case, and cases therein cited. In the *Perkins* case, it was said:

"It is very plain that, in one class of cases, appeals are not the exclusive remedy for reviewing or assailing the decision and orders of the school directors. This class includes all cases wherein the jurisdiction and power of the directors are brought in question, and wherein questions arise involving the construction of statutes conferring power upon school officers. The courts of the state are arbiters of all questions involving the construction of the statutes conferring authority upon officers and jurisdiction upon special tribunals. It was certainly never the intention of the legislature to confer upon school boards, superintendents of schools or other officers discharging quasi judicial functions, exclusive authority to decide questions pertain-

ing to their jurisdiction and the extent of their power. All such questions may be determined by the courts of the state. Hence, when the rights of a citizen are involved in the exercise of authority by a school officer, the courts may determine whether such authority was lawfully exercised."

2. As before stated, it is contended by appellant that, even though he is not entitled to an injunction, still he is entitled to some relief,—that is, to recover the money alleged to have been paid by plaintiff under compulsion; that the demurrer should not have been sustained and the petition dismissed. The argument is substantially this: That, since Section 2820 of the Code provides that "nothing in this chapter shall be so construed as to authorize either the county or state superintendent to render judgment for money," the board could not render a judgment for the \$50.75 already paid by appellant; and that, in proper cases, suits for money judgments are maintainable against school districts, as, for instance, that a teacher may sue for a breach of his contract with the school district, citing *Burkhead v. Independent School District*, 107 Iowa 29, and *Curttright v. Independent School Dist.*, 111 Iowa 20.

Appellant also argues that, where it appears that plaintiff's remedy at law would necessitate the bringing of a number of successive actions, and thus result in a multiplicity of suits, relief will be granted in equity, and quote from some of the cases that:

"Where acts may cause irreparable injury, where a multiplicity of suits will be avoided, or where acts of trespass are constantly repeated, but the injury resulting from each act is trifling, relief in equity will be granted, because of the inadequacy of the legal remedy." *Dumont v. Peet*, 152 Iowa 524, 528.

Counsel for appellant say, however, that they do not contend that always, or perhaps in the instant case, the prevention of a multiplicity of suits is, in and of itself, a

sufficient ground for equitable jurisdiction, under the doctrine announced in *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa 422, 487, 488. They do contend that, as equity had jurisdiction of the cause upon the grounds of impending irreparable injury and inadequacy of relief at law, the prevention of a multiplicity of suits at law enhanced the plaintiff's equities, and is a sufficient ground upon which to base plaintiff's prayer for a money judgment. They also quote from *Novak v. Novak*, 137 Iowa 519, 524, to this effect:

"The doctrine is too well settled to admit of either discussion or dispute that, when a court of equity once acquires jurisdiction of a cause, it will not relax its grasp upon the *res* until it shall have avoided a multiplicity of suits by doing full, adequate and complete justice between the parties."

The *Novak* case is the only one cited on that point. There, one defendant had filed a cross-petition, which was dismissed by the trial court, after a trial, because it was not germane to the cause of action stated in the original petition. And the court said that, had cross-petitioner cared to raise the point that the cause of action stated in the cross-petition would not affect that contained in the original petition, he should have raised the question by motion to strike or to dismiss, and that, having pleaded to the merits, he was not in a situation to question the procedure by which he was brought into, or submitted himself or the subject matter to, the court's jurisdiction, because it was competent for the parties by mutual consent to submit the issues joined to the court for its determination; and that, by his conduct, he consented to a trial in that manner, and that such was the effect of his conduct. So that the point now suggested was really not in the *Novak* case.

Upon a somewhat limited independent investigation, it seems that there is a conflict in the cases as to whether.

where an action is brought in equity and the equitable issues are not proved or sustained, the court may proceed as in equity to try questions which are of a legal character. The question is an important one, and, since its determination is not necessary, because the case may be determined upon other grounds, we do not feel justified in passing upon the question without full argument. We shall content ourselves with the citation of some of the cases, with perhaps a few brief observations on that point. See *Fisher v. Trumbauer*, 160 Iowa 255, and cases cited at page 261; *Howard v. National French Draught Horse Association*, 169 Iowa 719, 728; 16 Cyc. 111-114; *Johnston v. Bunn*, (Va.) 19 L. R. A. (N. S.) 1064, and note; and, as having some bearing, the discussion in *Eller v. Newell*, 159 Iowa 711. The *Fisher* case itself does not bear directly, perhaps, because there the action was brought in equity and a cross-petition was filed for the recovery of damages at law, and the question was as to the transfer of the cause from one docket to the other; but in the supplemental opinion, it was held that plaintiff was entitled to a hearing in equity on the merits, and the defense of counterclaim was at law, and, such a defense having been interposed in a suit properly begun in equity, the legal defenses so interposed should also be heard there. This, we think, is a different proposition from that where the action is improperly brought in equity, or the equities alleged are not proved.

In the *Eller* case, the action was at law, in which a cross-petition asking for equitable relief was pleaded and the cause was transferred to the equity side of the calendar, which was held to be erroneous. The rules and apparent exceptions are stated in the reference to Cyc. just given. It might be suggested that if, in all cases, the court must proceed to hear questions at law in a suit brought in equity, a person having a claim which is really at law might,

for the purpose of avoiding a jury trial, bring his case in equity, setting up some equitable issue, knowing that he could not maintain it, unless possibly the defendant would be entitled to a jury trial, in a proper case, of a fact question, even though the action be brought in equity.

But, as before stated, we think the question here presented may be determined upon other grounds. It should be remembered that, as to the recovery of the \$50.75, plaintiff claims that he paid the same under protest and by compulsion or duress, and the facts are stated. Appellee contends that such payment was voluntary, and cites *Anderson v. Cameron*, 122 Iowa 183, 184; and says that equity courts and jurisdiction are not maintained for the purpose of collecting moneys paid either voluntarily or under compulsion, citing *Kelly v. Andrews*, 94 Iowa 484. This money was paid under the same sort of an order of the board of directors as was made in reference to future payments, and plaintiff sought to enjoin defendant from compelling such future payments. I think the plaintiff had the same right to appeal to the county superintendent from the order requiring the payment of the installments he now seeks to recover. If the order of the board was erroneous, he could have had it corrected on appeal; at least I think we should not, for the purpose of permitting plaintiff to resort to the courts rather than take an appeal, assume that the county superintendent or the state superintendent would not decide the question correctly. In other words, plaintiff's remedy as to such payments was by appeal, as well as the future payments he sought to enjoin. If he had appealed and the controversy on appeal had been settled as he now contends it should have been, he would not have been compelled to pay at all. But it seems to be the rule that, where plaintiff proves or shows that he is entitled to the

equitable relief asked, equity will determine the entire controversy.

3. Section 2804 of the Code provides, in part:

"The parent or guardian whose child or ward attends school in any independent district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid."

Appellant contends that the pronoun "he" in this statute stands for the nouns "child" or "ward," not for the nouns "parent" or "guardian," and that, when so construed, the words "parent or guardian" include the parent, and that, if the child or ward, Thomas Hatton, in attending the West Des Moines High School, be held to attend a school within a "district of which he (the child or ward) is not a resident," the appellant should be allowed to deduct the amount of school tax paid by him in said district. Appellee contends that the pronoun "he," as used in the statute, refers to the words "parent or guardian," and that plaintiff is neither, and that plaintiff is a resident of the same district in which Thomas D. Hatton is required to pay tuition, the contention at this point being that the person who is entitled to deduct the taxes paid is the parent or guardian whose child or ward is attending school in a district of which said parent or guardian is not a resident. Without determining the question, I am inclined to appellee's view at this point. It seems to me that it is a sufficient answer to this claim of appellant's to say that we do not find that plaintiff asked such relief in his petition, nor is it alleged therein that he asked the board of directors to make the deduction now argued; but, on the contrary, appellant was contending that no tuition was required for the minor. I see no reason why the board of directors, as well as the court, could not have made the deduction, had it been

proper; and, had it been asked and refused, then as to that question, plaintiff could have appealed to the county superintendent.

Other questions are argued, but those referred to are decisive of the case. It is the conclusion of the majority that the trial court erred in sustaining the demurrer to the petition. The judgment is therefore—*Reversed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

IN RE ESTATE OF CHARLES J. HOYT.

CHARLES E. HATCHER, Administrator, Appellee, v. E. N. FARBER, Administrator, Appellant.

TRUSTS: Resulting Trusts—Evidence—Admissions. Admissions by
1 one whose estate is sought to be charged with a resulting trust, tending to show that he so held the property in question, are manifestly competent.

APPEAL AND ERROR: Harmless Error—Presumption as to Error
2 —Necessity for Prejudice. Reception of incompetent testimony, in an action tried to the court, is not reversible error if, from the entire competent record, it is manifest that the judgment is the only one which could be properly arrived at.

APPEAL AND ERROR: Harmless Error—Transactions with De-
3 cedent—Improper Reception. Reversible error may not be predicated on the reception of evidence of personal transactions with a deceased person, within the meaning of Sec. 4604, Code, 1897, when the matter in issue was fully established by other competent testimony. (Probate case tried to court.)

WITNESSES: Competency—Transaction with Deceased—Burden of
4 Proof. The court will not presume that certain testimony constitutes or is a part of a personal transaction with a deceased person, within the meaning of Sec. 4604, Code, 1897. Such fact must appear from the circumstances, or the objecting party must show it.

WITNESSES: Examination—Non-Responsive Answer—Objection.

5 Principle recognized that only an examining party may move to strike a non-responsive answer.

APPEAL AND ERROR: Harmless Error—Reception of Evidence.

6 Error, if any, in allowing a witness to answer "yes" to the question whether he had told anyone his purpose in calling upon the party in question, is clearly harmless.

Appeal from Marshall District Court.—JAMES W. WILLETT, Judge.

SATURDAY, JUNE 23, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

THIS was an action in probate for the allowance of a claim in favor of the estate of Mary L. Bradford, deceased, and against the estate of C. J. Hoyt, deceased. The amount claimed was \$4,000 and interest, and that amount was allowed. The case was tried to the court, without a jury. The administrator appeals.—*Affirmed.*

E. N. Farber, pro se, and Lundy, Peisen & Soper, for appellant.

C. H. E. Boardman, for appellee.

PRESTON, J.—The claim was based upon the following allegations, substantially: That C. J. Hoyt, during his lifetime, purchased for Mary L. Bradford certain real estate; that said Mary L. Bradford furnished the money to make said purchase, and C. J. Hoyt took the title in his own name; that subsequently said C. J. Hoyt sold or traded said real estate for \$4,000.

It is undisputed that the rights of third parties have intervened so as to prevent an enforcement of the trust in the specific property. A money allowance and order of payment and establishing the claim against the estate was therefore had.

No evidence was introduced by the defendant administrator, except that he offered in evidence, as a part of the cross-examination of one of the witnesses, three certain deeds, one of which was a deed from Theodore F. Bradford to Mary L. Bradford, executed July 2, 1901, conveying the real estate alleged to have been taken in the name of C. J. Hoyt, deceased, at a later date; also, a deed to the same property from Mary L. Bradford to C. J. Hoyt, executed April 5, 1904 (this deed recites a consideration of \$2,000); and another deed, being a correction deed, dated May 16, 1904, by Mary L. Bradford and her son, Theodore F. Bradford, and his wife, Emma C. Bradford. This gives the description of a part of the real estate.

It is not claimed anywhere in the record nor in argument that C. J. Hoyt, deceased, ever invested any money in the land, or that he paid any of the purchase price. It is not disputed that the land was worth \$4,000, and that he received that amount of money for it; and there is no claim that this \$4,000 has ever been paid back.

Appellee contends that the defenses are technical. It is conceded by appellant in argument that most of the questions raised in this appeal pertain to rulings upon evidence, and upon the competency of certain witnesses.

C. J. Hoyt died in 1905, leaving a will, and naming his wife, Myra Y. Hoyt, as executrix. Subsequently, E. N. Farber was appointed as administrator, with will annexed. The will of Mary L. Bradford was admitted in evidence, over the objection by defendant. It is contended by appellant that the will had not been admitted to probate, but the additional abstract shows that it was admitted. Witness identified the signature of testatrix thereto, and stated that it was her last will. The will is very brief, and gives all of her property to Emily C. Bradford, the wife of witness Theodore F. Bradford. The appellant's objection to the will is that, if the will has not been probated, Theodore

F. Bradford, being the only heir or child of said Mary L. Bradford, would, under the law, take all the property, and be interested, and therefore incompetent to testify as a witness in this case; and if the will has been admitted to probate, then he is incompetent because he is the husband of the sole legatee under the will, and for that reason incompetent to testify. This objection will be disposed of by what we shall say in regard to the evidence and the alleged incompetency of Theodore to testify.

The evidence which was admitted without objection, and that which was admitted over the objection of defendant, shows, by the conveyance from Theodore F. Bradford to Mary L. Bradford before referred to, and assignment of contracts, etc., that Mary L. Bradford became the owner of the real estate in controversy, subject to a mortgage of about \$700 to J. T. Hardin. Prior to November 17, 1903, Hardin had foreclosed his mortgage, and the property had been sold at foreclosure sale. On that date, November 17th, Mary L. Bradford borrowed \$875 of a bank at Marshalltown, giving her note, which was also signed by one Charles Henry. This note was introduced in evidence. On the same date, Charles Henry gave this money to deceased, Charles J. Hoyt, and told him to go to Hardin County and secure an assignment of the sheriff's sale certificate to him for Mrs. Bradford; or, if the purchaser would not assign, to redeem the land. This is testified to by Henry. On the 19th of that month, Hoyt went to Eldora, procured the assignment in the name of Charles Henry, and paid the taxes. A written exhibit in the handwriting of Hoyt shows an amount expended by him of \$92.50 for railroad fare, taxes, etc., which he (Hoyt) presented on his return and collected. At this time, Hoyt had nothing invested in this real estate, and he had been reimbursed for all expenses, etc. In March, 1904, Hoyt sold or traded this property to Jennie B. Woods for certain property in Union and \$2,125 in notes, and took a mort-

gage on the Hardin County land for \$1,500, payable to his wife. The amount he received for the land in controversy was \$4,000. A written contract showing this transaction is in evidence; also the mortgage. As stated, the undisputed evidence is that the Hardin County land was worth at that time, \$4,000. In April, 1904, by the deed of that date before referred to, Mary L. Bradford deeded to deceased, C. J. Hoyt, the Hardin County land. It is the contention of appellee that this deed was executed so that it might straighten up the record for Mr. Hoyt in closing up with Mr. Wood and his wife, Jennie B. Wood. Witness Theodore F. Bradford so testified, over objection by the defendant, but this objection was not on the ground that the witness was incompetent under Sec. 4604 of the Code. The sheriff's certificate under the foreclosure sale was assigned by Henry to C. J. Hoyt, and, on April 16, 1904, a sheriff's deed was issued to Hoyt. The sheriff's certificate had been assigned by the purchase to Henry, who in turn assigned to Hoyt, as stated. The sheriff's deed is in evidence. The original written contract between C. J. Hoyt and Jennie B. Wood for the sale of the real estate is in evidence. It had been left with Theodore F. Bradford.

July 1, 1904, deceased, Hoyt, was taken

1. TRUSTS: re-
sulting trusts:
evidence: ad-
missions.

very sick, and Bradford asked him to assign the Woods contract to his mother, Mary L. Bradford, and quitclaim to her the land described in the Woods contract. Hoyt, at that time, was too sick to sign his name; but he said in the presence of his wife that it was all right, and that his wife knew all about it, and that she would attend to it if he did not get better. This was testified to by witness Bradford, over defendant's objection that he was incompetent to testify to such a personal transaction, and the further objection that the testimony seeks to establish an express trust by parol.

We shall dispose of the first objection later, in refer-

ring to the testimony generally to which appellant objects; but as to the second objection, we think it was competent as an admission by deceased, and as having a bearing upon the issue in the case as to whether the property was taken in Hoyt's name with money furnished by Mrs. Bradford, and to show that he recognized that the land belonged to Mrs. Bradford. This circumstance or admission by deceased was also testified to by another witness, Young.

At this time, the Woods contract, the quitclaim deed and an assignment were left at the bedside of Hoyt. Hoyt died the next day, July 2d. In May, 1906, the Hoyt estate sold the Union real estate, and the deed is in evidence; and in August, 1907, Jennie B. Woods deeded the Union real estate to Myra Hoyt, widow of deceased, and on the same date, Myra Hoyt deeded the Hardin County land to Jennie B. Woods. The deeds are in evidence.

The plaintiff contends, substantially, that the transaction in connection with the securing of the assignment of the sheriff's certificate, and the furnishing of the money by her, established a resulting trust in Mary L. Bradford. She also contends that Hoyt was her agent, and, as he had taken the title in his own name, by reason of that fact a resulting trust in her was established. The administrator contends, among other things, that the deeds given by Mary L. Bradford to Hoyt preclude the establishment of any trust as pleaded, and preclude her from showing or establishing any such trust. We do not understand appellant to seriously contend that such deed or deeds by her to Hoyt would have that effect if there was in fact no consideration passing from Hoyt to Mary L. Bradford. The real contention at this point is that it is not competent for a witness to contradict the recitals in a deed and testify that there was no consideration. A witness did testify that there was no consideration. A witness did testify, over objection, that there was in fact no consideration for either

of the deeds executed by Mrs. Bradford to deceased, Hoyt, although one recites a consideration of \$2,000, and the correction deed for a part of the land recites a consideration of \$1.00. Appellant cites no cases to sustain this contention. Furthermore, we are satisfied, from competent evidence in the record and all the circumstances, that these deeds were for the purpose of enabling Hoyt to carry out the Woods contract.

1. It is contended by appellant that a case of this kind, an allowance upon a claim in probate, is tried as a law action, and that, where a jury is waived, the court is required to rule upon objections to evidence, and that it is reversible error to admit incompetent evidence. Cases are cited to sustain this proposition, and, as a general rule, it may be conceded, for the purposes of the case, to be the law. But it does not follow that a reversal must necessarily result because of the admission of incompetent evidence. It must have been prejudicial, to work that result. The rule often stated is that, where there has been error, a presumption of prejudice arises, and, if the record fails to satisfy us that no prejudice has been caused, then such error cannot be disregarded. It may be that a judge would not be influenced so much, and could more readily disregard such evidence than a jury.
2. **APPEAL AND ERROR: harmless error: presumption as to error: necessity for prejudice.** It is contended by appellee that where, as in the present case, there is no conflict in the evidence, and where, with the incompetent evidence rejected, no other conclusion could be reached, it is then a question as to what judgments should be entered, and that the case should be affirmed on that ground. No case is cited so holding, though it is suggested in *Leasman v. Nicholson*, 39 Iowa 259, at 262, where it was said:

"If we could see that the evidence could be rejected,

and still no other conclusion be reached, we might affirm on that ground. But the evidence is conflicting," etc.

And as bearing somewhat upon this same matter, see *Van Sickle v. Staub*, 155 Iowa 472, at 479.

Conceding, for the purposes of the case, that the witness Bradford was incompetent as to personal transactions with Hoyt, deceased, and that, in the many rulings complained of, some incompetent evidence crept in, we think plaintiff proved his case by the evidence which was legally competent, and after eliminating all the incompetent evidence complained of.

Appellant assigns as error 37 specific objections to the evidence of Bradford as to alleged personal transactions between Bradford and Hoyt, and a like number to the evidence of witnesses that the evidence tended to establish an express trust in a part of the land, and some 15 other specific objections to the rulings on evidence. Manifestly, we cannot be expected, within the proper limits of an opinion, to review all these. We shall give some of them as illustrative of the objections made, and state our conclusions as to all of them more generally.

As to Bradford's evidence and his alleged incompetency as a witness under Code Section 4604, it may be stated that substantially all his evidence was strenuously objected to, all through. Much of his evidence is competent, and the witness competent to testify. To illustrate, after the witness had testified:

4. WITNESSES:
competency:
transaction
with deceased:
burden of
proof.

"I am the only child of Mary L. Bradford. There was one other child, who is dead, and leaving two children surviving him and living now. I am one of the children of Mary L. Bradford, for whose estate a claim is made in this suit,"

—he was asked this question:

"Q. I will ask you, Mr. Bradford, what was done by your mother on November 17, 1903, with reference to taking care of in some way of the incumbrance against this real estate."

Over objection, and some discussion between the court and counsel, in which the court said, "If we shall assume that the will introduced in evidence has probative force, then this objection is not well taken," and a statement by appellant's counsel that until the will is admitted there surely can be a contest of the will, and it is not established as the will, the witness answered:

"A. She borrowed \$875 from the Marshalltown State Bank to pay it or to secure an assignment of it."

The answer was responsive to the question.

"Q. I hand you Exhibit I, and ask you what it is, and whose names appear signed thereto."

Without objection, witness answered:

"A. It is the note that I have just spoken about for \$875, running to the Marshalltown State Bank, and dated November 17, 1903, signed by my mother and Charles Henry."

Then this question was asked the witness:

"Q. If you know, state who was present and got this \$875 at the bank, and what was done with the money. I don't want it if you don't know of it personally. A. Mr. Henry, Mr. Hoyt, myself; the money was obtained by Mr. Henry and turned over to Mr. Hoyt."

The objection was renewed in a motion to exclude this last answer on the ground, as claimed by appellant, that the witness participated in the transaction, and the court said:

"Of course, I am not advised whether he participated in the transaction or not; there isn't anything to show that he did. Counsel for appellant: I have to assume that he did; that is the reason for the motion."

This witness also testified without objection:

"Q. Do you of your own personal knowledge know whether Mr. Hoyt went to Eldora? A. I do."

This was an important fact in the case,—that is, whether Mrs. Bradford furnished the money to pay off the Hardin encumbrance; and the documentary evidence shows without dispute that Hoyt did take the title in himself thereafter, and the evidence tends very strongly to show, if, indeed, it does not establish, the fact that Mrs. Bradford furnished the money, and appellee contends that this establishes a resulting trust. Witness Henry gave similar testimony. He testified also that Hoyt was to go to Eldora to redeem the property or get the certificates, and that he did so. So far in the testimony of Bradford, it does not appear that there was any transaction between this witness and Hoyt. He simply says that the money was obtained by Mr. Henry and turned over to Mr. Hoyt. Counsel for appellant stated that they assumed that Bradford participated in the transaction, but this is not enough. Appellant was the objecting party, and it must be made to appear that the witness did participate before it can be said that he is incompetent as a witness. *Scott v. Brenton*, 168 Iowa 201. At the time the ruling was made, it was correct, and there was subsequently no motion made to exclude the evidence we have just set out. *O'Mara v. Jensen*, 143 Iowa 297, at 303. We think the evidence of Bradford, before set out, was competent, and that he was competent to testify thereto, and that appellant's objections thereto were not well taken.

Another illustrative part of the record on the subject being now discussed is as follows:

5. WITNESSES:
examination:
non-responsive
answer: ob-
jection.

"Q. Now it appears that, in April, 1904, C. J. Hoyt got the sheriff's deed. What was the next step in this transaction, if you know?"

Over objection that the witness was incompetent, etc., he answered:

"A. Along in the spring following, after the assignment of the certificate, I think it was,—I can't tell the exact date. Q. Refresh your recollection by looking at any memoranda that I hand you, if you want to get the exact date. (Papers produced, but no further objection to this question.) A. On or about the 25th day of March, 1904, Mr. Hoyt, who then held the certificate of sale, at my mother's direction made a trade of the property—of this land—for some property, with Jennie B. Wood and husband."

Defendant moved to strike that part of the answer, "At my mother's direction," as being a volunteer statement of the witness, and not asked for and not responsive, incompetent, irrelevant and immaterial; and further, to strike the entire answer as incompetent, irrelevant and immaterial and a mere conclusion and opinion of the witness. Counsel for plaintiff then adopted the answer, and the court overruled the motion. We think there was no error in the ruling at this point. Only the examining party can move to strike because non-responsive; further, the only objection to the answer was to that part of it before indicated, and on the grounds stated, and not on the ground that the witness was incompetent under Section 4604. In so far as that part of the answer was a voluntary statement, or not responsive, it was adopted by counsel for plaintiff. It is not necessarily a conclusion or opinion of the witness; because, for aught that appears, the witness may have heard his mother give the direction, and no other reason is given why the answer is incompetent, irrelevant and immaterial. and that objection raises no question for our determination. *State v. Madden*, 170 Iowa 230, 236, and cases; also *Longan v. Weltmer*, (Mo.) 64 L. R. A. 969, 976 and cases.

The same objection was made to the next question, and the same rule applies. That question is as follows:

"Q. Did you draw the contract with reference to the exchange of this property that Mr. Hoyt had under sheriff's certificate or deed to one Jennie B. Wood? A. I did. That is, I dictated it. My stenographer wrote it out, but I dictated it."

The instrument was acknowledged and introduced in evidence, and shows a contract between Hoyt and Jennie B. Wood to transfer certain property, including a part of that in controversy in this case. We might go on with other illustrations; and, as before stated, conceding, for the purposes of the present case, that the witness was incompetent as to some of the transactions, still as to others he was competent, and as to still others, proper objection was not made; so that, taking the entire record, this witness with the others, and the documents, circumstances and the proper inferences to be drawn therefrom, we are satisfied that plaintiff established her case by evidence which was legally competent, after discarding any which may have been improper.

It is thought that witness Henry was incompetent under Section 4604, because, as appellant claims, Mrs. Bradford and Hoyt were claiming title through Henry; but we do not so understand the record. It is certain that at the time Henry testified he had no interest of any kind, and had nothing to gain or lose by this suit. Nor was he a party to the suit nor interested in the result. Hoyt was not the assignee of the party seeking to establish this claim. Appellee contends that the objection to the testimony of witness Henry was not sufficient. But we shall not prolong the discussion at this point further.

2. As before stated, appellee's contention is that, Mrs. Bradford having furnished Hoyt the money to obtain the sheriff's certificate, and Hoyt having thereafter taken the title in his own name, this created a resulting trust in favor of Mrs. Bradford. Many cases are cited by either side.

But appellee relies upon the principle announced in *Amidon v. Snouffer*, 139 Iowa 159; also, *Acker v. Priest*, 92 Iowa 610, at 617, bottom; *In re Mahin's Estate*, 161 Iowa 439; *Parker v. Catron*, 120 Ky. 145 (85 S. W. 740, 117 Am. St. Rep. 575); *Reynolds v. Sumner*, 126 Ill. 58. We do not understand appellant to dispute this legal proposition, but they contend that the evidence, or some of it, tends to establish an express trust, and that this may not be done by parol testimony. This objection has reference, as we understand it, more particularly to the testimony in regard to Hoyt's being willing on his death bed to make a deed to Mrs. Bradford. But plaintiff was not seeking to establish an express trust. We have before referred to this matter as having been properly admitted as bearing upon the question of the resulting trust referred to in the claim. We think it was proper and relevant.

6. APPEAL AND
ERROR: harm-
less error: re-
ception of
evidence. 3. Witness Bradford, in testifying to the transaction when he left the contract and papers at Hoyt's house, shortly before Hoyt's death, was asked this question:

"Q. Did you tell anyone there what you had come to see Mr. Hoyt about?"

Defendant objected, because incompetent, irrelevant, immaterial, hearsay, not binding on the parties to this action, and because it was a self-serving declaration on the part of the witness, a party in interest to the suit. Thereupon, counsel for plaintiff stated that they were not asking for what he said, but that they simply wanted to show the fact that he told them what he was there for; and the witness answered, "Yes." Witness did not state what was said, but simply that he told them what he was there for. Clearly, no prejudice could result to the defendant by this.

4. It should have been said in the statement of facts that the record shows different orders made in the matter of the estate of Hoyt for the sale of land, of which there seemed

to have been a considerable amount; and it appears that the land was all sold, and that the estate was left substantially without assets. No blame is attached to the present administrator for this condition of affairs, but appellee's claim is that the widow, who was the executrix, made away with the estate.

Some other questions are argued, but the opinion is already too long, and those discussed are controlling.

It is our conclusion that the judgment or allowance of the claim by the district court was right, and is sustained by the competent testimony. It is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

LEW KILE et al., Appellants, v. JOHN H. HOGAN et al., Appellees.

GUARDIAN AND WARD: Sales and Conveyances—Jurisdiction
1 —**Failure to Appraise—Effect.** Omission to appraise the real property of an insane person will not, of itself, invalidate a sale and conveyance thereof by the guardian, such omission being a matter not going to the jurisdiction of the court to order a sale. See Secs. 3212, 3325, Code, 1897.

GUARDIAN AND WARD: Sales and Conveyances—Collateral Attack. Principle recognized that sales of real estate by guardians may not be collaterally attacked.

Appeal from Polk District Court.—W. S. AYRES, Judge.

MONDAY, SEPTEMBER 24, 1917.

Suit in equity for partition and to set aside a guardian's deed and other conveyances of real estate. Decree in favor of defendants. Plaintiffs appeal.—*Affirmed*.

E. P. Hudson and R. L. Hudson, for appellants.

Geo. Wambach, W. F. Riley, and I. W. Douglas, for appellees.

STEVENS, J.—I. Plaintiffs are the children, grandchildren and heirs at law of Lawrence Kile, who died February 14, 1915, intestate. On September 6, 1912, he was adjudged of unsound mind, and a guardian was appointed to look after and manage his business for him. He was at that time the owner of the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 30, Township 80 north, Range 23 west, Polk County, Iowa, containing 88.74 acres. The proceedings for the appointment of a guardian were begun in the name of Barbara Kile, his wife. On or about August 11, 1913, John H. Hogan, as guardian of Lawrence Kile, sold the real estate to the defendant William Young, who in turn sold it to one of his codefendants. The remaining defendants, except Barbara Kile, surviving widow of Lawrence Kile, are mortgagees or grantees and have some apparent interest in said real estate.

Plaintiffs, in their petition, pray the cancellation of the guardian's deed; that the several conveyances therein referred to be set aside; that the incumbrances placed on said real estate be cancelled, set aside, and held for naught; that title be quieted in them and their interest ascertained and decreed in said real estate; and that same be partitioned, or, in the event that same cannot be equitably done, that same be sold and the proceeds divided among them, according to their respective interests.

The grounds upon which the prayer of plaintiffs' petition is based are that the appointment of a guardian for Lawrence Kile and the order authorizing the sale of the real estate by the guardian were unauthorized; that the court was without jurisdiction either to appoint a guardian or order the sale of said real estate, for the reason that notice was not served upon Lawrence Kile of the petition for the appointment of a guardian and of the application to sell the real estate, as required by law; and that same was sold without appraisal, and for less than its value.

The defendant Barbara Kile, by a quitclaim deed, con-

veyed her interest therein to the defendant William Young, who was named as grantee in the guardian's deed. The record shows that the statute providing for the appointment of a guardian for an insane person was complied with; that due notice was served upon the defendant of the pendency of the petition of his wife for that purpose; that a guardian *ad litem* was appointed and filed answer; that all of the proceedings relative thereto were regular; and that the court had jurisdiction to make said appointment.

Section 3225 of the Supplement to the Code, 1913, authorizes the sale or mortgage of real estate belonging to drunkards, spendthrifts, and lunatics by the guardian thereof, and is as follows:

"Whenever the sale or mortgage of the real estate of such ward is necessary for his support or for the support of his family or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell or mortgage the same under like proceedings as required by law to authorize the sale of real estate by the guardian of the minor. . * * "

Section 3206 of the Code provides for the mortgaging or sale of real estate belonging to minors, while Code Section 3207 prescribes the notice to be served upon such minor of the petition for that purpose, and is as follows:

"The petition for that purpose must state the grounds thereof, be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court or judge, must be served personally upon the minor at least ten days prior to the time fixed for such application."

It appears that a copy of the petition of the guardian for the sale of the real estate in question, together with a notice thereof stating the time and place of the hearing of said petition, was served upon Lawrence Kile, and return thereof made by the sheriff of Polk County. The return

of the sheriff, when first made, did not state that a copy of the petition was attached thereto or delivered to Lawrence Kile. Later, however, the return was so amended as to conform to the facts, from which it appears that a copy of the petition was in fact attached to the notice and delivered to Lawrence Kile at the time of the service thereof. A guardian *ad litem* was appointed by the court, who filed answer. The petition alleged that William Young had offered \$140 per acre, cash, for the real estate therein described, and that the price so offered was the best obtainable, and the guardian recommended that the same be sold therefor at private sale, and that appraisement be waived. The provisions with reference to appraisement are governed by the following sections of the Code of 1897:

"Section 3212. The rule prescribed in the sale of real property by executors shall be observed in relation to the evidence necessary to show the regularity and validity of the sales of guardians; * * *

Turning to sale by executors, we find the following:

"Section 3325. The real estate shall, when to the interest of the estate, be divided into parcels, appraised as the personal estate was, and the appraisement filed in like manner; * * *

"Section 3326. * * * No property can be sold at private sale for less than the appraisement, without the express approval of the court or judge."

The court, in its order authorizing the sale, found that the price offered for said real estate was fair, just and reasonable, and the best obtainable, and authorized the sale thereof without the formality of appraisement. The land was, therefore, sold by the guardian without appraisement. The court having jurisdiction to authorize the sale of said real property, the omission of the appraisement was an irregularity only, and

1 GUARDIAN AND
WARD: sales
and convey-
ances: juris-
diction: failure
to appraise:
effect.

in no way affected the jurisdiction of the court to order the sale of the real estate. *Bunce v. Bunce*, 59 Iowa 533; *Hamiel v. Donnelly*, 75 Iowa 93; *Dohms v. Mann*, 76 Iowa 723; *Bacon v. Chase*, 83 Iowa 521.

Counsel for appellants refer to other sections of the statute prescribing the manner of serving notice upon a person of unsound mind. These statutes relate to the commencement of actions against a person of unsound mind, and not to proceedings by guardians for the sale of the real estate of their wards.

II. Plaintiffs' petition is drawn upon the theory that the district court was without jurisdiction either to appoint a guardian for Lawrence Kile or to order the sale of his real estate; but, as appears from the record, the court did have jurisdiction, and the omission to have the property appraised, and other matters complained of by appellants, are irregularities, and do not go to the matter of jurisdiction. While it is charged that the price at which the real estate sold was much less than the price for which it was sold shortly thereafter, no evidence was offered for the purpose of showing that, at the time of the sale, the land could have been sold for a larger amount by the guardian; nor is it claimed that there was fraud in any of the transactions or proceedings referred to in plaintiffs' petition.

2. GUARDIAN AND
WARD: sales
and convey-
ances: collat-
eral attack.

The wife of Lawrence Kile conveyed her interest in the real estate by quitclaim deed to the purchaser thereof from the guardian, who was appointed upon her application, and she is made a party defendant in this suit. The sale cannot be collaterally attacked. *Dohms v. Mann*, supra; *Bacon v. Chase*, supra; *Hamiel v. Donnelly*, supra; *Rice v. Bolton*, 126 Iowa 654; *Bunce v. Bunce*, supra.

It is our conclusion that the lower court rightly held that the guardian's sale should not be set aside, and that

same should be sustained. The judgment of the lower court is therefore—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

NICHOLAS H. KOPPES, Appellant, v. MATTHIAS S. KOPPES, Appellee.

BOUNDARIES: Establishment—Agreement Between Parties. Mutual and executed agreements between adjoining owners as to the location of boundary lines are final, even though subsequent surveys establish inaccuracy in the agreed line.

APPEAL AND ERROR: Harmless Error—Reception of Evidence—
2 **Motive Inducing Settlement.** Allowing evidence to the effect that one party to a boundary line controversy agreed to a certain line "in order to get things settled and get done with the controversy," is harmless.

PLEADING: Certainty—Basis for Adjudication. A pleading so uncertain as not to identify the subject matter of the action furnishes no basis for an adjudication.

Appeal from Jones District Court.—F. O. ELLISON, Judge.

MONDAY, JUNE 25, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

The opinion states the case.—*Affirmed*.

Remley & Remley, for appellant.

C. J. Cash and *C. B. Paul*, for appellee.

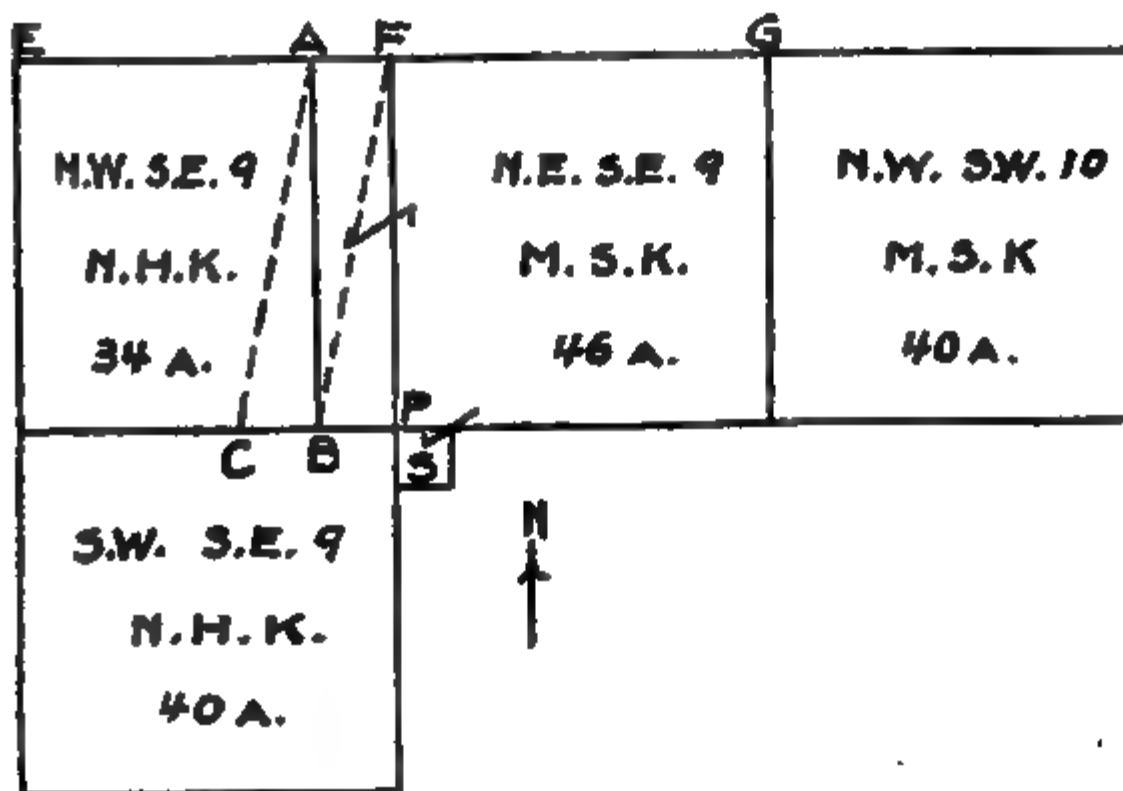
WEAVER, J.—The plaintiff and defendant are brothers. Prior to July 23, 1910, they were equal owners in common of the lands hereinafter described, and, being unable to agree upon a basis of division, an action in equity was brought by Matthias S. Koppes to enforce partition as provided by statute. There appears to have been some contest at the hearing upon the question

1. **BOUNDARIES:**
establishment:
agreement between parties.

whether the land was of such uniform value as to justify, the award of an equal number of acres to each party, but the final decree settled the controversy by ordering a partition as follows:

"The plaintiff is given the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 10, and the east 46 acres of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and 3 acres in the N. W. corner of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 9, all in Township 85 north, Range 1 west of the 5th P. M., and to the defendant Nicholas H. Koppes is allotted and given the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the west 34 acres of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, all in Section 9, Township 85 north, Range 1 west of the 5th P. M."

Assuming, for the present purposes of this statement, that Sections 9 and 10 are of standard form and dimensions, the partition thus made would be as indicated by the solid lines on the following plat:



The present action is at law, and was begun July 7, 1915, nearly five years after the entry of the decree in the partition case. In his petition, the plaintiff alleges the ownership of the property substantially as the same had

been settled in said decree, and alleges that the defendant, instead of observing the line A B as the true line between the east 46 acres of the north half of the southeast quarter of Section 9 set off to him, and the west 34 acres of the described tract set off to plaintiff, asserts right of possession west of said line to A C and has erected his fences accordingly, thereby excluding plaintiff from the possession and enjoyment of the strip or wedge of land included between said lines. On these allegations, judgment is asked restoring plaintiff to the possession of the land, and for damages.

Answering this claim, the defendant pleads the decree of partition between the parties, and alleges that, in said partition proceedings, referees appointed for that purpose marked the dividing line between the lands, as apportioned by visible monuments, in the presence of both plaintiff and defendant, and that the division as thus indicated and marked was mutually accepted by them, and permanent fences were erected by both on the line as thus determined and settled, and that, until the beginning of this action, each of them had continued to occupy and use his respective premises up to the line of division so fixed. Defendant therefore contends that the line as claimed by him has been settled and established, not only by the prior adjudication in the partition proceedings, but also by agreement and acquiescence, as well.

The issues were tried to a jury, which returned a verdict for defendant, and from the judgment entered thereon, the plaintiff appeals.

I. Appellant's counsel devote a considerable part of their brief to an elaborate discussion of the facts in controversy. Many of the points so made are foreclosed by the verdict of the jury, and do not call for consideration at our hands, except as they may bear upon criticisms directed against the trial court's instructions, or upon the further

question whether the verdict has sufficient support in the record.

Both parties lay considerable stress upon the effect of the adjudication in the partition proceedings; but, somewhat unfortunately, except for the final decree in that case, no part of the record therein appears to have been in evidence in the case before us,—at least we do not find it in the abstract. For example, much is said in argument in regard to alleged action by referees appointed by the court to make the partition, and several of the witnesses speak of what they claim to have seen and heard of the action taken by such referees, but no competent record evidence appears to have been offered to show the fact of their appointment, or what they did in that capacity, or the character of their report to the court. True, the decree recites that the “report and finding of the referees are not approved,” but further than this, the record of those proceedings is not before us. If, however, we may consider the parol testimony introduced, aided by the statements of fact indulged in by counsel on either side, it may be said to indicate that, at some time prior to the entry of the final decree of partition, the court appointed these referees, one of whom, Mr. Whalen, was a practical surveyor, to view the land and report a plan of partition. This apparently was done, and the referees are said to have reported recommending that all of the west half of the southeast quarter of Section 9 be set off to Nicholas H. Koppes, plaintiff herein, and the remainder of the land held in common be set off to Matthias S. Koppes, but, in view of a difference in the value of the lands so divided, that Nicholas should pay Matthias the sum of \$500 in money. We further infer that, on the return of this report into court, objection was made thereto, in so far, at least, as it proposed to adjust the difference in values by a money judgment, and the inequality was adjusted by allowing Matthias an additional number of acres

to be taken from the east side of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section, and such is the practical effect of the decree as entered. While it is not shown whether, after the decree was entered, the court ordered the referees to designate and mark the division line between the lands thus apportioned, as required by the statute, Section 4254, Code, 1897, there is parol evidence tending to show that they, or Whalen, the surveyor, did in fact visit the premises both before and after the decree, and did in fact undertake to ascertain the boundary. It is conceded that at this time there was an east and west fence on the north side of the quarter section (S. E. $\frac{1}{4}$ of Section 9), and the evidence is sufficient to justify the jury in finding that both parties agreed or admitted that this fence was correctly placed. It also appears that the location of the common corner of these two 40-acre tracts on the north (marked F on the plat) was not the subject of any dispute. When the plan of division was changed, the referee returned to the place and undertook to run a new line 12 rods west of the boundary between the two 40's above mentioned. If we were to assume that the two tracts were of standard size and form, and that the new line last mentioned was made parallel to the true boundary between them, it would separate the entire 80 into two parts, containing respectively 46 acres in the east fraction and 34 acres in the west fraction. It appears however, that the line on the north side of these tracts, on which the fence above referred to stands, varies several degrees from a true east and west course, and extends from south of east to north of west. In running the new or last line after the decree of partition, the surveyor either did not notice the irregularity of the line on the north, or, if he did see it, assumed that the boundary between the 40's was at right angles with the north boundary, and going to the common corner F, he measured thence west on the line marked by the fence 12 rods to A, and there turned a

right angle to the southward for the run to C. If the proper line between the 40's is true north and south, as claimed by plaintiff, it would coincide with the line F P on the plat, and the new line required by the decree should have been laid parallel thereto at A B, but the effect of running it at right angles with the north line was to carry it westward to A C, thereby increasing the excess area of land decreed to Matthias.

Were this all the record shows, we should be strongly inclined to hold that a mistake was made below, and that plaintiff was entitled to a verdict; for it is quite clear that defendant holds at least 3 acres of land which the court in the partition case did not intend to give him. But the defendant pleads, in substance, that the new line A C was laid with the consent and agreement of the plaintiff, and accepted by him as the line upon which the partition should be made, and, while it is also true that plaintiff denies such consent or agreement on his part, there is evidence to support the finding against him on that issue. The surveyor Whalen, who was one of the referees, after testifying to his surveys before the decree, further says:

"After the decree, I went down there and set off the 6 acres. I moved the stone at the north 12 rods west. * * * Nick and Matt Koppes agreed that the north line of the land should be considered the boundary and the division should be based on that line. I completed the division by using this line as a base line. Nicholas Koppes was present and raised no objections. * * * I adopted the old fence line at the request of Matt and Nick."

Such also is in effect the testimony of the defendant. It should also be said that, when the referees recommended the partition of the land along the boundary line between the two 40's (N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. 9), the surveyor then ran or located such boundary along the course indicated on the dotted line F B, on which a fence

was then standing or was afterward built before the decree was entered; and it will be seen from what we have already said that the last line run and now in dispute is parallel thereto and 12 rods to the west. In the year 1911, the defendant moved the old fence F B to the line A C, and has since occupied the land on the east side of it. For four years, so far as the evidence shows, the plaintiff acquiesced in this situation, or until, in the year 1915, he procured another survey to be made, and brought this action to establish his right to the possession of so much of the land as is contained in the triangle or wedge A C B.

II. Complaint is made of certain rulings upon the introduction of evidence. The defendant, having testified to giving his assent to the running of one of the lines involved in the controversy, was then asked by his counsel, "What induced you to assent to the line running in that direction?" and over plaintiff's objection, was permitted to answer, "In order to get things settled and get done with it." Error is assigned upon this ruling. It would seem entirely proper for a party to a dispute which he alleges has been settled or compromised to testify that his assent thereto was influenced by his desire to have an end to contention. But whether this be true or not true, the substance of the answer given by the witness is so clearly harmless that, even if the trial court erred in admitting it, the error was without prejudice.

III. Numerous instructions asked by the plaintiff, as well as many of the exceptions to instructions given by the court, are to the effect that agreements or concessions made by the parties prior to the entry of the decree of partition are wholly irrelevant, and should not be considered as having any bearing upon the right of each to claim and have the land and all the land given him by the decree. To the extent that it is not competent for either party in this action

2. APPEAL AND
ERROR: harm-
less error:
reception of
evidence: mo-
tive inducing
settlement.

to deny the validity of the decree or any part thereof, the objection is, of course, sound. The decree provided for a division of the land between the parties in the proportion of 46 acres to 34 acres, but it was still entirely competent for plaintiff to agree that the fence on the north marked the true boundary on that side, and that a line drawn at right angles thereto at the point A should be regarded as the line of partition between the tract on the east and the tract on the west. If such was the agreement or consent of the parties (and the jury seems to have so found), then the fact, if it be a fact, that, upon measurement of the land, it is found that one has more and the other less than the full acreage prescribed by the decree, is immaterial. There is evidence to support the verdict, and the court is not authorized to disturb the finding.

IV. We do not overlook the fact that plaintiff claims that defendant has so extended his fence as to take in still another small tract of plaintiff's land, but unfortunately the pleadings wholly fail to describe or locate such tract so as to enable the court to adjudicate the controversy, if any there be with reference to it. The only description given in the petition is as follows: "Commencing 201 feet west of the northeast corner of the southeast quarter of said Section 9 85-1 and running thence in a southwesterly direction to the river." This, it will be seen, does no more than describe a starting point and a line drawn therefrom in a southwesterly direction, nor does the pleading furnish any data from which the court or jury may ascertain the particular lot or parcel of ground which the pleader had in mind. If, however, as seems to be indicated in argument, the land intended to be described is that which lies between F P and F B extended southward, then what we have said with reference to the first described tract is equally applicable here.

3. PLEADING:
certainly:
basis for
adjudication.

We find no reversible error in the record. The issues were for the jury, and the instructions given by the court are not, in our judgment, vulnerable to the appellant's criticisms thereon.

The judgment below is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

H. R. MERRILL et al., Appellees, v. WILLIAM HUTCHINS et al.
Appellants.

HIGHWAYS: Alteration, Etc.—Uncertain Record—Acquiescence—Injunction. Changes by the public authorities in the location of a highway will be permanently enjoined when it appears: (a) That the present location is *substantially* on the lines called for in the original establishment; (b) that such present location has been acquiesced in as correct for more than half a century by the public generally, by the public authorities, and by the adjoining property owners; and (c) that a laying out of the road on the uncertain lines pointed out in the original order of establishment would be practically impossible—at least would not locate the road either on its present location nor on the location to which it is proposed to remove it.

Appeal from Franklin District Court.—R. M. WRIGHT,
Judge.

MONDAY, SEPTEMBER 24, 1917.

ACTION in equity by the owners of land alleged to abut upon a certain highway, to enjoin the defendants from moving the highway from its existing location and from interfering in any way with the lands and improvements adjacent thereto belonging to the plaintiffs. The trial court granted the prayer of the petition, decreed an injunction, and defendants appeal.—*Affirmed*.

J. J. Sharpe, for appellants.

B. H. Mallory and J. M. Hemingway, for appellees.

HIGHWAYS:
alteration, etc. :
uncertain
record : ac-
quiescence :
injunction.

WEAVER, J.—The petition alleges that the road was originally laid out in the year 1856, and that since that date to the present time it has been maintained in substan-

tially the same course and upon the location where it is now found, and the lands of plaintiffs abutting thereon have been cultivated and their buildings and other improvements have been made with reference thereto; that defendants, being township trustees, have undertaken to move the road farther to the north, and to remove plaintiffs' trees and improvements on said strip so sought to be occupied. Plaintiffs further allege that such acts so complained of are without authority; that the north line of the highway as it now exists is the one which has been publicly recognized for sixty years or more; and that the threatened changes will work irreparable injury to their lands. They also allege in substance that the highway upon its present lines has been established by dedication, by prescription and by acquiescence, and that they have title to the disputed strip by adverse possession, if not otherwise. The defendants deny the petition except as specifically admitted. They admit that there is a highway through the section named and that, as at present traveled, it meanders approximately east and west, but deny the correctness of its present location. They further aver that the fences along the plaintiffs' lands are not on the true north boundary of the highway as originally laid out in 1856, and admit that they are attempting or proposing to move said boundary farther north to accord with their claim of its proper location, and say that, in doing so, they are acting only in their official capacity and in discharge of their duties in the public interest. They further plead that, upon proper application, the board of supervisors of the county has ordered the establishment of a permanent grade for this road, and that the county highway engineer has surveyed the same for the purpose of in-

incorporating it into the county road system, and that this has been done in accordance with the record of the original establishment thereof. It is further stated that, as now maintained, the road is, in places at least, inadequate, narrow, and unfit for general use with modern vehicles, and that its improvement to its proper width and upon its proper location is a public necessity.

The trial court, upon hearing the testimony, found the issues in plaintiffs' favor, and defendants appeal.

In argument to this court, the appellees concede, for the purposes of the present case, that, if the record sufficiently shows the fact that the highway in question was ever established in the manner required by statute, and that plaintiffs have by their fences or otherwise encroached thereon, then mere lapse of time would not deprive the proper officers of the right to proceed to open or to improve such highway upon its true location as shown by the proper record. They contend, however, that, even if it be conceded that the county court making the order of establishment had full jurisdiction in the premises, the described location is not shown and cannot be retraced with accuracy or exactness, and that the use and general recognition of the road in its present location should be held conclusive upon that question. Were the only objection to the defendants' right to move the road fences out of their present location the failure of the record to show what kind of notice was given of the presentation of the road petition, we should hesitate very much at this late day to hold that the action thereon was void. Such a precedent would cast doubt upon the legal character of a very large part of the roads established in the early history of the state, when, as a rule, all such business was done and records were made with much informality. But there are other and sufficient reasons for sustaining the judgment below. It satisfactorily appears that, if an engineer were to attempt to retrace the lines

given in the original record, following literally and exactly the description there given, the location thus found would not correspond with either the present traveled road or the location to which the defendants propose to move it, and, except for the fact that the public for more than half a century have used, accepted and recognized the present way as the one intended by the order of the court, the proper location would be involved in great if not insolvable uncertainty. Under such circumstances, the court ought to and will give much weight to the practical construction which the public generally, the people owning the property immediately affected thereby, and the public officers having charge of the highways, have, during all these years, placed upon said order of establishment. Such was the rule applied in *Taege v. Riepe*, 90 Iowa 484, and we regard it as reasonable and just.

The use and maintenance of the highway substantially as it now exists were begun at or soon after the date of the order of establishment, at a time when the public understanding of its true intended location ought not to have been far astray. It is a matter of common knowledge that at that time section corners, as shown by the marks and monuments of the government survey, were as a rule still plainly visible, and the public usage of the road dating from that time constitutes valuable evidence of the correctness of the location, even though it should be held not to afford ground for application of the statute of limitations. The cases relied upon by the appellants which affirm the general rule as to the continuance of the public right in the streets and highways, notwithstanding long periods of disuse, need not be questioned nor their soundness denied; but it does not follow that every resurvey after long intervals of time is to be accepted as correct, and all highways affected thereby are to be moved to correspond to the latest conclusions of the civil engineer. If such were the case,

no highway would ever have a fixed or permanent location, for it seldom happens that two surveys which attempt to retrace original government lines to any considerable distance ever fully coincide. That general recognition and public usage of public ways are proper to be considered in such cases, whether it be to ascertain the true line, or to show the existence of a highway dedication or prescription, or to establish an estoppel of the public, see *Orr v. O'Brien*, 77 Iowa 253; *Smith v. Gorrell*, 81 Iowa 218; *Rector v. Christy*, 114 Iowa 475; *Heller v. Cahill*, 138 Iowa 301; *Lucas v. Payne*, 141 Iowa 592; *Weber v. City of Iowa City*, 119 Iowa 633; *Carter v. Barkley*, 137 Iowa 510; *Larson v. Fitzgerald*, 87 Iowa 402.

In view of all the evidence, we think the court properly granted the relief asked for by the plaintiffs. We reach this conclusion, not on the theory that the county court was without jurisdiction to establish the highways, but rather that, taking the record as a whole, it sufficiently shows that the highway as used is substantially upon the location contemplated in the order of establishment.

Some question is suggested in argument that the road as fenced is less than its proper width, but nothing in this decision or opinion is to be taken as a denial of the right of the road officers to compel the opening of the road to the legal width. The proper location of the road, and not its width, is the only matter put in issue by the pleadings, and the only question we have undertaken to consider.

It is also argued for appellants that, as their acts in the premises have been performed in their official capacity only, they ought not to be charged personally with the costs. But the acts enjoined in the decree are such only as amount to a trespass on plaintiffs' property, and the official station of one who commits or threatens to commit a trespass is never held to relieve him from liability therefor. It may also be said in this case that no motion was made in the trial

court below for a retaxation of costs, and that, under such state of the record, we do not ordinarily consider objections of this character.

The decree of the trial court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

E. M. MITCHELL, Appellee, v. JAMES MUTCH et al.,
Appellants.

SPECIFIC PERFORMANCE: Contracts Enforceable—Weakness of

- 1 **Mind—Inadequate Consideration.** Mere weakness of mind, unaccompanied by inequitable incidents, is insufficient to defeat the enforcement of an executory contract of sale, when such person has sufficient intelligence to understand the nature of the transaction and is left to act on his own free will. *Held*, contract enforceable, though the one objecting was quite aged, was very eccentric, was, to some extent, afflicted with senile dementia and arteriosclerosis, though the payments were long extended, and though the land was under-sold in some small degree.

SPECIFIC PERFORMANCE: Proceedings and Relief—Non-Discre-

- 2 **tion to Deny Relief.** A definite, written contract for the sale of lands, on a valuable and adequate consideration, free from fraud, and which may be enforced without hardship on either party, leaves a court of equity with no discretion to deny specific performance.

WITNESSES: Competency — Attorney and Client — Confidential

- 3 **Communications.** Principle recognized that communications by a client to his attorney are not privileged unless they are *confidential*.

APPEAL AND ERROR: Presumption—Equity Causes—Disregarding

- 4 **Incompetent Evidence.** On appeal in an equity cause, it must be presumed that the trial court disregarded all incompetent testimony.

SPECIFIC PERFORMANCE: Defenses—Defects in Title—Waiver

- 5 **by Plaintiff—Effect.** One may not defeat specific performance by pleading in defense that which plaintiff waives. So held where defendant pleaded that he had rented the land and could not deliver free possession as agreed.

Appeal from Tama District Court.—J. W. WILLETT, Judge.

THURSDAY, SEPTEMBER 24, 1917.

SUIT for specific performance of a contract to sell real estate. Decree for plaintiff. Defendants appeal.—*Affirmed.*

E. H. Lundy, Dean W. Peisen, and Williamson & Willoughby, for appellants.

Sherman W. DeWolf, Thomas & Thomas, and Clarence Nichols, for appellee.

STEVENS, J.—I. James and Mary Mutch, husband and wife, on April 28, 1913, made a written contract with E. M. Mitchell, in consideration of \$57,600, to be paid, \$600 in cash, \$5,000 March 1, 1914, the balance in 10 years at 5 per cent interest, to sell and convey to him the south half of Section 3, Township 86, Range 15, Tama County, Iowa. The contract, as originally written, did not require the purchaser to secure the payment of the \$52,000, but, on June 11th following, a stipulation was written on the contract, signed by the purchaser, and by the grantors by their attorney, by which the same was to be secured by mortgage on the premises. Upon the refusal of the grantors to carry out the deal, on April 17, 1914, the petition of plaintiff praying for specific performance of the terms of the contract was filed in the office of the clerk of the district court of Tama County. In the meantime, Elizabeth Mutch had been appointed temporary guardian of James Mutch.

The defenses urged upon behalf of defendants were, in substance: (a) That the consideration to be paid for said premises was inadequate; (b) that James Mutch was at the time a person of unsound mind, and that he and his wife are greatly distressed over the sale of said premises

and the possibility of being compelled to turn the same over to others; (c) that appellee and others conspired together to procure the conveyance of said real estate, by representing to James and Mary Mutch that the land at \$200 per acre was too high, and that same was not worth that sum; and that by their conduct and representations they overreached the old gentleman and caused him to execute the contract in question.

It appears from the evidence that James Mutch was born in Scotland, went to Tama County many years ago, and has accumulated a fortune of about \$250,000, owns 760 acres of land in the vicinity of the above described premises, including the land in controversy, and has been an active, hard-working, successful farmer. His family consists of three daughters and three sons, all of whom were, at the time of the transaction in question, absent from his home, except Elizabeth, who is unmarried.

The land in question is apparently well located, in a good state of cultivation, and well tiled and drained. The improvements thereon, however, are run down to some extent, and the residence is small, old and in bad condition. Witnesses testify that the farm has not been as well kept up and cared for recently as in former years.

Numerous witnesses, including two physicians, testified regarding the mental condition of James Mutch. From the testimony of the physicians, it may be inferred that he has for some time been to some extent afflicted with senile dementia and arteriosclerosis, and that his general physical condition was not good. One of the physicians testified to having waited upon him during a period of illness. They both express the opinion that he was not competent to form an intelligent opinion and rationally transact business of an important character.

He was, at the time of the execution of the contract, 82 years of age, and during the period of his residence in

Tama County had been known for certain eccentricities and peculiarities of person and habit. It is claimed that these have become more noticeable during the last few years. Various witnesses testified that at times he would, while on the streets in town, sing. This, however, he had done always. Further evidence shows that he declared his family was against him, that he was a poor man, and that he intended to go away; that, on several occasions, he did go a short distance, sometimes remaining over night; that, on one occasion, he purchased a railway ticket to Chicago, saying he was going to Scotland, and that at the time he was not seasonably clothed, had no baggage with him, and was untidy, but he was persuaded not to go; that the marshal of Reinbeck found him late at night lying in the doorway of a business house, sleeping; that he was several times found lying on the ground sleeping, on his premises; that on one occasion he covered himself up with hay in the barn, and was with great difficulty induced to return to the house; that friends in an automobile overtook him on one occasion when he had started away, and returned him to town; that he had land in Canada and said he was going there; that he, in later years, became fretful and fault-finding, and appeared to be obsessed with the idea that his family was against him; and there were several instances of like character, indicating that he had grown more untidy, forgetful and eccentric than in former years.

The evidence of claimed improvident dealing upon his part consists of the sale of a horse for \$100, claimed to have been worth \$150 to \$160, and of the sale of a few bushels of timothy seed for \$1 per bushel which was worth \$5 per bushel, and the sale of the land in question for \$180 per acre upon a payment of \$5,600, with 10 years' time on deferred payments at 5 per cent interest. As is usual in cases of this character, there was considerable diversity of opinion among witnesses as to the fair market value of the

land, those called on behalf of plaintiff placing same at from \$175 to \$180, whereas defendant's witnesses placed the same at from \$200 to \$215, cash.

The evidence regarding the transaction culminating in the execution of the contract, the indorsement thereon of June 11th, and the deed, as the same appears in the record, is, in substance, as follows: In 1911, defendant listed the land with E. E. Taylor, a newspaper and real estate man of Traer, for sale, and same was advertised for sale in circular form and in the Traer Clipper; that an offer of \$175 per acre was made for the land and refused by Mr. Mutch; that an offer was made, about the time the contract was consummated, to buy the land for \$175 per acre, but defendant clung tenaciously to his price of \$180 per acre; that, on the day of the sale, one of the parties whose conduct is complained of went in the forenoon and saw defendant in an effort to purchase the land at \$175. This he was unable to do, and, in the afternoon, the several parties, knowing that Mr. Mutch was going or had gone to Reinbeck, went to said place in an automobile and arrived there in advance of Mr. Mutch. He and some of the parties went to the bank; appellee was called in; the deal was talked over; the contract and deed were executed, and arrangements made by which some of the parties went with James Mutch to his home, where Mary Mutch, his wife, signed the deed; and the same was returned to the bank, where it was kept with the contract.

The record fails to disclose any fraudulent representations or conduct on the part of anyone at the bank. The contract was written by one of the officers, and there appears to have been but little conversation between the several persons present. The terms upon which the land was listed with the agent for sale included a cash payment of \$10,000, but appellee at the time stated that, before he moved upon the farm, he would have to build a modern

house, which would cost him about \$5,000, and he would pay \$5,600 cash, which would, in a way, be equivalent to paying \$10,000. The terms finally agreed upon were, as stated before, \$600 cash, \$5,000 March 1, 1914, at which time possession was to be given to appellee, and the balance in 10 years, with interest at 5 per cent, with certain optional payments. Some time afterwards, Elizabeth discovered that the contract did not require the purchaser to secure the payment of the \$52,000, whereupon she and her father consulted a lawyer at Toledo, who took the matter up with the purchaser, as the result of which a stipulation was written on the back of the contract and signed by the purchaser and by the attorney for the grantors, by which the purchaser agreed to execute a mortgage upon the premises to secure the deferred payment. The attorney who investigated the matter was called as a witness, and testified that he called his clients' attention to the stipulation, and that they were satisfied therewith, and that he, at their direction, returned the contract to the bank where it was originally left.

The circumstances relied upon by appellant as offering evidence of conspiracy and fraud are that the parties charged with bad faith watched Mr. Mutch pass Taylor's town, and themselves took a different road to avoid passing him; that they met him upon his arrival at Reinbeck; took him to the bank and procured the execution of the papers; hurried him home to get the signature of his wife to the deed and the matter all closed up before knowledge thereof should be brought to the attention of other members of the family. The parties present at the time of the signing of the deed by Mrs. Mutch testified that Elizabeth was there and procured writing material for the use of the parties in executing the instrument—this, however, she denies and says she was not in the room and did not know what was going on; that there was no attempt at concealment; and that they went to the Mutch residence upon his suggestion

that his wife could not conveniently come to town; and that it was convenient at that time to consummate the execution of the papers. The explanation made by the parties of the route taken by them to Reinbeck was that one of them had told Mr. Mutch that he was not going to town, and that he did not want to pass him on the way.

While we have not mentioned all of the testimony tending to throw light on the mental competency of James Mutch, we have referred to the more important portions thereof, and from the entire record we are of the opinion that, while he was doubtless enfeebled by age and to some extent deprived of the mental vigor and business sagacity of former years, yet he had not so far deteriorated mentally as to be unable to comprehend and understand the transaction in question, and to reach a reasonable conclusion as to what he desired to do in the way of selling his land. The improvements on the farm were apparently deteriorating in value, his eyesight was bad, on account of his age it was inconvenient for him to manage his business affairs, his sons were all absent from home and he was compelled to rely upon hired help or tenants to farm his land, and his conclusion to sell a part thereof would not tend to indicate lack of proper mental capacity. The time allowed for the payment of the \$52,000 was, at his age, pretty long, but it was claimed that he stated, at the time of the execution of the contract, that he did not need the money, and that the interest income would yield him more than \$6 per acre rental for the land, and that he had ample money for his needs. It appears from the testimony that he, at the time, had \$15,000 in the bank where the papers were drawn, on which he was receiving 4 per cent interest. He may have been inspired with the belief that his family was against him, and with a desire to go away, but his desire does not seem to have controlled his judgment to the extent of inducing him to sell the land at even \$5 an acre less than the

price which he had constantly demanded therefor. That he was forgetful, that his eccentricities appeared more pronounced, that he was not so attentive to the affairs of the farm as in former years, nor so good a judge of stock, etc., is not unusual in men of his age and temperament, but these things do not necessarily indicate such loss of the mental faculties as to render him, within the meaning of the law, of such unsoundness of mind as to require the setting aside or cancellation of his contracts.

The land had been on the market for many months without a buyer. Counsel for appellants explain this, however, by saying that no one in the community believed that he would sell his land when put to the test. That this belief was prevalent in the community appears from the evidence to be true, and it may have influenced those who might otherwise have purchased the land to refrain from attempting to do so.

But there is, in our opinion, no such inadequacy of consideration as to shock the conscience or justify the inference that James Mutch was overreached in the transaction. The judgment of men as to values of property differ so radically that expressions of opinion as to such matters are not usually very conclusive, but of necessity constitute evidence that must be given careful consideration by the court. Making some allowance for the possible tendency to under- and over-value the land, under the circumstances, and placing the value of the land at some reasonable figure between the values fixed by the witnesses in behalf of the respective litigants, we think the land may have been worth a few dollars an acre more than the price paid, but the difference is not sufficient to justify the court in finding the consideration so grossly inadequate as to require the interference of a court of equity. The inference is not unreasonable that, after the indorsement had been placed on the back of the contract, requiring the purchaser to secure the payment of

the \$52,000, the parties were satisfied, and then approved the deal, and that they intended to comply with its terms. The time that had elapsed between the date of its execution and the addition thereto had been sufficient for reflection and an understanding of the real nature of the transaction, and whether provident or otherwise. It may be that sentimental considerations have tended to change the minds of the parties, and that they have become reluctant to part with so large a part of their farm and to turn the same over to others; but however unfortunate the contract under the circumstances for such reasons, if they exist, it affords no ground for the action of a court of equity.

"*Mere weakmindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance.*" Pomeroy's Equity Jurisprudence (3d Ed.), Section 947. See *Crooks v. Smith*, 123 Iowa 439; *Nowlen v. Nowlen*, 122 Iowa 541; *Paulus v. Reed*, 121 Iowa 224; *Harrison v. Otley*, 101 Iowa 652.

The rule in cases of this kind is well settled by the decisions of this court:

"It is well settled by the decisions of this court, as well as by the decisions elsewhere, that, to avoid a contract on the ground of mental incapacity, it must be satisfactorily shown that the party was incapable of transacting the particular business in question. If delusions be relied upon, it must be shown that they influenced the party to such an extent that he had no reasonable conception or understanding of the true nature and terms of the contract." *Mathews v. Nash*, 151 Iowa 125, 127; *Swartwood v. Chance*, 131 Iowa 714; *Reese v. Shutte*, 133 Iowa 681.

2. SPECIFIC PERFORMANCE: proceedings and relief: non-discretion to deny relief.

11. It is, however, urged by counsel for appellants that whether or not specific performance will be decreed rests largely in the discretion of the court. In a sense this is true, but the discretion to be exercised is not arbitrary, capricious, or unsound, but must be controlled by established principles of equity and exercised upon a consideration of all the circumstances of each particular case.

"Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. * * * The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity." *Pomeroy's Equity Jurisprudence* (3d Ed.), Section 1404, and cases cited. See *Auter v. Miller*, 18 Iowa 405; *New York Brokerage Co. v. Wharton*, 143 Iowa 61.

Among the circumstances tending most strongly to indicate bad faith upon the part of appellee was the omission from the original contract of any provision for securing the payment of the \$52,000. There appears, however, to have been nothing said about the matter by anyone present at the time, and the omission may have been wholly unintentional, and not in any sense attributable to the act of appellee. In any event, the attorney who acted for appellants testified that, upon request, appellee signed the in-

dorsement on the back of the contract requiring him to secure the payment thereof by mortgage on the premises, and this appears to have made the deal satisfactory to appellants and Elizabeth, who, at the time of the trial, was the temporary guardian of James Mutch.

There is not such evidence of trickery, fraud, bad faith, inequitable conduct, inadequacy of consideration or mental capacity on the part of Mr. Mutch, or other facts or circumstances, as to justify a court of equity, in the exercise of a sound judicial discretion, in refusing specific performance of the terms of the contract.

III. It is urged by appellants that the testimony of the attorney who was consulted by James Mutch and his daughter and employed by them to procure the indorsement upon the back of the contract is incompetent, and that the matters testified to were privileged. Some of the testimony comes very close to the line, if the same is not, to some extent, possibly overstepped; but we think the most essential part of his testimony within the rule declared in *Caldwell v. Meltveldt*, 93 Iowa 730, and stated by Jones on Evidence, Section 752. But we must presume that the trial court disregarded the evidence vulnerable to the objections made, and that its conclusion was based solely upon the admissible evidence. *Secor v. Silver*, (Iowa) 161 N. W. 769.

IV. Appellants place some reliance upon the fact that the land in question has been leased, and that they were unable to deliver possession free therefrom. This was a defect that the party seeking specific performance of the terms of the contract could waive. *Donaldson v. Smith*, 122 Iowa 388; *Brown v. Ward*, 110 Iowa 123; *Wetherell v. Brobst*, 23 Iowa 586.

3. WITNESSES:
competency: attorney and client: confidential communications.

4. APPEAL AND ERROR: presumptions: equity causes: disregarding incompetent evidence.

5. SPECIFIC PERFORMANCE: defenses: defects in title: waiver by plaintiff: effect.

Ormsby v. Graham, 123 Iowa 202, relied upon by appellants, is not in conflict with the holding of this court in the above cases.

Upon the whole record, we think the conclusion of the trial court was right, and the judgment below is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellee, v.
DES MOINES UNION RAILWAY COMPANY,
Appellant.

APPEAL AND ERROR: Presentation and Reservation of Grounds

- 1 —*Necessity—Constitutional Law.* Questions in no manner brought to the attention of the trial court will not be reviewed on appeal. So held as to a constitutional question relative to the Federal Interstate Commerce Act.

COMMERCE: Interstate Commerce—Damages—Judgment Against

- 2 *Initial Carrier—Conclusiveness Against Connecting Carrier.* A foreign, non-collusive judgment, rendered under the Federal Interstate Commerce Act, against an initial carrier for damages to a shipment, is, in an action by the initial carrier against a subsequent connecting carrier to recoup the damages, a final adjudication as to the amount of damages, even though the subsequent connecting carrier was not a party to the action against the initial carrier. Act Congress June 29, 1906, Amending Act Feb. 4, 1887 (34 Stat. at L., Part 1, page 595).

COMMERCE: Interstate Commerce—Damages—Recoupment by

- 3 *Initial Carrier—Evidence.* In an action by an innocent initial carrier against a guilty subsequent connecting carrier for recoupment of the amount paid by the initial carrier on judgment for injury to the shipment, such judgment, along with the pleadings, evidence, instructions, and verdict attending the judgment, is admissible, the former to show the amount of the recoupment, the latter to identify the judgment and to show that the exact injury for which the initial carrier had to pay occurred on defendant's line.

COMMERCE: Interstate Commerce—Damages—Action Against

- 4 *Initial Carrier—Notice to Guilty Connecting Carrier to Defend.* Notice by an initial carrier to a subsequent connecting car-

rier that the initial carrier has been sued for damages occurring to a shipment, and demand that such subsequent carrier appear and defend, is, while proper practice, not necessary in order to arm the initial carrier with right to recover of the subsequent carrier the amount of the resulting judgment, provided the damages occurred on the line of such subsequent carrier.

Appeal from Polk District Court.—CHARLES A. DUDLEY,
Judge.

WEDNESDAY, MAY 16, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

THE issues and material facts are sufficiently stated in the opinion.—*Affirmed.*

Parker, Parrish & Miller, for appellant.

Carr, Carr & Evans, for appellee.

WEAVER, J.—The parties plaintiff and defendant are railway companies constituting parts of a connected line of common carriers between Blair, Nebraska, and Des Moines, Iowa. On May 31, 1913, one D. M. Duncan delivered to plaintiff at Blair a carload of strawberries for transportation to Des Moines. The shipment was accepted, and plaintiff thereafter delivered it to the Chicago & Great Western Railway Company, another connecting carrier, which in turn delivered it to the defendant, the terminal carrier of such shipment. Thereafter, the shipper, Duncan, brought suit against the plaintiff in this case in the district court of Buchanan County in the state of Missouri to recover damages for injuries to said shipment alleged to have been caused by the negligence of the carrier in transporting the car to Des Moines. Such action being instituted, the plaintiff herein gave to the defendant notice thereof in writing. This notice also informed defendant of the nature

of the claim asserted by Duncan, and of plaintiff's contention that the damage, if any, was sustained while the car was in the possession of the defendant, and that, if Duncan should succeed in obtaining a recovery in said action, plaintiff would look to defendant to make reimbursement to the amount of such judgment and all costs and expenses which plaintiff might be compelled to pay. In this connection, plaintiff also called upon defendant to appear with it in the Duncan suit and assume the defense thereof. The defendant ignored the notice and did not appear in that action. On trial of the case in the Missouri court, Duncan recovered a judgment of \$600 and costs, all of which plaintiff has paid in full. Having discharged the judgment, plaintiff began this action at law. In its petition, having recited the facts which we have hereinbefore stated, plaintiff alleged that the shipment of strawberries was transported by it and by the Chicago & Great Western Company and delivered to the defendant as the terminal carrier in good condition, and that such damage was caused by the negligence of the defendant and its agents and servants. On the showing thus made, and under the Acts of Congress regulating interstate commerce, plaintiff demands judgment against defendant for the amount expended by it in satisfying the Duncan claim and for expenses incurred in defending such action.

Answering the petition, defendant denies the same and each and every allegation therein made. On trial of the issues thus joined, it was stipulated by the parties that the car of strawberries was delivered to the plaintiff company at Blair, Nebraska, in good condition on May 31, 1913; that plaintiff transported the same to St. Joseph, Missouri, where it delivered the car to the Chicago & Great Western Railway Company, which transported it to Des Moines, and on the evening of June 1, 1913, placed it on the defendant's track at Eleventh Street in said city, promptly notifying the defendant of such delivery, and thereupon the defend-

ant moved the car over its line to its destination at the warehouse of the consignee. The further evidence offered by plaintiff tended to show that, on the same evening of the delivery of the car as aforesaid, a fruit inspector with another witness inspected the car and its contents and found the loading and bracing of the crates in good order, the ice bunkers full and the temperature at about 50 degrees. The inspector opened four or five of the top crates at each end of the car, and made notation that "the berries were fairly cool, overripe. Crates show considerable soft berries. Slight mold on a few crates." On the following day, and after the car had been placed at the warehouse of the consignee for unloading, it was again examined by the same inspector and others, disclosing the fact that "one of the ice bunkers had been knocked loose, allowing the ice to fall into the car. The entire load had been shoved towards the other end of the car, crushing in a great number of cases, and the bracing of the car was broken loose."

Another witness says:

"The bracing between the two sections of berries was broken and some of the crates were broken. There were broken ones all through the car, but mostly in the east end."

The crates appear to have been packed in either end of the car, leaving an empty space opposite the side doors, and the two sections of the load were held in place by a system of bracing across the empty space. The inspector who was present at both examinations says that, on the second occasion, "the bracing was knocked loose and buckled up and shoved west. The berries were knocked clear across the aisle to the west end and mashed up. The ice was rolled out of the ice box on top of the berries. The crates of berries that were in the east end had been pushed toward the west and covered the entire vacant space. I didn't mean that they were all pushed toward the west. I intended to

say that the top row of crates was shot over toward the other and the broken crates were smashed up against the crates which were originally in the west end of the car. The space was full with bracing and berries. I couldn't say how many crates were broken."

The only testimony offered by the defendant was that of its own inspector, who did not see the shipment until the second day, but before the car was unloaded. He says he found that "the bracing in the center of the car was partly broken and laying over on the west end of the load in the car, and the partition which separates the ice in the east end from the interior was leaning. The top tiers of the load in the east end had been shifted to the west, and some of them fallen down on the floor."

He further says he watched the unloading and counted the injured crates, and that, except 7 which were crushed and 25 partly broken, none were so crushed "as to be noticeable." Speaking of the condition of the berries, he says:

"The few cases I examined showed a little mildew and overripe. I examined the top tiers. Not all I looked at were mildewed, but in all I examined, the berries were sunken a little at the top, showing what we called leaky berries, overripe."

No evidence was offered by defendant in explanation of the apparent violence suffered by the car and its load after the inspection thereof on the evening of June 1st, and before the second inspection made on the following morning; nor was any evidence offered tending to show that the car or its load had sustained such injury before its delivery into the defendant's possession.

At the close of the evidence, the plaintiff filed a motion for a directed verdict as follows:

"Comes now the plaintiff at the close of all the testimony and moves the court to direct a verdict in its favor

for the amount of the judgment rendered in the court of Buchanan County, Missouri, in the case referred to in the record, with interest thereon from the date of said judgment, and for the sum of court costs and expenses as shown by the exhibits offered, with interest thereon from the 15th day of August, 1914, for the reason that the evidence shows that the plaintiff in the suit of Duncan et al. vs. St. Joseph & Grand Island Railroad recovered a judgment against the plaintiff on account of the loss of the said shipment of berries which occurred while the said berries were in the hands of this defendant, and that the evidence shows the same without dispute."

The motion was sustained, a verdict returned for plaintiff, as directed by the court, and from the judgment entered thereon, the defendant appeals.

I. The first proposition advanced for a reversal of the judgment below is that, in so far as the Acts of Congress regulating the liability of carriers of interstate commerce afford any support for the claim made by the plaintiff in this case, they are unconstitutional and void.

The particular statutory provision against which this objection is directed is that part of Section 7 of the Act of Congress approved June 29, 1906, amending an act entitled "An Act to Regulate Commerce," approved February 4, 1887, as follows:

"That the common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall ex-

empt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, *as may be evidenced by any receipt, judgment, or transcript thereof.*"

The particular point made in argument is that, while the provision which makes the initial carrier liable to the shipper for any loss, damage or injury to a shipment occurring upon the line of any connecting carrier to which such shipment may pass is concededly constitutional and valid, yet the further provision by which the initial carrier, having paid the damage so sustained, is declared "entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, *as may be evidenced by any receipt, judgment or transcript thereof,*" if enforced according to its literal terms, constitutes a taking of property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

We find it unnecessary, under the record here presented, to inquire whether this constitutional question has already been settled by the court of last resort, or, in the absence of any such controlling precedent, to express any opinion thereon. A search of the abstract filed by the appellant discloses that the point now pressed upon our attention

was in no manner raised or suggested in the court below, by pleading, motion or demurrer, or by objection to the testimony or by motion for new trial, and the rule is too well settled to require citation of authorities that an objection to the constitutionality of a statute, not properly raised in the trial court, will not be considered upon appeal.

II. Appellant further argues that, upon a proper consideration of the act of Congress above mentioned, the judgment against the initial carrier is to be considered binding upon a connecting or terminal carrier only in cases to which such connecting or terminal carrier has been made a party, and that the trial court therefore erred in treating the judgment rendered in Duncan's suit against the plaintiff as conclusive upon the defendant.

We think it is to be said that the trial court made no express ruling holding the judgment against plaintiff binding upon defendant, nor is such the necessary implication of any of its rulings. It is true the court admitted the judgment in evidence, but that is not the equivalent of holding that it is conclusive of the defendant's liability. Neither is such the effect of the ruling directing a verdict for the plaintiff. The judgment against the plaintiff entered in the Missouri court is neither in form or effect a judgment against the defendant in this case, nor was it given any such effect by the trial court. The right of the plaintiff in this action to recover depends not upon the judgment mentioned, but upon the sufficiency of the showing that the loss, injury or damage for which such judgment was entered occurred on the defendant's line of railroad, and, so far as that issue is concerned, the adjudication between Duncan and the plaintiff is of no force or effect against the defendant. But when the plaintiff had offered evidence tending to show, and, as we think, conclusively showing, that the

2. Commerce:
interstate
commerce:
damages: judg-
ment against
initial car-
rier: conclu-
siveness against
connecting
carrier.

injury to the shipment was sustained while in the possession and control of the defendant, then the statute makes the judgment in favor of Duncan competent evidence upon the further question as to the amount of plaintiff's recovery. Such is the very obvious meaning and intent of the statute, and the court is not at liberty to nullify its effect by any strained or unnatural construction of its language. As the statute makes the initial carrier primarily liable to the shipper for the default or negligence of any and all connecting carriers, as well as its own, it is thereby compelled, when sued upon a claim of that nature, to defend not alone its own conduct in the premises, but the conduct of all the carriers making up the connected line of through transportation. Such being the case, it is a reasonable conclusion that a judgment obtained by a shipper against such initial carrier for loss, injury or damage to his shipment must operate as a final adjudication of the amount of damages so sustained wherever it may have occurred upon such connected lines, and that, in any subsequent litigation between the several carriers upon the question of ultimate liability, the amount of damages so ascertained will not be open to question, save, of course, upon plea and proof of collusion or fraud. The several carriers constituting a through line of transportation are to a degree engaged in a common enterprise, and the statute makes the initial carrier in a very substantial sense the representative of all in controversies with a shipper. As we have before observed, in defending against such claims it stands for all the carriers, because its primary liability is for the safe carriage of the shipment over the entire connected line. Having done its duty in this respect, and paid the damages adjudged against it, it brings itself very clearly within the protection of the statute which gives it in express terms the right to reimbursement from "the common carrier, railroad or transportation company on whose line the loss,

damage or injury shall have been sustained," and the amount which it is so authorized to demand and collect is the amount it has been *"required to pay to the owners of the property as may be evidenced by any receipt, judgment or transcript thereof."*

Applying the law as thus stated to the case before us, we find that plaintiff has pleaded the fact that, as relates to the shipment of Duncan, it was the initial carrier; that it delivered such shipment to the next connecting carrier, the Chicago & Great Western Railway Company, which in turn delivered it to the terminal carrier, the defendant herein; that Duncan subsequently brought suit and recovered judgment against plaintiff as such initial carrier for injury and damage to his shipment in the course of such transportation, which judgment plaintiff has paid. It further alleges that the injury to the shipment occurred on the defendant's line, and, by reason thereof, defendant is the carrier ultimately liable for such damages, and is therefore under obligation to make reimbursement to plaintiff for the amount it has been compelled to expend on that account. The defendant has met this petition and demand with a simple denial. It has not attacked or sought to avoid the judgment as collusive or fraudulent, or set up any other affirmative defense. On the trial it was conceded that plaintiff was the initial carrier; that defendant was the terminal carrier; and that the shipment was received from Duncan in good condition. The fact that Duncan sued and recovered judgment against plaintiff was shown without dispute or challenge, except defendant's general objections to the relevancy and competency of the evidence, objections which, for reasons already stated, were not well taken. The sole question left at issue was raised by the defendant's denial of the allegation that the injury to the shipment occurred on its line, and in this respect the evidence is practically without dispute that the injury for the ship-

ment for which Duncan recovered judgment was received after the car had been delivered to the defendant by the Chicago & Great Western Company.

8. Commerce:
interstate
commerce:
damages: re-
compment by
initial carrier:
evidence.

In this connection, we may properly consider appellant's assignment of error on the trial court's ruling admitting in evidence the record of the proceedings and judgment in Duncan's action against the plaintiff. There was no error in this respect. The statute, as we have seen, makes the judgment proper evidence; but to the proper identification of the judgment as an adjudication of the kind and character contemplated by such enactment, so much, at least, of the record may be admitted as will disclose the issues tried and the questions decided. To that end, the pleadings in that case, the court's charge to the jury, with the verdict and judgment, are quite essential. Of course, the record of the evidence there given is not competent as independent testimony of the facts there stated, but it is proper to be considered as showing the scope of the thing adjudicated. See *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 331.

Now the petition in the Duncan case shows that the demand for a recovery therein was as the plaintiff alleges it to have been, and the answer there pleaded by the plaintiff herein not only denied the claim, but pleaded affirmatively, for itself and for the connecting carriers (of which, as we have said, it was, for the purposes of the suit, the representative), that each and all of them transported the shipment with due care, and, if the berries reached their destination in bad condition, it was because of their over-ripeness and inherently perishable nature, a condition which was beyond control of the carriers. Turning, then, to the charge of the Missouri court in submitting the case, we find that the jury was specifically instructed as follows:

"(3) You are instructed that the plaintiffs cannot

recover in this case except for the value of the berries which may have been destroyed by reason of the rough handling of the car by the defendant, provided you believe there may have been such rough handling; and in determining the amount of your verdict, you will ascertain the number of crates of berries which were shown by the testimony to have been mashed or otherwise injured, and render your verdict for the value of such berries only."

It must be assumed that the jury obeyed the instruction, and that Duncan's recovery was based solely on the damages resulting to the berries by reason of the undue violence or rough handling of the car in which they were shipped. Reference to the evidence shows that the only testimony of violence or rough handling given in that case was that concerning the broken and disordered condition of the car and its load of crated berries as disclosed by the inspection at Des Moines. It is thus made clear that Duncan's recovery was based solely on the injury to the berries which the testimony offered in the present case shows beyond reasonable doubt was sustained by the shipment after it was delivered to the defendant, and before its delivery to the consignee, and not because of any loss resulting from the inherently perishable nature of the fruit. The latter question is, therefore, not involved in plaintiff's demand for reimbursement. Duncan recovered judgment against plaintiff as the initial carrier for damages occasioned by the rough handling of the car. In this case, plaintiff shows without dispute that the rough handling which subjected it to such recovery occurred on the defendant's line. Under the statute, in the absence of any impeachment of the judgment for collusion or fraud, that judgment is the measure of the defendant's liability, and the proof offered by defendant tending to show the bad quality of the fruit, independent of the injury done by the improper handling of the car, cannot affect the amount of plaintiff's recovery.

4. COMMENCE:
interstate com-
merce: dam-
ages: action
against initial
carrier: notice
to guilty con-
necting carrier
to defend.

III. We have finally to consider the effect of the notice given by plaintiff to defendant of the suit brought by Duncan. We have thus far omitted mention of this feature of the case, because, in our judgment, the plaintiff's right of recovery in no

way depended thereon. The Federal statute, we repeat, fixes and prescribes the terms upon which the initial carrier, having been subjected to a recovery of damages by a shipper, may in turn recover indemnity or reimbursement from a connecting carrier, and the giving of such notice is not made a condition thereof. The court has no authority to add to or take from the prescribed terms. This is not to say that it is not proper practice for a defendant who is exposed to liability upon which he claims a third person is bound to hold him harmless, to serve such person with notice of the pendency of the action and request him to appear and assume the defense. Ordinarily, if a third person who is in fact liable over to the defendant as claimed, neglects or ignores the notice given him, he does so at his peril, and will be held to indemnify the defendant to the full extent of the judgment rendered against the latter. This is not because such notice brings the person notified within the jurisdiction of the court, or because the judgment entered against the defendant is in any proper sense a judgment against him also, but is rather because, having neglected his duty to protect the defendant against loss on his account when given opportunity to do so, he will be estopped, when sued by the defendant for reimbursement, to deny that the judgment against the latter is for the correct amount. The suit by plaintiff against the defendant in this action is not in fact or effect a suit upon the Duncan judgment. It is a suit upon a demand for reimbursement for money paid to discharge a claim on which the defendant is alleged to be ultimately liable as the principal debtor.

If the fact be shown that the injury to the shipment for which Duncan recovered his judgment occurred on defendant's line,—and of this, as we have said, there can be no question,—then defendant, by virtue of the statute, is the party ultimately liable as indemnitor of the plaintiff. Being such, the judgment against plaintiff is the measure of the amount in which it must respond. Assuming, then, which will not be denied, that each connecting carrier stands in the relation of an indemnitor of the initial carrier for all damages which the latter may be compelled to pay for an injury to a shipment occurring upon the line of the former, then, even if the statute did not provide, as it does, that the liability of such indemnitor shall be measured by the judgment in favor of the property owner, we are of the opinion that, under the established rule and practice to which we have referred, the same result would follow where the initial carrier gives notice to the connecting carrier which is ultimately liable, and affords it an opportunity to assume or assist in the defense of the suit by the property owner.

One reason, and perhaps the main reason, for the statutory provision, as well as for the rule and practice at common law to which we have referred, is to avoid a multiplicity of suits. There is no good reason why both the question of the primary liability of the initial carrier and the ultimate liability of the connecting carrier should not be settled and adjudicated in the action brought by the shipper. On the contrary, its justice and propriety are too manifest for serious question. The burden which the statute places upon the initial carrier, making it primarily liable to the shipper for the negligence and default of every connecting carrier, no matter how many or how difficult it may be to fix or apportion the blame, is at best an onerous one, and it is in every way appropriate and desirable that the right of the shipper

to recover and the designation of the carrier which is ultimately liable may be settled in one action.

While appellant has argued other propositions, they are all so related to those we have discussed as to be governed by the conclusions already announced, and do not require further specific consideration.

We find no reversible error in the record, and the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

SCHMIDT BROS. CONSTRUCTION COMPANY, Appellant, v. RAYMOND YOUNG MEN'S CHRISTIAN ASSOCIATION, Appellee.

CONTRACTS: Rescission and Abandonment—Grounds—Default of

- 1 **Both Parties—Mechanics' Liens.** One who is in default in the performance of a contract may not rescind, even though the other party is also in default. So held under a building contract, where the contractor was seeking to rescind, but was in default in the completion of the building at the time agreed, and the owner was likewise in default in making payments as provided by the contract.

CONTRACTS: Rescission and Abandonment—Abandonment of

- 2 **Building Contract—Right of Owner.** An unjustifiable abandonment of a building contract arms the owner, nothing appearing in the contract to the contrary, with right to complete the building and charge the reasonable cost and expense thereof to the defaulting contractor. Evidence reviewed, and held that the expenditures in completing an abandoned building were reasonable.

Appeal from Floyd District Court.—J. J. CLARK, Judge.

TUESDAY, JUNE 26, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

SUIT in equity to foreclose a mechanics' lien. The facts are fully stated in the opinion.—*Affirmed*.

Alden, Latham & Young and J. C. Campbell, for appellant.

Blythe, Markley, Rule & Smith; Ellis & Ellis; Sager, Siceet & Sager; Eggert & Lockwood; and Frank Lingenfelder, for appellee.

STEVENS, J.—On April 18, 1910, Schmidt Bros. Construction Company, of Chicago, appellant herein, entered into a written contract with the Raymond Young Men's Christian Association, of Charles City, Iowa, to furnish all the necessary material and labor, and construct for it a Y. M. C. A. building in said city. The contract provided that the building should be constructed according to the plans, drawings and specifications of an architect, and that the material used should be as specified. The contract further provided that the building should be completed on or before November 1st following, and that the association would be allowed as liquidated damages the sum of \$15 per day for each and every day required for the construction of the building after November 1, 1910, and that the association would allow the contractor a like sum per day for each and every day that the building should be completed and accepted prior to November 1, 1910, in addition to the price stipulated in the contract. The consideration to be paid the contractor was \$56,474, same to be paid upon certificates of the superintendent as nearly as possible on the 8th day of each month as the work progressed, monthly payments not to exceed 85 per cent of all material wrought into the building, plus not to exceed \$2,000 in value of the accepted material on the ground, the remainder on satisfactory completion and acceptance of the entire work after the expiration of 30 days.

The contractor began work about April 18th, and continued until May 31st, when work was suspended until the

early part of July, when it was resumed and continued until November 19th. Upon the latter date, the contractor abandoned his contract, and the building was subsequently completed by the association at its own expense. Payments were made from time to time by the association up to about the first of November, when, according to the estimate of the superintendent, there was due the contractor \$12,019.83. The last payment made was on November 12th, and was in the sum of \$6,019.85.

Appellant assigns as its reason for quitting work the first time certain disagreements between its representatives and appellee's superintendent and some of its officers regarding written orders for extras, and the refusal of appellee to submit to the decision of the architect a dispute regarding certain material used and on the ground for use in the building; for its final abandonment of the contract, nonpayment by appellee of a past-due monthly installment, and the refusal of appellee to pay a large sum demanded in payment of alleged extras, and to make future settlements upon estimates made by the architect or by appellant. The amount claimed by appellant at this time as due it for extras was \$5,130.81. Appellee conceded \$1,410.50 of this amount.

Appellant also claimed to have expended and paid for material wrought into the building or on the ground, about \$16,500; for labor, \$16,082; miscellaneous expense, \$1,815; and that it was obligated to subcontractors for about \$12,000, making the aggregate paid out and for which it was liable, \$46,397; admitted the payment by appellee of \$22,009.15, and claimed a balance due of \$24,387.85. Appellee claims to have completed the building according to the plans and specifications, at an expense of \$23,561.22, and to have suffered damages amounting to \$2,925. Appellant offered testimony tending to show that the building could have been completed for approximately \$16,000.

The court found that appellant was entitled to recover the contract price, plus \$1,410.50 allowed as extras, or a total of \$57,884.50, against which it charged \$22,009.15, the amount admitted to have been paid appellant, damages in the sum of \$2,925, the cost of completing the building, \$23,561.22, and rendered judgment for the balance, \$9,389.13, in favor of appellant as principal, adding thereto \$1,583.63 as interest, or a total of \$10,972.76. The court further found that there was due several subcontractors, who had intervened, in the aggregate, \$12,551.17, together with costs amounting to \$71.80, and entered judgment against appellant in their favor for the amount due each respectively, and provided that the same be paid from the said judgment. The court further established a lien on the building for the amount found due and owed to appellant.

I. As above stated, appellant finally quit work on the building and abandoned its contract about November 19, 1910, and, while negotiations were carried on between the representatives of the respective parties relative thereto, it never resumed work on the building, and in July, 1911, appellee took charge of and completed the same at its own expense. After the completion of the building by appellee, the construction company brought a suit in the district court of Floyd County, claiming the sum of \$24,595 as the balance due it, and praying foreclosure of a mechanics' lien. It was alleged in plaintiff's petition that it had sought to perform its contract according to the terms thereof, and that it was prevented, by reason of the failure and refusal of appellee to make payments under the contract as the same became due, from completing same; that, notwithstanding it caused notice to be served upon appellee prior to November 19th, advising appellee's officers that it would quit unless full payment was made, appellee neither paid nor tendered payment of the amount claimed to be due;

1. CONTRACTS: rescission and abandonment: grounds: default of both parties: mechanics' liens.

and that, on account thereof, it was justified in abandoning said contract. The petition further alleges that appellant was entitled to \$5,130.81 as compensation for extra material and labor; that it had received payment in the sum of \$22,009.15; and that the above balance was due and unpaid.

The contract between the parties provided that payments should be made as nearly as possible on the 8th of each month as the work progressed, in an amount equal to 85 per cent of all material wrought into the building, and material accepted and on the building site, not exceeding \$2,000 in value, and the balance 30 days after the expiration of the date on which the building was completed. Estimates were made by Mr. Emmett, superintendent, in accordance with the provisions of the contract, for August, September, October and November. Estimates were also made by the representatives of appellant. Payments were made on the contract as follows: August 12th, \$4,720.47; September 13th, \$2,127.98; October 8th, \$3,640; October 15th, \$2,500; October 15th, to subcontractor, \$2,600; October 15th, to subcontractor, \$400; November 12th, \$6,019.85. According to estimate of appellee's superintendent, it owed appellant, on November 8th, \$12,019.85, and, according to appellant's estimate, the amount due on said date was \$16,195.68. But, as above stated, appellee paid \$6,019.85, leaving a balance due on November 19th of \$6,000.

The contract provided for the settlement of disputes respecting the value of any work added or omitted by the contractor, and such matters as might arise in relation to the contract, the work to be or that had been done or performed under it, or in relation to the plans, drawings and specifications. Disputes as to the work added or omitted were to be submitted to Charles Snyder, and, as to the other matters, referred to Shattuck & Hussey, architects, the decisions of each of said arbiters to be final and binding

upon the respective parties; but no provision was made in the contract for settling or adjusting disputes arising out of other matters than those above stated. Appellant was required to complete the building November 1st, unless the time was extended on account of a general strike, alterations, fire or other action of the elements.

It is argued on behalf of appellee that appellant was in default November 1st, not having completed the building at that time as required by the contract, and that the demands made upon it, as a condition precedent to resumption of the work and the completion of the building, were not in accordance with the terms of the contract, but contrary thereto and to the facts.

On November 14, 1910, a firm of attorneys representing appellant wrote the officers of appellee a letter, stating that work would cease on November 16th unless appellee complied with the following demands: (a) That appellee adjust certain sums, due as extras for excavating, demurrage, delays, extra concrete and rubble, change of sewer and other matters, exceeding in value \$3,000; (b) that, in the future, monthly estimates of the work be made by the architects, or the estimates of appellant accepted by the officers of appellee. As appellee did not comply with the demands made by appellant's attorneys, on the 19th of November appellant ceased work and abandoned the contract, but retained the keys and continued in possession of the building until forcibly removed, the fore part of July, 1911.

Many authorities are cited by counsel for appellant to the effect that the failure of the owner to make payments according to his contract is such a default in the performance of its terms as to justify the contractor in rescinding the contract and bringing suit for the value of the materials furnished and work and labor performed upon the structure. Conceding this to be the law, is it applicable to or controlling in this case? There is another rule appli-

cable to the rescission of contracts, which has been well stated by the Supreme Court of California as follows:

"The rule is general that the right to rescind a contract rests only with the party who is without default. One party cannot * * * violate the contract himself, and then seek a rescission on the ground that the other party has followed his example." *State v. McCauley*, 15 Cal. 429, 458.

See also *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, (Cal.) 110 Pac. 951; *American-Hawaiian Eng. & Const. Co. v. Butler*, (Cal.) 133 Pac. 280, and cases cited.

The building in question was to be completed by November 1st, and, as above stated, appellant abandoned work November 19th, without having completed the same; so that, unless time was extended by the owner, or it was excused on some other ground, then appellant was in default, and the rule last stated is to be applied. Counsel for appellant seek to excuse its failure to complete the building within the time specified, upon the ground that delays resulted because of controversies between the representatives of appellant and superintendent of appellee, consuming at least six weeks of the time, and that other delays resulted from different causes for which appellant was not to blame. Appellant quit work upon the building the 31st of May, and did not resume work until the fore part of July. The reasons assigned for quitting work at this time are that a controversy arose with reference to extra work; that appellee's superintendent refused to give written orders for extras as provided by the contract; that brick shipped had not been approved by the architect; that some crushed stone taken on the ground by appellant had been rejected by appellee's superintendent; that its officers refused to submit matters for decision to the architect, but insisted that its superintendent was competent to pass upon the matter. The superintendent testified that nothing was said to him by the representatives of appellant about quitting work, and the

officers of appellee were not previously advised of appellant's intention, or the purpose for which it ceased work at this time.

It appears from the evidence that there was a controversy with reference to a carload of crushed rock, and also some brick; that some inferior material had been wrought into the building. The matters in dispute were finally submitted to the architect, who decided that appellee's superintendent was right as to the crushed rock, and that appellant was seeking to use inferior brick in the structure; and required appellant to remove clay from the crushed rock, and condemned some of the brick that it was seeking to build into the structure. There was also some controversy from time to time in regard to certain materials furnished and labor performed by appellant, for which it claimed pay as extras. The evidence shows that the members of appellant construction company were experienced contractors and builders, necessarily thoroughly familiar with the plans and specifications of the architect, knew and understood the kind and character of the material required for the structure in question, and could not have been ignorant of the fact that the crushed rock and some of the brick used prior thereto and on the ground May 31st for use were not such as were required by the specifications.

It is doubtful whether the controversy over the matters above referred to required appellee, under the contract, to submit same to the architect for decision. In any event, in so far as the same related to the brick and crushed rock, it was quite clear that the decision of the architect was not necessary. The contract provided that Mr. Emmett should act as superintendent of the work on the building, for appellee, and he had the right to forbid the use of material in the building which, it was patent, was not as specified by the architect. So far as the controversy related to pay for certain extras, the work was not far advanced upon

the building, and there was no apparent reason why the same should be suspended or abandoned on account thereof. This was a matter that could well have been settled at any time in the future. The record fails to disclose facts which justified appellant in suspending work at the time in question, so that, unless the time for completing the building was extended by agreement, appellant was in default by failing to complete the building on or before November 1st. We cannot find, under the evidence, that the officers of appellee agreed to extend the time for the completion of the building. On the contrary, it appears from the evidence that the representatives of appellee declined to enter into an agreement to extend the time, giving as one reason that such extension would avoid the bond given by the contractor to secure the faithful performance of the terms of the contract. Being in default, appellant was not in a position on November 19th to rescind the contract on account of the failure of appellee to make strict payments in accordance with the terms of its contract. Furthermore, appellant had no right, under its contract, to demand that monthly estimates as to the work and labor performed and materials furnished be made by the architects, or that its estimates be accepted, for the reason that the contract provided that the estimates were to be made by Mr. Emmett, superintendent; nor had it a right to demand payment for extras to which it was not entitled, as a condition precedent to its continuing the work after it should have been completed.

Mr. M. W. Ellis, called as a witness on behalf of appellee, testified that he was present at a meeting of the officers of appellee, after work was suspended the first time, at which several representatives of appellant were present, and that Mr. Young, as spokesman, stated that appellant would proceed with the building if appellee would allow the payment claimed as extras for excavating, approve the

building as far as completed, discharge Mr. Emmett as superintendent, pay it for work done up to that time, waive the provision of the contract for \$15 per day liquidated damages for each day after November 1st that the building remained uncompleted, and permit the architect to pass upon all questions, instead of the superintendent; so that, apparently, the demands and conduct of appellant, commencing shortly after work began, were not calculated to inspire confidence on the part of the officers of appellee, but rather indicated a disposition to avoid carrying out strictly the terms of its contract. However, it is claimed by appellant that, at or about the time it resumed work in July, a tacit agreement was made with the officers of appellee that the time would be extended for six weeks. This is specifically denied by all of the officers named.

It is not contended that appellant did not have a right, under its contract and upon complying therewith, to demand payment of the monthly installments in strict accordance with its provisions; but, at the time it quit work, according to reasons assigned therefor by its attorney, it was not alone because of the failure to pay the installments that it abandoned the work, but because it apparently desired to coerce appellee to pay it a sum of money not due, and obtain terms more beneficial than those expressed in its contract. It had agreed to carry out the contract according to its true spirit, meaning and intent, and to do the work to the full and complete satisfaction of appellee's superintendent. This it did not do. No evidence was offered to show that appellee's superintendent was unfair or unreasonable in what he did to have the building constructed out of the material specified and according to the plans of the architect.

It is our conclusion that the lower court was right in its holding that appellant did not excuse its failure to complete the building by the time specified in its contract.

2. CONTRACTS:
 rescission and
 abandonment:
 of building
 contract:
 right of
 owner.

II. Evidence was offered on the part of appellant, for the purpose of showing that the building should have been completed at a much less cost than was expended by appellee in completing same. W. J. Zitterall, who had had 22 years' experience as a general contractor, testified that he made an estimate of the cost of completing the building, and found that it could be completed for \$16,631. Adolph Proskauer, architect and civil engineer, with 14 years' experience, testified that, according to his estimate, it could have been completed for \$13,938.26; while W. L. Maxson, another experienced contractor, offered, it is claimed, to furnish all labor and materials necessary to complete the building for the sum of \$16,500. On behalf of appellee, it is claimed that the latter declined to enter into a contract guaranteeing to complete the building for the estimated amount. The testimony offered on behalf of appellee fixed the cost of completing the building at \$23,561.22. Appellant contends that this amount is grossly excessive, and includes certain specific items not properly allowable as expense against it.

The court allowed appellant the full amount of the contract price, plus \$1,410.50 allowed as extras, or a total of \$57,884.50, charging against this sum the amount paid, \$22,009.15, damages amounting to \$2,925, cost of completing building, \$23,561.22, and rendering judgment for the balance due plaintiff, \$9,389.13, with interest thereon at 6 per cent from July 20, 1911, to the date possession of the building was surrendered to, and received by, the owner, amounting to \$1,583.63, making the total amount due, for which judgment was entered, \$10,972.76. Several subcontractors filed liens and intervened in this suit. The court found the aggregate of their claims, with costs taxed, to be \$12,622.97, and entered judgment upon each respective claim for the amount due, and decreed that the amount

found due appellant be first applied to the payment of the claims of the intervening subcontractors. The contract contained no provision respecting the completion of the building in case of the failure of the contractor to complete the same. Under these circumstances, appellee had the right to complete the building and charge the reasonable cost and expense thereof to appellant. That this is the true rule seems to be conceded, but see *Page & Son v. Grant*, 127 Iowa 249; *Ludowici Caladon Co. v. Independent School District*, 169 Iowa 669.

Appellant undertook to show that, before its abandonment of the contract, it had paid out for labor on the building, \$16,082, for material, \$16,500, miscellaneous expense, \$1,815; that it still owed subcontractors about \$12,000, and was entitled to be paid for extras in the sum of \$5,130.81. Appellee submitted a full and complete itemized statement of all labor and material going to make up the amount claimed to have been expended by it in completing the building. Appellant has failed to point out that any material was used or charged that was not necessary to complete the building according to the plans and specifications, but it is claimed that an unreasonable time was occupied in doing the work, and that labor was employed by the day instead of by contract; that it could have been done cheaper by contract, and should have been done for less money.

Appellant having abandoned the contract, appellee was not required to submit the cost of completing the structure to competitive bidders, nor to complete the same at the lowest possible cost, but had the right to expend such sum for labor and material as was fairly and reasonably necessary to complete the structure in accordance with the contract and the plans and specifications of the architect. It is not shown that appellee did not expend upon the building the amount claimed. Counsel for appellant, though several

times requested to do so, failed to produce or offer in evidence all vouchers which it claimed to possess, showing expenses incurred for labor and other items. However, the amount claimed to have been expended, added to the expense incurred by appellee in completing the building, greatly exceeded the contract price. This, however, may tend as well to show that appellant engaged to erect the building for an inadequate price—that it was mistaken as to the amount actually expended by it—as that the cost to appellee of completing the building was excessive.

Specific items allowed by the trial court to which our attention is called by appellant are: \$207.65, expense of janitor; \$150 per month allowed the secretary of defendant during the time the building was being completed; and \$6 per day paid Emmett as superintendent. The testimony is that the janitor was kept busy at odd jobs by the superintendent; that defendant's secretary kept the books of account showing all expenditures made by appellee in completing the building, the time of the workmen, and the rate allowed per hour for each. He also kept an account of money received from the sale of certain material that was on the premises when appellee took possession, and that was afterward sold by it, for which appellant was given credit. Originally, appellee's superintendent was paid by it; but, after the abandonment of the work by appellant, he took charge of the work of completing the building. That it was necessary to have a superintendent for this purpose will not be denied. It does not appear that the amount paid the parties named was unreasonable, and, therefore, it was properly charged against appellant by the court.

III. Appellant also complains of the allowance made by the court as damages. The allowance was in accordance with the provisions of the contract. It seems to be con-

ceded that the case is one in which the measure of damages provided by the contract should be applied. In view of what has been said above, the conclusion follows that the amount allowed by the court is fully justified by the evidence and should stand.

IV. The only remaining question relates to the matter of extras. This question involves a technical construction and interpretation of the plans and specifications of the architect. We have gone over the evidence regarding each of the several items and checked the same with the finding of the trial court in detail. Some eighteen days were occupied in the trial of this case. The court saw the witnesses and heard the testimony, held the matter under advisement for several months, and we are not disposed to interfere with its finding. Much careful and patient consideration was evidently given the facts by the court, and the conclusion reached is fully justified by the evidence. Upon an examination of the whole record, we reach the same conclusion.

For the reasons pointed out, the judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

THOMAS SCHULTZ, Appellant, v. PERCY STARR, Appellee.

APPEAL AND ERROR: Questions of Fact, Etc.—Conflicting Evidence. A verdict on fair conflict of evidence is conclusive on appeal on the fact questions involved.

TRIAL: Instructions—Objections and Exceptions—Waiver. Failure to except to instructions as required by Section 3705-a, Code Supplement, 1913, precludes review of instructions on appeal.

TRIAL: Instructions—Requests Otherwise Covered. Error may not be based on the refusal to give instructions which are otherwise substantially covered by the court's charge.

NEGLIGENCE: Proximate Cause—When Negligence Per Se Is Im-
4 material. The doing of that which is negligence *per se* becomes immaterial when in no wise the cause of an accident. So held where the court refused to receive evidence to show that defendant's motor cycle was not equipped with horn, bell or other warning device, as required by Section 1571-m17, Code Supplement, 1913, and also refused to instruct relative thereto, because, concededly, both parties were fully aware of the presence of the other at a time long anterior to the collision.

APPEAL AND ERROR: Harmless Error—More Favorable Instruc-
5 tion Than Requested. It is harmless error to refuse a correct instruction which is less favorable to the one requesting it than one given by the court on its own motion. So held where the court refused to instruct that a presumption of negligence arose from the operation of a motor cycle at a speed greater than 25 miles per hour, but on its own motion instructed that the jury might, in view of an ordinance, find defendant negligent if he was traveling 15 miles per hour.

WITNESSES: Examination—Cross-Examination—Discretion of
6 Court. Principle recognized that, on appeal, the discretion of the trial court as to the *manner* and *extent* of cross-examination will rarely be overturned.

APPEAL AND ERROR: Review, Scope of—Undue Cross-Examina-
7 tion—Absence of Adequate Record. The court, on appeal, cannot say that undue cross-examination was permitted on a certain matter when complainant concedes that said matter was touched upon to *some* extent in the direct examination, but fails to present the record relative thereto so that the court may be able to judge whether the cross-examination was undue.

APPEAL AND ERROR: Harmless Error—Improper Exclusion of
8 Evidence on Damages—Verdict For Defendant. Improper exclusion of evidence bearing upon the amount of damages becomes quite harmless when the jury finds that plaintiff has no cause of action.

EVIDENCE: Opinion Evidence—Conclusions—Rate Of Speed.
9 Whether an object was moving slowly or rapidly is an allowable conclusion—the best that can be had under the circumstances.

WITNESSES: Examination—Questions—Indefinite Questions. One
10 may not complain of the exclusion of a question indefinite in

fact, when he failed to comply with the implied suggestion of the court that the question be made definite.

EVIDENCE: Relevancy, Materiality And Competency—Negligence—

- 11 **Immaterial Custom, Etc.** Whether an ordinary motor cycle was adaptable to the carrying of more than two passengers, and the custom relative to more than one person's riding thereon, is wholly immaterial in defense of an action for the negligent operation of such a vehicle.

Appeal from Floyd District Court.—C. H. KELLEY, Judge.

MONDAY, SEPTEMBER 24, 1917.

ACTION for damages resulting from the alleged negligence of defendant in operating a motor cycle. Trial to a jury. Verdict and judgment in favor of defendant. Plaintiff appeals.—*Affirmed.*

J. H. Lloyd and Frank Lingenfelder, for appellant.

H. J. Fitzgerald, for appellee.

STEVENS, J.—This is an action for damages claimed to have resulted to plaintiff from a collision of his bicycle with the motor cycle of defendant. The accident occurred at the intersection of Kelly and Brantingham Streets in Charles City, Iowa. The negligence charged is that the defendant was, at the time, operating his motor cycle at a high and dangerous rate of speed, and in a careless, reckless and imprudent manner, and in excess of the speed limit prescribed by the ordinances of Charles City; and that he failed to have the same equipped with proper horn or bell, and to sound a signal or give warning of his approach. Plaintiff was riding a bicycle on Brantingham Street, going south, and he claims that, while in the exercise of due care upon his part, defendant ran his motor cycle into the bicycle, throwing plaintiff upon the ground in such a manner as to fracture his arm and to inflict severe and painful injuries upon the

muscles of his hip, on account of which he suffered and will continue to suffer great pain and loss of time, and that he has incurred large expense for medical services.

The ordinances of Charles City were offered in evidence, and fix the maximum speed for motor cycles in said city at 15 miles per hour, and upon Main Street at 10 miles per hour. At the time of the accident, defendant was going east on Kelly Street, approaching the intersection of said street with Brantingham Street. Plaintiff testified that, when he first observed the motor cycle approaching, it was a block and across one street from the intersection of Kelly and Brantingham Streets; that he attempted to cross said intersection at about 10 or 12 miles an hour; that defendant's motor cycle was being operated at a rate of speed between 35 and 40 miles per hour; and that, when he reached a point about 45 feet west of plaintiff, he changed his course as he approached him, and then turned south to the curbing.

From the abstract of plaintiff's testimony, we quote the following:

"He turned right south to the curbing, and when I saw that he turned that way toward the curbing, I aimed to see if I could make the turn and get in a little pocket there that would let him go by; but he got me. I did not have time. The collision was south of the course Starr had been traveling and east of the course that I had been traveling, and was 6 or 8 feet west of the southwest corner of the intersection."

Plaintiff further claimed that the motor cycle gained speed as it approached him. This claim is borne out by the testimony of defendant. It further appears from the evidence that a man was sitting on the gasoline tank in front of defendant on his motor cycle, with his feet hanging down and reaching within a few inches of the ground.

The defendant's version of the accident, in substance.

was that he was riding a Harley-Davidson motor cycle, going east on Kelly Street, 4 or 5 feet from the south curbing at approximately 6 or 8 miles per hour; that plaintiff came down Brantingham Street at about the same speed; that he hesitated on Kelly Street about 10 feet over the crossing; that at this time defendant was back 20 or 30 feet from the crossing; that, when plaintiff hesitated, he threw in his clutch to go ahead; that when he threw in the clutch the speed of the machine gradually increased; that plaintiff swung his wheel around as if going east; that, in attempting to avoid the collision, the hind wheel of the bicycle was struck by the motor cycle, and the rim of the back wheel of the bicycle and some of the spokes were broken out, plaintiff was thrown upon the ground, and, the evidence shows, suffered a fracture of his wrist, and other painful injuries. Omitting many details, the above is a substantial statement of the respective claims of the parties.

This case has been twice tried in the court below. The first trial resulted in a verdict for plaintiff in the sum of \$1, and the second in favor of the defendant. The record does not disclose the ground upon which a new trial was granted defendant after the first trial. Thirty-five alleged errors are complained of by counsel for appellant, most of which relate to the admission or exclusion of evidence. Some complaint, however, is made of the instructions given to the jury by the court upon its own motion, of the refusal to give several requested instructions, and of misconduct upon the part of counsel for defendant in the examination and cross-examination of witnesses.

The first errors complained of are that

1. **APPEAL AND ERROR:** questions of fact, etc.; conflicting evidence.

the verdict is contrary to the law and is not sustained by the evidence. The evidence is very conflicting. Both plaintiff and defendant attempted to sustain their respective theories of the collision and consequent injuries. We cannot say, however,

that the verdict is not sustained by the evidence, and there is nothing to show that it was the result of passion or prejudice on the part of the jury. The evidence was in conflict, and it has often been held by this court that a verdict rendered on conflicting evidence is conclusive on appeal. *Mitchell v. Chicago, R. I. & Pac. R. Co.*, 138 Iowa 283; *Kopecky v. Benish*, 138 Iowa 362; *Knapp v. Brotherhood of American Yeoman*, 149 Iowa 137; *Rockwell v. Ketchum*, 149 Iowa 507; *Bank of Latham v. Milligan*, 140 Iowa 251.

II. No exceptions were taken to the court's instructions as required by Section 3705-a of the Supplement to the Code, 1913, and they cannot be reviewed by this court. *Rule v. Carey*, 178 Iowa 184; *Hanson v. City of Anamosa*, 177 Iowa 101.

III. Proper exceptions were preserved to the refusal of the court to give certain requested instructions. Plaintiff requested the court to instruct the jury that the operation of a motor cycle upon the street in question at a greater rate of speed than 15 miles per hour would constitute negligence. The instruction was refused, but the court instructed the jury that, if it found that at the time of the injury the defendant was operating his motor cycle at a rate of speed in excess of that permitted by the city ordinance, same would constitute negligence. We think the instruction given by the court sufficiently covered the point, and that the refusal to give the requested instruction was not error. It will be presumed that the jury followed the evidence.

IV. Plaintiff sought to show in evidence that the motor cycle of defendant was not properly equipped with horn, bell or other signaling device, and that no signal was given of his approach, preceding the collision. The

2. TRIAL: instructions: objections and exceptions: waiver.

3. TRIAL: instructions: requests otherwise covered.

4. NEGLIGENCE: proximate cause: when negligence per se is immaterial.

court sustained the objection of defendant to this testimony, and refused to give Instruction No. 2, requested by plaintiff, to the effect that it was the duty of defendant to have his motor cycle equipped with a suitable bell, horn or other device for signaling, and to use the same upon approaching an intersection or crossroad, and that the failure to have the same so equipped therewith or to use the same would constitute negligence.

Section 1571-m17 of the Supplement to the Code, 1913, requires motor vehicles to be equipped substantially as set forth in the requested instruction, but appellant testified that he saw defendant approaching on his motor cycle more than a block away, and observed the movements thereof from that time until the collision occurred. The court held, in excluding the evidence offered by appellant, that it was immaterial whether the motor vehicle was equipped as required by statute, or signal given, for the reason that the failure to have the same so equipped or to signal was in no wise the cause of the injury complained of; that is, that every purpose of a signal was met by the fact that plaintiff saw the motor vehicle at so great a distance that the giving of a signal would not have availed to prevent the injury, and the failure to give the same doubtless in no wise contributed thereto. We think that, under the facts disclosed, the exclusion of the testimony and the refusal to give the instruction, if erroneous, was without prejudice.

The reasons above given dispose of the assignment of alleged error on account of the refusal of the court to give Instruction No. 3.

V. Appellant also requested the court

5. APPEAL AND
ERROR: Harm-
less error, more
favorable in-
struction than
requested.

to instruct the jury as follows:

"If you find from the evidence in this case that the defendant, Percy Starr, was operating a motor vehicle on a public highway at the time of the injury in question, and further find

that the defendant, Percy Starr, was running at a rate of speed in excess of twenty-five (25) miles an hour, that fact would be presumptive evidence of driving at a rate of speed which is not careful or prudent in case of injury to the person or property of others."

The instruction was proper; but was the refusal to give the same prejudicial to appellant? The question of defendant's negligence was submitted to the jury by the court in a proper instruction. It was told that, if plaintiff was operating his motor vehicle at a rate of speed in excess of that permitted by the ordinance of the city, which, as above stated, was 15 miles per hour, same would be negligence. The jury found the facts in favor of the defendant, whether upon the ground that defendant was not negligent in the operation of his motor cycle, either in the manner of operating same or the speed at which same was being operated, or because plaintiff was guilty of contributory negligence, is not shown. In any event, in view of the verdict of the jury, we do not think the refusal to give the instructions was prejudicial. The court's instructions permitted the jury to find the defendant negligent if it appeared from the evidence that he was operating his machine at a rate of speed in excess of 15 miles an hour. Had the instruction been given, plaintiff could not have been aided thereby.

6. WITNESSES:
examination:
cross-examina-
tion: dis-
cretion of
court.

VI. There is possibly some merit in appellant's contention that counsel for defendant was somewhat harsh in the cross-examination of plaintiff. It is claimed that he repeated the answers of the witness in a sneering, sarcastic and mocking manner, greatly to plaintiff's prejudice. The language of counsel appearing in the record, however, does not bear out this claim. The manner of counsel at the time of using the language, of course, does not appear, but frequent objection was made thereto and often overruled by

the court. The extent of the subject matter and manner of cross-examination of a witness are matters to be controlled largely in the discretion of the trial court, and will rarely be interfered with on appeal. *Baker v. Mathew*, 137 Iowa 410; *Nolan v. Glynn*, 163 Iowa 146; *McBride v. McBride*, 142 Iowa 169; *Brackey v. Brackey*, 151 Iowa 99.

7. APPEAL AND
ERROR: re-
view, scope
of: undue
cross-examina-
tion: absence
of adequate
record.

VII. Defendant's counsel went into considerable detail upon cross-examination regarding a conversation between himself and plaintiff in which the matter of a compromise and settlement and other matters relating to the merits of the case were discussed. The theory upon which the court permitted the cross-examination to proceed was that counsel was inquiring about a conversation gone into by plaintiff in chief, and that he was entitled to the whole conversation. An examination of the abstract fails to disclose the evidence of the witness in chief upon this point, but it appears to be conceded by counsel for appellant that there was some testimony elicited from plaintiff regarding the conversation of which the matters complained of were a part. In the absence of the evidence in chief, we are unable to say that the court committed reversible error in permitting the examination of the witness to proceed, as shown by the record. It is, of course, well understood that offers of compromise or settlement are not ordinarily admissible in evidence, but, without the whole record before us, we cannot say that the court committed error in the ruling complained of.

8. APPEAL AND
ERROR: harm-
less error:
improper ex-
clusion of
evidence on
damages: ver-
dict for de-
fendant.

VIII. Objection was sustained to questions propounded to the wife of appellant regarding complaints made by him of pain in his shoulder and other parts of his body. The ruling was contrary to the holding in *Keyes v. City of Cedar Falls*, 107 Iowa 509, but, in view of the verdict of the jury, was clearly

without prejudice to appellant. The evidence admitted by the court left no doubt that appellant suffered severe and painful injuries,—indeed, such as would have justified the jury in returning a verdict in a substantial amount, had it found in his favor. The evidence excluded went only to the amount of damages.

IX. Objection to the form of the question and that same was incompetent and improper was sustained to the following interrogatory propounded by counsel for appellant to a witness, relative to the speed at which appellee was operating the motor cycle immediately before the accident: "State whether or not Mr. Starr appeared to be going fast or slow, in your judgment." Objection was also sustained upon the same ground to the following question: "How did he come?" The court, in ruling upon the last objection, said: "Well, the question is indefinite, as it now stands." No further questions upon this point were propounded to the witness. The first question is not materially different from the line of examination held proper in *Payne v. Waterloo, C. F. & N. R. Co.*, 153 Iowa 445, and the court should have permitted the witness to answer the same.

The answer of the witness to the first question could only have been that he was going fast or slow, and if the former, it would have been in no sense conclusive as to the rate of speed at which the motor cycle was traveling. Further questioning would have been necessary to bring out materially important testimony. The court cannot presume, in the absence of some showing to the contrary, that the witness would have testified, in answer to further questions not propounded, that the speed of the motor cycle was in excess of that permitted by law. Perhaps, considering the connection in which the latter was

9. EVIDENCE:
opinion evi-
dence conclu-
sions: rate of
speed.

10. WITNESSES:
examination:
questions: in-
definite ques-
tions.

propounded, it would probably not have been error for the court to have permitted the witness to answer the same, but it is so apparent that no prejudice could have resulted to appellant from the ruling of the court sustaining the objection to the above question that we need not pursue the same in argument. It is not quite certain what counsel sought to elicit by this question. The question might or might not have been material or helpful to appellant. The ground upon which the court sustained the objection was that it was indefinite. The record fails to disclose that counsel propounded other questions more definite, or otherwise sought to indicate the matters which he desired to prove by the line of questioning complained of. We think, if the court committed error, it was without prejudice.

11. EVIDENCE:
relevancy,
materiality
and compe-
tency. negli-
gence: imma-
terial custom,
etc.

X. Testimony was admitted in favor of defendant, both in chief and upon cross-examination, over the objections of plaintiff, regarding the adaptability of an Indian, and of a Harley-Davidson, motor cycle for carrying more than one passenger, and the custom prevailing in Charles City of more than one person's riding thereon. The theory upon which this testimony was admitted by the court is not clear, but we are satisfied that same was in no way prejudicial to plaintiff. The custom of various operators of motor cycles in Charles City to carry passengers could in no way tend to establish negligence upon the part of defendant, or the want of due care upon plaintiff's part. The evidence was wholly immaterial, and should have been excluded, but this case should not be reversed on account of its admission.

Numerous other alleged errors are assigned in the admission and exclusion of testimony, and some of the rulings of the court thereon may have been erroneous, both in the admission and exclusion thereof, but, upon a careful examination and analysis of the whole record, we are unable to

reach the conclusion that any substantial right of appellant was prejudiced thereby. On the whole, it cannot be said that plaintiff did not have a fair trial.

XI. Some time after the jury retired to deliberate upon its verdict, the panel was brought in and interrogated by the court as to the probability of a verdict's being reached. Appellant complains because his attorneys were not notified and given an opportunity to be present, but the record contains the questions of the court and the answers of the jurors, and, without setting them out herein, we think the court committed no error in this regard.

It is our conclusion, therefore, upon the whole record, that the judgment of the lower court should be and the same is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

DAVID M. SIMPSON, Appellant, v. BOARD OF SUPERVISORS OF
KOSKUTH COUNTY et al., Appellees.

DRAINS: Establishment—Jurisdiction—Return of Engineer—Boundaries of Appropriated Land—Irregularity Only. The exact boundaries of the land to be appropriated by a proposed public drainage improvement should specifically and definitely appear from the engineer's return—that is, from his report or plat. Omission to so show will not undermine jurisdiction to proceed—is a mere *irregularity*, and waived if not duly raised before the board of supervisors and by appeal from an adverse decision—when the report or plat contains such facts as that therefrom such exact boundaries may be determined. (Section 1989-a1. Code Supplement, 1913.)

DRAINS: Establishment — Recommendations of Engineer — Conclusiveness. Principle recognized that a public drainage improvement must be established in accordance with the recommendations of the engineer, or not established at all.

EMINENT DOMAIN: Proceedings to Take—Strict Compliance.

- 3 Principle recognized that, in the exercise of the power of eminent domain, strict compliance with statutory procedure is exacted.

DRAINS: Establishment—Appeal—Scope of Inquiry. Principle

- 4 recognized that, upon appeal to the district court from an order establishing a public drainage improvement, no objections will be considered except those *which have been properly raised before the board of supervisors.* (Section 1989-a3, Code Supplement, 1913.)

INJUNCTION: Nature and Form of Remedy—Existence of Other

- 5 Remedy—Void and Voidable Acts Distinguished. One may not resort to injunction when a special remedy is provided for the correction of voidable acts.

PRINCIPLE APPLIED: A petition praying for the establishment of a public drainage improvement was filed. An engineer was appointed. His return did not, as the law required, specifically and definitely show the exact boundaries of the land which would be appropriated by the improvement, but did show facts from which such exact boundaries could be determined. This omission was held to be an irregularity only—a voidable act. An objecting property owner made the drag-net objection before the board of supervisors that the board was without jurisdiction to establish the improvement. The objection was overruled. The objector did not appeal, but later sought to enjoin all proceedings. *Held*, the law had provided him with a special remedy, appeal, which was exclusive, and, assuming that the question of the engineer's defective report was raised before the board, his failure to appeal exhausted his remedy.

EMINENT DOMAIN: Nature of Power—Procedure—Drains. Up-

- 6 on discovering that the land condemned for a public drainage improvement is insufficient, the board of supervisors has no power to condemn additional land except by strict compliance with the procedure governing an original condemnation. So held where the board attempted to condemn such additional lands by the simple expedient of a resolution, and by entering, in favor of the landowner, an additional allowance as damages. (Section 1989-a2, Code Supplement, 1913.)

Appeal from Kossuth District Court.—N. J. LEE, Judge.

TUESDAY, MAY 22, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

SUIT in equity to enjoin the contractor and joint boards of supervisors in a drainage proceeding from entering upon the premises of appellant to excavate a ditch. The facts are fully stated in the opinion.—*Reversed.*

P. A. Bronson, Thos. S. Donnelly, Mayne & Green, for appellants. *Quarton & Quarton, Morse & Kennedy*, and *Harrington & Dickinson*, for appellees.

1. DRAINS: establishment: jurisdiction: return of engineer: boundaries of appropriated land: irregularity only.

STEVENS, J.—Prior to June 17, 1914, a petition was filed in the auditor's office of both Kossuth and Emmet Counties praying the establishment of a joint drainage district. After due notice to the parties entitled thereto, the boards met in joint session, and, on July 17, 1914, passed a resolution establishing the proposed district, designating it as the Emmet and Kossuth County Drainage District No. 2. The engineer appointed by the respective boards to make preliminary survey and report as to the feasibility and practicability of the proposed improvement, on March 3, 1914, submitted his report recommending the establishment of the proposed district, and filed plat and profile showing the land to be included within the district, and the location, route and terminus of the proposed ditch. The report of the engineer recommended a ditch 12 feet wide on the bottom, with side slopes of one to one, but neither the report of the engineer nor the resolution of the boards of supervisors fixed the width of the right of way sought to be taken for the use

of the public in the construction of the improvement. The appraisers appointed by the respective boards of supervisors to appraise damages estimated that the right of way required would be 85 feet, and computed the amount of damages to be awarded to each of the several property owners upon that basis. After the work of excavation began, it became apparent that the 85-foot right of way was not sufficient, and that the spoil bank had to be placed so near the ditch that the earth therefrom would wash into the ditch, causing it to fill. The report and plan of the engineer provided that a berm should be left on each side of the ditch, 8 feet in width, but, on account of the peculiar character of the soil, it was found that the earth removed spread to such an extent as to require a right of way of from 100 to 120 feet in width. To meet this contingency, the boards of supervisors, acting jointly, without notice or other proceeding of any kind, on October 29, 1915, passed a resolution reciting in substance the fact that the engineer had recommended making the total width of the right of way 120 feet instead of 85 feet, and ordering that the landowners affected should be allowed additional damages, the amount of which being specified in said resolution. On April 11, 1916, appellant filed a petition in the office of the clerk of the district court, reciting, in substance, the matters above stated, and alleging that the proceedings of the respective boards in the matter of establishment of said drainage ditch had not been in conformity to the statutes, that defendants were attempting to deprive him of his property, in violation of the Constitution of Iowa and of the United States, without due process of law, that defendant Walb, who was the contractor doing the work, was about to enter upon his premises for the purpose of excavating the ditch, without authority to do so, and praying a temporary writ restraining the contractor and boards of super-

visors from entering upon his premises for the purpose of constructing said ditch, and that upon final hearing the injunction be made permanent. Temporary writ was issued, but, upon final hearing, was dissolved, and judgment entered in favor of the defendants.

Plaintiff appeals from the finding, order, and judgment of the district court dissolving the temporary injunction and rendering judgment in favor of the defendants.

I. Appellant's principal contention is that an attempt is being made to deprive him of his property without due process of law. He rests this contention upon the claim that the respective boards of supervisors of Kosuth and Emmet Counties, acting jointly, proceeded in the matter of the establishment of the district and the appropriation of a right of way over his property without having first acquired jurisdiction to do so.

The report of the engineer appointed by the boards to make the preliminary survey estimated that 94 acres would be required for right of way. The plat filed by him indicated the commencement, route and terminus of the ditch, but neither the report nor the plat contained a statement or designation of the exact boundaries of the land sought to be condemned. Appellant filed a claim for damages in the sum of \$15,000. The engineer who made the preliminary survey, with two other freeholders appointed to appraise damages, reported the amount of damages sustained, including the value of the land taken, by each of the property owners in the district. Appellant was allowed \$1,248. Damages were allowed for the value of the land taken at the rate of \$140 per acre, from which it appears that something over 8 acres of the right of way were taken from the land of the appellant. The report of the survey made by the engineer and the appraisement of damages were each

approved by the boards of supervisors, in joint session, and the improvement finally established. Before the final order of establishment was entered, appellant filed objections thereto, upon the grounds, in substance, that the ditch was not a public necessity; that its establishment would amount to the taking of private property without adequate compensation; that sufficient drainage already existed; and that the boards of supervisors were without jurisdiction to establish the same: but said objections did not point out specifically the defects in the report of the engineer now complained of. The objections of appellant being denied and the improvement established, appellant, in due time, served notice of appeal from the order of establishment to the district court of Kossuth County, but failed to perfect his appeal by filing petition in the office of the clerk of the district court, as required by law. An appeal was also taken by him from the award of damages and also from the classification of the lands for assessment and the assessment of benefits. Both of these appeals were pending in the court below at the time of the trial of this case.

After the work of excavation had begun, it appeared that, on account of the peculiar condition of the soil and other conditions prevailing, a strip of more than 85 feet in width would be required. The engineer thereupon recommended to the respective boards of supervisors that a further strip of 35 feet in width be appropriated, making the total width of the land proposed to be taken 120 feet. The boards of supervisors, without notice to the property owners or other preliminary action, by resolution approved the recommendation of the engineer, and awarded damages to appellant for the extra land proposed to be taken, at the same rate per acre, apparently, as previously.

It appears to be conceded by appellant that the proper notice was given the property owners of the petition filed in the office of the county auditor and of the proceedings

for the proposed establishment of the improvement, so that no question of jurisdiction is urged on account of the failure to give the proper notice.

The real question presented is whether the matters complained of were mere irregularities or go directly to the question of jurisdiction. So far as material to the question presented, the drainage statutes provide as follows:

"Sec. 1989-a2. * * * He shall make return of his proceedings to the county auditor, which returns shall set forth the starting point, the route, the terminus or termini of the said ditch or ditches, drain or drains, or other improvements, together with a plat and profile showing the ditches, drains or other improvements, and the course and length of the drain or drains through each tract of land, together with the number of acres appropriated from said tract for construction of said improvement, * * * and the description of each tract of land therein and names of the owners thereof as shown by the transfer books in the auditor's office, together with the probable cost, and such other facts and recommendations as he may deem material.

"Sec. 1989-a6. * * * any party aggrieved may appeal from the finding of the board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district court by filing notice with the county auditor, * * * If the appeal is from the action of the board in establishing or refusing to establish said drainage district, the court shall enter such order as may be proper in the premises, and the clerk of said court shall certify the same to the board of supervisors, who shall proceed thereafter in said matter in accordance with the order of the trial court.

"Sec. 1989-a46. The provisions of this act shall be lib

erally construed to promote the leveeing, ditching, draining and reclamation of wet, overflow or agricultural lands; the collection of the assessments shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the board of supervisors locating and establishing the levee, ditch, drain or change of natural watercourse provided for in this act, but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law unless they were appealed from."

The provisions of the foregoing statutes require that, before action is taken by the board of supervisors, there shall be on file in the office of the county auditor the report of a competent, disinterested engineer, recommending the improvement, and the board is limited to the establishment of the improvement as recommended. This report is necessary to the jurisdiction of the board of supervisors. *Hartshorn v. District Court*, 142 Iowa 73.

In so far as the board of supervisors, in drainage matters, seeks to condemn land for public use, such board proceeds under the right of eminent domain. In the absence of legislative authority, the board would be wholly without jurisdiction to condemn land for ditch purposes; hence, in exercising such power, the board must follow strictly the form of procedure enacted and provided by the legislature. *Hartshorn v. District Court*, 142 Iowa 73; *Sisson v. Board of Supervisors*, 128 Iowa 442; *Metlar v. Middlesex & S. Traction Co.*, (N. J.) 63 Atl. 497; *McLeod v. South Deerfield Water Supply District*, (Mass.) 78 N. E. 764.

Statutes granting this power are strictly construed, and jurisdiction or authority granted by such statutes can only

be exercised in the manner pointed out thereby. Mr. Justice Deemer, speaking for the court in *Gano v. Minneapolis & St. L. R. Co.*, 114 Iowa 713, said:

"But notwithstanding the right is one which appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a matter for judicial cognizance. This is simply a reaffirmation of what Chief Justice Marshall said in *Barron v. City of Baltimore*, 32 U. S. 243 (8 L. Ed. 672), as follows: 'That the right of eminent domain applies to every independent government. It is an incident to sovereignty, and requires no constitutional recognition.' The legislature cannot, strictly speaking, delegate this power, but may select such agencies to exercise it, and may confer on them such rights, as are not forbidden by the Constitution. It follows then that the power, except when assumed by the sovereign itself, can be exercised only in virtue of a legislative enactment, and that the time, manner, and occasion of its exercise are wholly in the control of the legislature, except as it may be restrained by the fundamental law. *Bachler's Appeal*, 90 Pa. St. 207; *Swan v. Williams*, 2 Mich. 427; *Wilkin v. Railroad Co.*, 16 Minn. 271 (Gil. 244); *Secombe v. Railroad Co.*, 23 Wall. 108 (23 L. Ed. 67). The authority must be expressly given, and strictly pursued. *Creston Water Works Co. v. McGrath*, 89 Iowa 502, *Lewis, Eminent Domain*, and cases cited. The jurisdiction is limited, and can only be exercised in the manner pointed out by statute. *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 549."

"The order of taking must contain a description of the land included in the limits of the new public work so that it will identify a definite tract of land as certainly as is required in the case of a conveyance of land, or in the proceedings for condemnation by judicial decree, and any doubt

in the description is resolved in favor of the owner." Section 393, Nichols on Eminent Domain (2d Ed.). See also *Mathias v. Carson*, 49 Mich. 465; 15 Cyc. 855.

Section 1989-a2 requires the engineer to include in this report: " * * a plat and profile showing the ditches, drains or other improvements, and the course and length of the drain or drains through each tract of land, together with the number of acres appropriated from said tract for construction of said improvement, * * "

The engineer appointed for the designated purpose must set forth in his report the exact width, boundaries and location of the right of way required for the improvement and sought to be condemned by the board of supervisors for that purpose. This is required by the statute, which, in so far as the same seeks to take private property for public use, must be strictly construed. This is not in conflict with the provision of the statute which requires the drainage act to be liberally construed to carry out its purpose. The report of an engineer recommending the proposed drainage improvement is jurisdictional, and as to such matters the statute is mandatory, and must be strictly followed. Unless the proceedings conform strictly to the statutory requirements as to jurisdictional matters, the board will be without authority, unless such statutory requirements are waived by the person affected.

The case, however, presented is not one in which there was no report of the engineer, for he did report the boundaries of the land to be included in the district, the commencement, route and terminus of the proposed ditch, without, however, designating the exact boundaries of the land required to be taken for the improvement. Upon appeal from the order of establishment, every objection urged against

4. DRAINS: establishment: appeal: scope of inquiry.

the proposed scheme of drainage may be reviewed and passed upon by the district court upon the hearing of such appeal, but only such objections as were made before the boards of supervisors will be considered by the district court. *Lyon v. Sac County*, 155 Iowa 367; *Lightner v. Greene County*, 145 Iowa 95; *In re Jenison v. Greene County*, 145 Iowa 215; *Kelley v. Drainage District*, 158 Iowa 735.

The complaint now made of the engineer's report was not made before the boards of supervisors, except in so far as same might possibly be implied from the general objection that the boards were without jurisdiction to establish the district. Had this objection been urged before the boards of supervisors, an order could have been made directing the engineer to amend his report so as to remedy the defects therein. Upon the failure or refusal of the boards to take the proper action in the matter, the district court, upon appeal, had full authority to have the error corrected. In *Hartshorn v. District Court*, 142 Iowa 72, this court said:

"That upon appeal to the district court in such cases the court may pass upon the order appealed from, affirming or reversing the same, and making such orders for the direction of the board of supervisors as may be proper for giving effect to the court's judgment or decree."

See also Section 1989-a6, quoted above.

Notwithstanding the duty of the engineer to indicate upon his plat or in his report specifically and definitely the exact boundaries of the land to be appropriated, yet, if his report or plat contained such facts as that therefrom true lines and boundaries of land to be appropriated can be ascertained or computed, the situation would not be the same as it would have been had there been no report of an engineer. In *Kelley v. Drainage District*, 158 Iowa 735, the report of the engineer omitted the description of several

tracts included and the names of the owners. The court, in passing upon the question there presented, said:

"A description which when followed up will enable an engineer to ascertain precisely the lands intended is [not] so defective as to render all subsequent proceedings illegal and void for want of jurisdiction."

See also *In re Drainage District No. 3, Hardin County*, 146 Iowa 564.

As above suggested, the omission in question was one that the boards of supervisors had authority to direct the engineer to correct, and, doubtless, would have done so had their attention, at the time, been called thereto. The engineer could readily have marked out the boundaries on his plat with precision. It therefore seems clear that the omission is only an irregularity which could easily have been corrected by the engineer, and that appellant, failing to appeal from the finding and order of the boards, must be held to have waived such irregularity. Such is the plain provision of the statute quoted above.

6. INJUNCTION:
nature and
form of remedy:
existence of other
remedy: void
and voidable
acts distinguished.

Injunction to restrain the proceedings of an inferior tribunal will only be granted when same are wholly void. If voidable only, injunction will not lie. The finding of the board in the case at bar was not, as to the above matters, wholly void, but at most voidable, and could have been corrected by the district court upon appeal. This remedy having been provided by statute, and the finding and order of the boards of supervisors being voidable only, the remedy by appeal should have been followed. This court, in *Clifton Land Co. v. City of Des Moines*, 144 Iowa 625, referring to the point, said:

"Save only in cases where the order of proceedings sought to be enjoined is absolutely void,—not voidable merely,—it is well settled that a special remedy created by statute is exclusive as to all the controversies coming with-

in its scope, and if a party to whom such remedy is given fails to take advantage of it, he cannot resort to equity for relief. *Nixon v. Burlington*, 141 Iowa 316; *Reed v. Cedar Rapids*, 137 Iowa 107; *Andre v. Burlington*, 141 Iowa 65; *Owens v. Marion*, 127 Iowa 469; *Minneapolis & St. L. R. Co. v. Lindquist*, 119 Iowa 144; *Stevens v. Carroll*, 130 Iowa 463. The remedy by appeal was broad and ample, the district court being given by the statute above cited full power to hear and try every objection properly raised, and to set aside, vacate, or modify the assessment complained of, and generally to make such order as the city council ought to have made in the premises, or remand the proceedings with proper orders and directions for further proceedings in harmony with the findings of the court."

It therefore follows that the decree of the court below in favor of appellees, in so far as the foregoing matters are concerned, must be sustained.

II. After the work of excavation was begun, it was found that the 85-foot right of way was insufficient, and the engineer in charge reported said fact to the respective boards and recommended that the right of way be widened to 120 feet and that damages be allowed therefor. Acting upon this recommendation, a resolution was adopted by the board of the proper county approving the same, and allowing appellant the further sum of \$404.60, the same being for 2.89 acres at the price previously fixed.

Counsel for appellee suggest that, while the proceedings to condemn the extra 35-foot strip may not be regular, appellant will not be prejudiced on account thereof. It may be that, upon the trial of his claim for damages, appellant could show the extent and real value of the land taken, but counsel here confuse the legal right of appellant with a favorable situation resulting from a combination of cir-

6. EMINENT DOMAIN: nature of power: procedure: drains.

cumstances, including the enforced delay in completing the improvement in question.

The question presented must be determined upon the basis of his rights as they existed before the final order of establishment, and not in view of favorable circumstances subsequently accruing to him. This court has often held, as above suggested, that it is the duty of a property owner to raise every objection which he may have to the improvement before the final order of the board is entered, and, in doing this, he need not anticipate the happening of future events and circumstances not contemplated by the statute, or order of the board of supervisors.

What we have said above is sufficient to show that appellees are wholly without authority to appropriate the 35-foot strip in the way attempted. The statute provides no such way of condemning private property for public use. The authorities cited above are conclusive upon this question. Defendants should have been restrained from entering upon or using any part of the 35-foot strip referred to in the engineer's report.

In so far, therefore, as the decree of the lower court is inconsistent with this finding, same is reversed, and the cause remanded to the district court with directions to enter a decree in accordance herewith, pending further proceedings in the matter of obtaining further right of way.
—*Reversed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

C. W. E. SNYDER, Appellee, v. NATIONAL TRAVELERS BENEFIT ASSOCIATION, Appellant.

INSURANCE: Health and Accident—Action for Benefits—Defenses

1 —False Representations. Inaccurate representations, made in the good-faith belief that they were true, will not avoid a policy.

INSURANCE: Health and Accident—"Illness Within 30 Days,"

2 Construction. On the issue whether illness began "within 30 days from the date of a policy" of health insurance, illness following a surgical operation performed *after* said 30 days will not be held to be a continuance of the illness following a surgical operation *within* said 30 days, from which latter operation the patient had apparently fully recovered, even though the physical condition which necessitated the last operation existed when the first operation was performed.

Appeal from Benton District Court.—B. F. CUMMINGS, Judge.

MONDAY, SEPTEMBER 24, 1917.

ACTION for weekly indemnity under a policy for health insurance. The facts are stated in the opinion.—*Affirmed.*

Carr, Carr & Evans and *Tobin & Tobin*, for appellant.

Nichols & Nichols and *C. W. E. Snyder*, for appellee.

1. **INSURANCE:**
health and
accident: ac-
tion for bene-
fits. defenses:
false repre-
sentations.

STEVENS, J.—On October 31, 1914, plaintiff signed an application for health insurance in the defendant company, and on November 9th of that year, the policy in suit was issued to him. This action was brought to recover weekly indemnity allowed by the terms of said policy for loss of time while totally disabled from performing the duties of his profession, and while confined indoors. The defenses urged were breach of certain warranties contained in the policy, and fraud practiced by plaintiff upon defendant in procuring said policy to be issued. The following extracts from the application we deem material to

a correct understanding of the case presented upon this appeal:

"I hereby make application for membership in the association, basing my application upon the following representation of facts, all of which I hereby certify to be true, complete and material to the risk. I agree that any statement made by me to the agent or solicitor of this application shall not bind the association unless written hereon.

"8. Give name and address of physician last consulted by you. Dr. Blackford, Rochester, Minn.

"When was this? April, 1914. For what? Intestinal operation. Has your recovery from this been complete? Yes. What other sickness or injury have you had in the past seven years? No other.

"11. Are you now in sound physical health? Yes."

Plaintiff is a lawyer, and at the time of the trial below was 46 years of age. He testified that, in January, 1914, he was operated upon at the Mayo Hospital in Rochester, Minn., for varicose veins in the duodenum; that he had his gall bladder removed, and in 17 days thereafter, left the hospital and went to the hotel. Very shortly thereafter, he began bleeding. He left Rochester for 10 days, tried a law suit, and, on March 26th following, was operated upon for an ulcer in the duodenum, at which time other varicose veins were discovered. At this time, a new opening was made into his stomach. He returned home in April, became much better, gained his normal weight, his blood and breathing became normal, and he was apparently restored to health. He returned to the hospital November 20, 1914, although it is claimed that his visit at that time was incidental to a business trip in that vicinity. An examination made at this time of his blood and urine indicated the presence of tubercular trouble. He testified that he was not sick, but apparently in normal health.

Upon examination by the surgeon, his left kidney and epididymis presented evidence of tuberculosis, and on December 7th, the left epididymis was removed, and on the 21st of December, his left kidney. He left the hospital January 11th, and, while attempting to board a motor car, caused an injury to the scar on his left side. On January 13th, he arrived at Iowa City, called a physician, and was confined to his bed or the house until February 7th or 8th.

At the close of the evidence, the attorneys moved for a directed verdict in favor of their respective clients. The motion made by counsel for appellant was overruled, whereupon the motion in favor of plaintiff was sustained, and judgment entered in his favor for the amount found by the court to be due.

The evidence as to the several operations above referred to is not disputed, but there is dispute as to the conversation between plaintiff and defendant's agent, plaintiff claiming that he told the agent in detail about his prior illness and operations, and the agent denying most of it, the conversation occurring at the time the application was made out and signed. The application used was a printed form with a blank space following each question, in which the answers of the applicant were written. The space left for that purpose was sufficient only for very brief answers to the questions. One of the questions answered by plaintiff as to what physician he had last consulted, and when, was, "Dr. Blackford, Rochester, Minn., April, 1914." It will be observed that the time given was the month in which the last operation in the spring of 1914 was performed. This answer would seem to be in accordance with the undisputed facts. The purpose of the visit and consultation was an intestinal operation. The answer is brief, but was evidently deemed wholly sufficient by appellant at the time the policy was issued. If more information was necessary or desira-

ble, there would seem to have been no reason why it could not have been obtained before the policy was issued.

There is no merit in the claim that the answers here referred to were untruthful or misleading. He was next asked to state whether his recovery had been complete. He answered, "Yes." This answer, under the evidence, is apparently as nearly correct and truthful as the applicant was capable of making. He testified that his blood and respiration had become normal; that he had regained his former weight; and that he was feeling well; and we hardly see how it can be said that there is such concealment or misrepresentation of facts as to constitute fraud. The only illness suffered by plaintiff within seven years preceding the date of the application was that resulting from the operations performed in January and March preceding. The separate operations performed on the dates indicated were upon the same organ, and the second was to further relieve the condition partially discovered at the time of the first, and to relieve the hemorrhages which continued from the time of the first operation. There is no evidence tending to show that plaintiff's answers to these questions were untruthful.

He was then asked whether, at the time, he was in sound physical health. To this he answered in the affirmative. As before stated, the answer was in harmony with all that was known by him of his physical condition at the time. He could hardly be expected to do more than state truthfully the facts known to him at the time. There is absolutely nothing to indicate bad faith upon the part of applicant, either in concealing information or untruthfully or evasively stating the facts. We think the holding in *Lakka v. Modern Brotherhood of America*, 163 Iowa 159, and *Teeple v. Fraternal Bankers' Reserve Society*, 179 Iowa 65, applicable to the facts in this case. While the language in the application in the cited case is somewhat different in

form, it is not sufficient to distinguish the case. What is there said relative to the knowledge of the applicant, good faith and apparent truthfulness of the answers to the questions, is applicable to the facts in this case.

II. The policy in suit provided:

"This policy shall not cover * * * illness beginning within 30 days from the date of this policy."

2. INSURANCE:
health and
accident: "ill-
ness within
thirty days,"
construction.

The question here presented is more doubtful. As before stated, operations were performed in January and March, 1914, and on December 7, 1914, the left epididymis, and on December 21, 1914, the left kidney, were removed. The policy was issued on November 9th, so that the operation on December 7th was within 30 days after the date of the contract. The operation of December 21st was had more than 30 days after the date of the policy. If the illness following the operation of December 21st is to be treated as a continuation and part of the illness following the operation of December 7th, then same began within thirty days after the date of the policy; but if they be treated as wholly separate, then plaintiff is entitled to recover for such loss of time under the terms of the policy as followed the later operation. Appellant's testimony is that he left the hospital on December 15th; that he felt well, and was out and around town until the 21st, when he returned to the hospital and had the left kidney removed. He left the hospital January 1 or 2, 1915. On January 12th, he was finally discharged, and left Rochester for Waterloo, Iowa. In boarding a motor car, he received an injury to his left side, which opened the scar left by the operation; and, upon his arrival at Iowa City, January 13th, he called a physician, and was confined to the house or bed until February 7th or 8th. After that time, he employed assistance to try cases, for which he was not physically able. The court found plaintiff entitled to recover for

loss of time from December 21, 1914, to January 11, 1915, both inclusive, and from January 13, 1915, to February 8, 1915, both inclusive, and rendered judgment in his favor for \$137. The tubercular condition making necessary the two later operations doubtless existed at the time the application was signed, and the necessity for the last operation was probably apparent at the time the preceding one was performed. The tubercular condition existed, but appellee was suffering no illness or inconvenience therefrom. The purpose of the operations was to remove the infection and prevent its further ravages upon the body. The only illness of appellee was that resulting from the two operations. He was confined to the house and his bed on account thereof and while recovering therefrom. The only connection or relation of the later to the preceding operation was that both sought to remove infected parts of different organs of the body, and were a part of the necessary treatment for the condition found to exist.

We do not think it can be said that the loss of time resulting from the second operation is in any way traceable to the operation performed within thirty days following the date of the policy. The illness for which recovery is sought began when the last operation was performed. The condition requiring the treatment existed at the time the first operation was performed, but appellee was not ill on account thereof, but was, as he testifies, in normal health, actively pursuing the duties of his profession. The only illness covered by the policy was that which so disabled the assured as to confine him to his house and totally prevent him from performing the duties of his profession.

It is our conclusion that no question was presented for the jury, and that the court did not commit error in instructing it to return a verdict for the plaintiff.

III. Appellant complains of the rulings of the court

admitting certain testimony offered by plaintiff. We do not deem it necessary to set out the testimony which it is claimed was improperly admitted, or to discuss the same in detail. Suffice it to say that we are of the opinion that the testimony was properly received by the court.

Since we discover no error in the record, the judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

GEORGE A. TEWKSBURY, Appellee, v. TITLE GUARANTY & SURETY COMPANY, Appellant.

JUDGMENT: On Motion—Judgment on Pleadings, Etc.—When

- 1 Allowable. Motions for judgment (a) on the pleadings and (b) on matters of record properly before the court (while not to be encouraged) are allowable when defendant has fully pleaded all matters relied upon as a defense, and when a demurrer will not lie because of the fact that the said record matters are not embraced in the pleadings.

PLEADINGS: Issue, Proof and Variance—Matters to Be Proved—

- 2 Conclusion Denials. An allegation that a cause of action has been assigned to plaintiff, *accompanied by undenied fact allegations sufficient to prima facie establish such assignment*, is not put in issue by a naked allegation that defendant has no knowledge or information relative thereto sufficient to form a belief, and therefore denies the same.

PARTIES: Defendants—Non-Joiner—Voluntary Appearance—Ef-

- 3 fect. A plea of non-joinder of parties defendant is fully obviated by the subsequent appearance of such non-joined parties with a record stipulation by them which as fully protects defendant as though such non-joined parties had originally been made parties defendant.

BONDS: Construction and Operation—Words and Phrases Foreign

- 4 to Purpose—Effect—Executors and Administrators. A bond will be construed and given an effect in harmony with the *manifest purpose* for which it was given, as reflected in the record facts and circumstances, even though such construction may, in effect, exclude a large portion of the bond as surplusage.

PRINCIPLE APPLIED: An executrix was serving without bond. Claimants against the estate became apprehensive, and secured an order requiring executrix to give a bond, concededly for the purpose of securing the payment of said claims. In executing this bond, a printed form was used, which was the form used generally by executors and administrators when giving bond for the faithful performance of their duties as such. Following these general printed conditions was a provision in longhand, commencing with the word "or," and providing, in substance, that the makers would pay the claims, as finally allowed, of the parties enumerated, and that the bond was for their benefit only. Said claims were allowed and not paid. Action on bond followed. *Held*, the petition need not allege a breach of said printed provisions of the bond—that the breach might be assigned wholly on the failure to pay the claims.

WORDS AND PHRASES: "Or" and "And." Principle recognized that "or" may be construed in the sense of "and."

Appeal from Marshall District Court.—JAMES W. WILLETT, Judge.

SATURDAY, JUNE 23, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

ACTION at law against the surety on a bond given by an executrix of an estate to secure the payment of certain claims allowed against said estate. Plaintiff filed motion for judgment upon the pleadings and record, which was sustained, and judgment entered against the surety. Surety appeals.—*Affirmed*.

E. H. Lundy, Dean W. Peisen and W. H. Soper, for appellant.

C. H. E. Boardman, for appellee.

1. JUDGMENT: on motion: judgment on pleadings, etc.: when allowable.	STEVENS, J.—Appellee is the assignee of a claim filed and allowed in favor of R. L. Young against the estate of Charles J. Hoyt, deceased. Myra Y. Hoyt qualified as executrix of the estate of Charles J. Hoyt, in ac-
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cordance with the terms of his will designating her as his executrix without bond.

Appellant states in its answer that, upon application of R. L. Young et al., Myra Y. Hoyt gave the bond in suit, naming him and several other persons as beneficiaries. The bond recites the usual conditions of bonds of administrators, executors, etc., and continues: "or, if she shall discharge the claims of said persons in such amounts as may be finally found due on these claims as already filed in the district court of Marshall County, Iowa, then this bond to be void; otherwise in full force. This bond is however for the protection of, and shall inure to the benefit of, the above named persons, claimants against said estate, but for or to no other."

This bond is signed by Myra Y. Hoyt and appellant, and is in the penal sum of \$6,000.

The plaintiff in his petition alleged that, on the 25th day of January, 1910, R. L. Young in writing assigned the claim in question to him, and that it was filed in the office of the clerk and attached to Docket 7 at page 419, which by reference is made a part of said petition; alleges the allowance of the claim in question and the breach of all of the conditions of the bond, and prays judgment in the sum of \$600 against appellant.

Defendant then filed a demurrer to plaintiff's petition, which was overruled. Thereupon defendant filed answer, denying all of the allegations of plaintiff's petition not specifically admitted. The answer then proceeds to admit all of the allegations of plaintiff's petition except that regarding the assignment of the claim to plaintiff, which is denied on the ground that the defendant had not sufficient knowledge or information to form a belief as to the truth thereof, and affirmatively alleges that, prior to the commencement of this suit, the following claims had been allowed to beneficiaries named in the bond: To Charles E.

Hatcher, special administrator, \$6,000; to C. H. E. Boardman, approximately \$1,000; that, because said claimants had not been made parties to this suit, there was a non-joinder of parties defendant; and asked that plaintiff's petition be dismissed.

Later, Charles E. Hatcher, special administrator, and C. H. E. Boardman entered their appearance in this case, and filed a written stipulation consenting to the payment of plaintiff's claim and agreeing that same should be without prejudice to defendant, and that, at the final adjustment of said claims, should the aggregate amount of same exceed the penalty of the bond, defendant should be liable only for the full amount of the penalty of its bond. Whereupon, plaintiff filed a motion for judgment upon the pleadings and record, for the full amount of his claim with costs.

Defendant filed a motion to strike plaintiff's motion for judgment and also objections thereto, and an additional motion to strike from the files the stipulation above referred to. All of said motions and objections were submitted together. The court overruled all of defendant's motions and sustained plaintiff's motion for judgment, and judgment was accordingly entered for \$695 and costs. From this judgment, defendant appeals.

I. Appellant contends that our statute does not authorize the rendition of a judgment upon a motion based upon the pleadings therefor. The motion filed by appellee asked judgment upon the pleadings and on the record. The motion for judgment and appellant's motion to strike the same, together with its resistance to said motion and the motion to strike the appearance and stipulation of Boardman and others from the files, were all submitted to the court together, so that, at the time the court passed upon the motion for judgment, it also passed upon appellant's motion to strike the same from the files.

It is the position of appellant that the sufficiency of the answer to constitute a defense could not be challenged by a motion for judgment, but that, if appellant desired to challenge same, he must follow the procedure prescribed by statute and demur thereto. If appellee desired only to challenge the sufficiency of the matters pleaded in defendant's answer to constitute a defense, undoubtedly a demurrer would have been the proper proceeding, but appellee appears by his motion to have sought to raise questions that would not have been presented by a demurrer; that is, the full record upon which, apparently, the court sustained appellee's motion for judgment did not appear upon the face of defendant's answer.

The record does not show affirmatively the introduction in evidence of the proceedings in probate in the Charles J. Hoyt estate; but appellee has filed an amendment to appellant's abstract, setting out chronologically the proceedings had in said estate, in so far as the same would appear to be material to any question presented in this case. No motion to strike this amendment, or denial thereof, has been filed in this court, so that, at the time the court passed upon the motion for judgment, it seems to have had before it for consideration matters of record that would not have been proper for its consideration in passing upon a demurrer to the answer, but that were of value to the court in passing upon the motion for judgment.

Our statute does not provide for the filing of a motion for judgment upon the pleadings or record, and authorities from other jurisdictions are cited by counsel for appellant criticising this procedure. One of the grounds upon which this proceeding is assailed is that it may deprive a litigant of the right to file proper amendments to his pleadings; but, as before stated, in this case the several matters above referred to were submitted to the court at the same time, and the record fails to disclose that counsel for appellant

either tendered or requested permission of the court to file an amendment to its answer. It may well be assumed that appellant had fully pleaded all matters relied upon by it as a defense to plaintiff's cause of action.

In addition to the contention of appellant that the proceeding was unwarranted and not justified by our statute, it is further alleged by counsel for it that the answer, in fact, presented matters constituting a defense, and that issues were thereby presented entitling it to a trial upon the merits.

Following a general denial which was made subject to the admissions thereafter set forth in its answer, defendant stated therein:

"And plaintiff's allegations setting forth the copy of the judgment of allowance of claim of R. L. Young is admitted in so far as to admit the allowance of said claim in said court as is shown in Docket 7 at page 419; that as to whether or not said claim has been assigned to the plaintiff in this suit defendant has neither knowledge nor information sufficient to form a belief, and therefore denies such assignment."

Defendant also alleged a non-joinder of parties defendant, basing the same upon the provisions of the bond in suit designating C. H. E. Boardman and Charles E. Hatcher, special administrator of the estate of Mary L. Bradford, deceased, in addition to R. L. Young, appellee's assignor of the claim in suit, as beneficiaries, and that they were necessary parties to a proper determination of the issues presented.

The interposition of a denial, upon the ground that appellant was not possessed of sufficient knowledge or information to form a belief as to the alleged assignment of the claim to appellee, doubtless was because appellant did not desire to rely upon its general denial as to this matter.

This appears to be the view of counsel for appellant, as it is this plea which is urged in argument as presenting a triable issue: that a denial based upon insufficient knowledge or information to form a belief as to the truth of the matters alleged in an adverse pleading is, in effect, a denial of the matter thus pleaded, and puts the same in issue. *Carr v. Bosworth*, 68 Iowa 669; *Craig v. Hasselman*, 74 Iowa 538.

This court, however, in *Cottle v. Cole & Cole*, 20 Iowa 482, held that simply "denying that the judgment had been assigned" was not good pleading, and did not deny the fact of the execution of the written assignment pleaded in plaintiff's petition nor set out any facts upon which the conclusion that the judgment had not been assigned was based. The denial should have been of the facts pleaded, as the petition on its face contained facts which *prima facie* established the assignment.

The allegations of plaintiff's petition material to a consideration of this point are as follows:

"Plaintiff shows to the court that, on or about the 5th day of November, 1909, plaintiff's claim was allowed against the estate of Charles J. Hoyt, deceased, and against Myra Y. Hoyt, executrix, and judgment was rendered in favor of R. L. Young and against the estate of Charles J. Hoyt, deceased, and Myra Y. Hoyt, executrix, for the sum of \$500 and costs, all as shown by the probate records of this county in Case No. 2348, Docket 7, at page 419, which record is hereby, by reference, made a part of this petition.

"Plaintiff further shows to the court that, on the 25th day of January, A. D. 1910, R. L. Young assigned this claim to the plaintiff, George A. Tewksbury, as shown by said assignment, duly filed in said Cause No. 2348, Docket 7, page 419, which assignment is by reference made a part hereof."

The foregoing allegations of plaintiff's petition stated

facts which *prima facie* established the judgment and the assignment. Defendant's answer, as appears from the portion thereof quoted above, admitted the allowance and record thereof of the claim in suit, and stated that it had "neither knowledge nor information sufficient to form a belief, and therefore denies such assignment."

It will be observed, therefore, that defendant did not deny the execution of the alleged written assignment, the record thereof, nor the facts pleaded by plaintiff, but, as in the cited case, simply by the statement of a conclusion, denied the assignment. The denial to present an issue should have been of the facts pleaded in the petition, and not of the conclusion to be drawn therefrom. The denial was insufficient to raise an issue as to the facts pleaded in the petition relative to the assignment of said claim, and the holding in *Cottle v. Cole & Cole*, *supra*, is applicable.

Both the petition and answer made specific reference to the record of the allowance of the claim in suit. It appears from appellee's amendment to appellant's abstract that the original written assignment of the claim by R. L. Young to appellee was duly acknowledged, filed, and attached to and made a part of the record of the allowance of the claim; so that, by reference to the admitted record, the court had before it the original assignment which, by the pleadings, was made a part of the record in this case, and evidently, in ruling upon the motion for judgment, considered the same sufficient to make a *prima-facie* showing of the alleged assignment. It must not be overlooked that the motion for judgment is not based alone upon the pleadings, but upon the record also. The record of this assignment was, by special reference in plaintiff's petition, and parts of it by the admission of defendant's answer, before the court, and all that appeared upon the record was, therefore, for the proper consideration of the court.

8. PARTIES: de-
fendants: non-
joinder.
voluntary ap-
pearance: ef-
fect.

Appellant also argued that the answer presented an issue upon the question as to whether there was a non-joinder of parties defendant. The parties who, it is claimed, should have been made defendants are named in the answer, and are C. H. E. Boardman and Charles E. Hatcher, special administrator of the Mary L. Bradford estate.

As before stated, C. H. E. Boardman and Charles E. Hatcher, as special administrator of the Mary L. Bradford estate, entered their voluntary appearance in this case and filed a stipulation and agreement consenting to the payment of the claim in suit in full, and specifically agreeing that the payment thereof should be without prejudice to defendant in any action upon the bond to recover the claims held by said parties against the Hoyt estate, and that, in the event said claims which were in litigation were finally allowed in an amount exceeding the defendant's liability on its bonds, they would accept the amount for which the defendant was liable in full pro rata upon said claims. Counsel for appellant moved to strike this appearance and stipulation from the files. The motion was overruled, and the court, in its finding of facts and judgment, held that, under the stipulation, the payment of the claim in suit would be without prejudice to any right of defendant.

Conceding, for the purpose of argument, that the parties designated were necessary parties to a proper decision of the matters in suit, the difficulty was obviated by their appearance in the court below and the stipulation filed. They are as effectually estopped and their rights as fully adjudicated herein as they would have been if they had been made parties defendant, as it is contended by appellant they should have been.

While we do not approve the practice followed in this case, and do not desire to encourage the filing of motions

for judgment, yet, in view of the record herein, we think the court committed no error in entertaining the motion and rendering judgment thereon.

4. Bonds: construction and operation: words and phrases foreign to purpose: effect: executors and administrators.

II. Myra Y. Hoyt qualified as executrix of the estate of Charles J. Hoyt, deceased, without bond. Defendant alleges in its answer that thereafter application was made by appellee's assignor, praying that executrix be required to file a bond for the purpose of securing the payment of said claim, and, pursuant to said application, an order was made by the court requiring her to give such bond, and that the bond in question was thereafter filed and approved.

The argument of appellant is that the bond, in truth and effect, is an ordinary bond, and the one usually given in such cases, and that the allegations of plaintiff's petition do not charge a breach of the conditions of said bond. It is in substance stated by appellant in its brief and argument that the bond in suit was an ordinary printed form, commonly used by executors and other like officers, and that the portion thereof commencing with the word "or" in the last paragraph thereof was written in longhand, following the printed part of the document. If the bond was given, as stated by appellant in its answer, in obedience to an order of court requiring same to be given for that purpose to secure the payment of the claim in suit and the claims of other parties named as beneficiaries in said bond, then the portion written in longhand was evidently designed to meet the desire of the parties interested to have same clearly stated in the bond. There was nothing in the printed form used that expressly stated the purpose for which the bond was given. Apparently to guard against the possibility that the bond might be subsequently construed, in a suit by the beneficiaries named upon their respective claims against the surety on the bond, as the usual

and ordinary bond of an executor, instead of an instrument securing the payment of the specific claims for which the same was executed, the portion in longhand was added.

In construing the bond, it is quite necessary to take into consideration all the facts and circumstances, so far as appears from the record, entering into and surrounding its execution.

It appears from appellee's amendment to appellant's abstract that the ground of the application made by appellee's assignor and others, asking that the executrix be required to give a bond, was that the assets of the estate had been sold by executrix, and it is conceded by appellant that the court ordered her to file a bond for the security of the creditors making the application therefor. Executrix had been permitted to qualify as such without bond, and, from the matters stated in defendant's answer and set forth in appellee's amendment to appellant's abstract, we conclude that the bond was not intended, at the time the same was executed, as the usual bond of an executrix, but that the real purpose for which the same was executed was to provide security for the payment of certain claims in favor of the parties therein designated, among which was that of the plaintiff. While the bond in part is in form an ordinary executor's bond, yet, in construing its meaning, the following portions thereof must be given special consideration:

"Know all men by these presents, That we, Myra Y. Hoyt, as principal, and The Title Guaranty & Surety Company, of Scranton, Pennsylvania, as sureties, all of the County of Marshall and State of Iowa, are held and firmly bound unto the State of Iowa *for the use and benefit of* C. E. Hatcher, Special Administrator of the Estate of Mary L. Bradford, deceased. (and others) * * * in the penal sum of Six Thousand (\$6,000.00) Dollars, for the payment of which, well and truly to be made, we do jointly

and severally bind ourselves. * * * or, if she shall discharge the claims of said persons in such amounts as may be finally found due on these claims as already filed in the District Court of Marshall County, Iowa, then this bond to be void; otherwise in full force. This bond is, however, for the protection of, and shall inure to the benefit of, the above named persons, claimants against said estate, but for or to no other."

The bond was not designed primarily to insure the faithful performance by the executrix of the duties of her office nor to require her to account for the assets of the estate, but to secure the payment, among others, of the particular claim in suit.

Following the printed portion of the instrument, the part in writing commenced with the word "or." Based upon this language, it is argued by appellant that the principal on the bond was to pay the claims of the beneficiaries named in the bond only in the event that she failed to properly administer the estate. This argument is based upon a false assumption. It is perfectly apparent that the primary purpose of the bond was not to secure the faithful performance of the ordinary duties of the principal as executrix of the estate of Charles J. Hoyt, but in obedience to the order of the court based upon the application of the claimants named as beneficiaries in the bond, to secure the payment of the respective claims.

While it is probably true that if, instead of the word "or," "and" had been used, the meaning of the instrument would have been somewhat more clear, yet, in the view we take of the matter, the legal effect of the instrument, so far as the same was given to secure the payment of the claims in question, would not have been different. The following extract from the bond is a clear statement of the purpose for which the same was executed:

"This bond is, however, for the protection of, and shall inure to the benefit of, the above named persons, claimants against said estate, but for or to no other."

No reversible error appearing in the record, the judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

GEORGE TONEY, Appellee, v. INTERSTATE POWER COMPANY,
Appellant.

NEGLIGENCE: Acts or Omissions Constituting—Unguarded Electric Power Wires. The court may not say, as a matter of common law, that an electric power company was not negligent in failing to insulate or otherwise guard its power wires from contact with other wires lawfully constructed in the same vicinity, even though the power company could not, in all cases, foresee in specific detail the way or manner in which other wires might come in contact with such power wires. Former holdings, disapproving the so-called doctrine of "reasonable anticipation" in case of torts, reaffirmed.

NEGLIGENCE: Acts or Omissions Constituting—Trespassers and Licensees—Condition and Use of Lands, Etc. A telephone lineman engaged in repairing a telephone line on premises over which the line extended, is neither a trespasser nor a mere naked licensee—at least not in such sense that an electric power company owes him no duty with reference to its nearby power wires.

NEGLIGENCE: Acts or Omissions Constituting—Negligence per se —Unguarded Electric Wires. Unguarded electric light or power wires along public highways constitute negligence per se. (Section 1527-c, Code Supplement, 1913.) Applied where a telephone wire slipped from the hands of a lineman, sprang back, and, unknown to the lineman, was, before it struck the ground, carried over and in contact with an uninsulated or otherwise guarded electric power wire.

APPEAL AND ERROR: Presentation of Grounds of Review—Theory
4 of Case—Inconsistent Attitudes. On appeal, one may not contend for the materiality of a fact which, on trial in the lower court, he successfully excluded on the plea of immateriality.

EVIDENCE: Opinion Evidence—Contradiction of Statutory Re-
5 quirement—Competency. Opinion evidence, contradictory of the requirements of a statute, is wholly incompetent. So held where it was sought to show by opinion evidence that insulation and other guards for electric wire were unnecessary, though required by statute.

STATUTES: Construction—Police Regulation—Application to Prior
6 Construction. A statute requiring insulation or other guards for electric light and power wires applies, in the absence of provisions to the contrary, to lines erected prior to the enactment of the statute.

NEGLIGENCE: Acts or Omissions Constituting—Jury Question.
7 Where a circuit breaker was installed in an electric power plant and automatically opened when the line was grounded, held to be a jury question whether the servant in charge was negligent in closing it when it opened at the time in question.

ELECTRICITY: Negligence—Common-Law and Statutory Obliga-
8 tions. The common-law obligation to provide reasonable protection against dangers from electric wires, and the statutory obligation to provide specified guards, apply to wires carrying any kind of electricity, "static" as well as that generated for light or power purposes.

NEGLIGENCE: Contributory Negligence—When Question of Law.
9 Contributory negligence becomes a question of law only in those exceptional cases where the want of care of the injured party is so manifest and flagrant as to at once convince all fair and candid minds that he did not exercise the caution for his own safety which marks the conduct of ordinarily prudent men. Evidence reviewed, and held to present a jury question as to the contributory negligence of an electric lineman in not discovering that a telephone line was in contact with a line carrying a heavy power current.

APPEAL AND ERROR: Harmless Error—Incompetent Testimony—
10 Preliminary Offer. The reception of incompetent testimony, preliminary to a further offer, which latter is wholly rejected, followed by distinct direction to the jury to disregard the in-

competent evidence already received, may fully cure the error. So held where, in a personal injury action, the preliminary testimony received tended to show that another person at a former time had been killed at or near the place where the plaintiff was injured.

TRIAL: Verdict—\$8,500—Excessiveness. Verdict for \$8,500, for 11 serious and permanent injuries to plaintiff's nervous system, sustained. Plaintiff was 31 years of age, married, in good health at time of injury, of good habits, had been employed for a considerable time as a telephone lineman at \$55 per month and expenses, and was in line for promotion. His injuries crippled him materially in his power to do physical labor.

PLEADING: Amendment—Conforming Pleadings to Proof. To 12 allow amendments which conform the pleadings to the proofs is clearly within the discretion of the court. So held where, in a personal injury action, an amendment set up an additional item of expenditure.

Appeal from Allamakee District Court.—W. J. SPRINGER, Judge.

SATURDAY, JUNE 23, 1917.

REHEARING DENIED MONDAY, SEPTEMBER 24, 1917.

ACTION at law to recover damages for personal injury. There was a trial to a jury, and verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

Dawley, Jordan & Dawley and *D. J. Murphy*, for appellant.

H. E. Taylor and *William S. Hart*, for appellee.

WEAVER, J.—The Standard Telephone
1. NEGLIGENCE: acts or omissions constituting unguarded electric power wires. Company constructed and maintained a rural telephone line upon the south side of a public highway extending east and west in Allamakee County. From its main line it extended service lines to the right and left, wherever re-

quired for the convenience of its patrons. At a certain point on the main line, a service line was carried across the road northward and across an adjacent field, to the home of one Sheetz. The first pole on the service line is 145 feet from the pole on the main line where the connection is made. Some years after the erection of the telephone line, the defendant constructed along the north side of the same highway a system of lines for the transmission of electric power. The wires transmitting the power current are carried on poles of greater height than those used by the telephone company and across the course of the Sheets service line. Whether, at this point of crossing, the power lines were within the limits of the highway is a matter of dispute between counsel in argument, but, under the record as made by the defendant, to which we shall refer later, defendant cannot now be heard to question the location or to assert any defense based upon the claim that its line was outside of the limits of the highway. Moreover, while the descriptive terms employed by some of the witnesses are quite elastic, and could well be used to describe either a location inside the lines of the highway or immediately outside and parallel thereto, yet we think the record as a whole permits no other conclusion than that the power line at this point was within the highway limits, though near to the boundary. We are further of the opinion, however, that the question is not a controlling one, as will be more fully developed in the course of this opinion. The power company's poles carried three transmission wires, and at the point in question, the lowest of these wires was strung $30\frac{1}{2}$ feet above the surface of the ground and $7\frac{1}{2}$ feet above the telephone company's wire. $2\frac{1}{2}$ feet above the last mentioned wire and 5 feet below the transmission wires, the defendant company carried upon its own poles two private telephone wires.

The foregoing sufficiently describes the place where

plaintiff claims to have been injured. On the date in question, September 2, 1912, and for a considerable period prior thereto, plaintiff was in the employ of the Standard Telephone Company. His duties were those of a lineman, charged with the business of keeping the line in order. Complaint having been made of some defect in the line, plaintiff was sent out to ascertain and remedy it. The evidence offered by him tends to show that, on arriving at the place where the Sheetz service line crosses the traveled path of the highway, plaintiff discovered that this wire had become slack, and was hanging so low as to create danger of interference with the public use of the highway, and he undertook to remedy this condition by taking up the slack. To accomplish this, he climbed the telephone pole at the place of connection, and made use of an instrument known as a "come-along," devised for that purpose. This device is in the form of a small block and tackle, with clamps at either end. Having climbed to the bracket and clamped one end of the come-along at the pole, plaintiff reached out as far as he could along the wire and there attached the other clamp. The slack being pulled in, he cut out a section of wire, leaving enough with which to reconnect the line at the insulator on the bracket. Then, making use of a connector, a pincher-like tool made for that purpose, he clamped it to the end of the wire and sought to pull it in sufficiently to attach or fasten it to the insulator. He had brought it nearly to place, and was about to make the twist necessary to hold it there, when the wire, with the connector attached, slipped from his grasp, and naturally recoiled or flew back in the direction of the strain from the other pole. In doing this work, plaintiff faced the south and away from defendant's power line, and away from the direction in which the wire had recoiled. Descending from the pole, he went in that direction to or near the first pole

on the service line, for the purpose of regaining the wire. On reaching it and attempting to take it in his hand, he received an electric shock, rendering him unconscious, and from which he alleges he has sustained great injury. On the arrival of assistance, it was discovered that, by reason of the force of the recoil when plaintiff lost control of the wire, or from other cause, the loosened wire had been thrown over the defendant's transmission line, from which the slack descended to the ground, thus short-circuiting the power current of over 6,000 volts. Plaintiff testifies that he did not see or know of the fact that the telephone wire had been thrown over the power lines, and that, on reaching the ground, he followed the usual course of workmen in such cases by proceeding at once in the direction of the next pole to regain the wire which had escaped him, having no knowledge or reason to apprehend that such wire had become charged with a dangerous current of electricity. In this manner, as he avers, he was brought into contact with the overcharged wire and received great injury, without contributory negligence on his part.

Plaintiff brings this action to recover damages for the injury so sustained, alleging that the same was the proximate result of the defendant's negligence, as follows: (1) Failure of the defendant to insulate its power wires or make other provisions to guard the same and prevent contact therewith; (2) failure to provide proper and sufficient safety devices or equipment to obviate or lessen the dangers arising from contact or interference with its wires; and (3) failure to construct its lines according to the requirements of law.

He also makes the general allegation that the servants and employes of the defendant were grossly and recklessly negligent in the maintenance and operation of its power lines. It may also here be said that the petition describes the telephone line and the power line as being located along

the public highway, while the answer as finally amended denied that the power line was within the highway limits. On trial to a jury, a verdict was returned for the plaintiff for damages in the sum of \$8,500, and from the judgment entered thereon, this appeal has been taken by the defendant. Without attempting to mention *seriatim* the numerous assignments of error, we will consider, so far as appears necessary, those propositions which appellant has chosen to urge in its argument.

I. It is said, and numerous precedents are called to our attention as supporting the contention, that there is no evidence in the record to sustain a finding that defendant was negligent as charged. Counsel premise their discussion with the claim that the duty of the defendant to guard or protect its wires carrying high tension currents of electricity against exposure to human contact exists only where the location of the wires is such as to suggest the likelihood or probability of injury to someone in the absence of such adequate protection. In other words, if the injury complained of from such source could not reasonably have been anticipated by the party charged with negligence in failing to protect, then there is no liability. With this alleged rule as a foundation, it is next argued that the trial court should have held, as a matter of law, that defendant was not bound to anticipate the occurrence of an injury such as plaintiff claims to have sustained, and that the charge of negligence fails for want of support in the evidence. We shall not here attempt to discuss or define the limits of the rule of "reasonable anticipation" as above set forth, except to say that some courts have carried it to an extreme to which this court has never committed itself. We have recognized such doctrine as being applicable in cases involving breach of contract obligations and contract rights, but have distinctly refused to do so where damages are demanded for a tort—and negligence is a tort. See *Mentzer v. Western*

Union Tel. Co., 93 Iowa 752, 760; *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa 32, 36.

Again, the application of the rule, even in courts giving it effect in negligence cases, is often very materially affected by the question whether the person charging negligence is a trespasser, or mere licensee, or is injured in the course of lawful employment, or in a place where he has an unquestionable right to be. It is also a very material inquiry in such cases whether the duty with neglect of which a defendant is charged, is one of common-law obligation only or is one of positive statutory requirement. The statutes, now so common, though of comparatively recent enactment, providing in specific terms for the manner of guarding machinery and other dangerous instrumentalities, in order to avoid or minimize peril therefrom to all persons exposed to contact therewith, doubtless had their origin in the legislative desire not only to save life and limb, but to put an end to much of the haggling and hairsplitting, otherwise quite sure to arise in nearly every case, as to whether the injury complained of is one which the defendant should have anticipated.

But passing, at present, the question of statutory obligation, and assuming, for the purposes of this case, the legal rule to be as counsel state it, we are quite satisfied that the record does not support their conclusion that there is no evidence to sustain the charge of negligence. In the first place, the general rule that every person is bound to manage and control his own property and carry on his own business with due regard to the rights, safety and comfort of others is no less incumbent upon a public service corporation than upon the individual citizen. It may, if it chooses, establish and carry on a business which is inherently dangerous, or it may, for business purposes, employ or use an agency or power which, unless properly controlled

and guarded, is a source of great peril to others within its vicinity. But just in proportion to the danger so created must care and diligence be increased to keep such agency or instrumentality under control and prevent injury therefrom to others. The dangers arising from the production, transmission, storage and use of electricity are among the greatest and most subtle known to mankind. Its proper management and control involve technical knowledge, skill and care which are a sealed book to the great mass of the people, and without conscientious and intelligent care in creating and installing devices for its safe use, to say nothing of constant watchfulness in their proper maintenance, distressing and tragic results are sure to follow. The defendant in this case constructed its transmission line over and across the course of the telephone company's service line. In so doing, it could not destroy or limit or rightfully ignore the right of the telephone company, its servants and employees, to maintain its service line, or to inspect, repair or renew the same, and it must have known that such service was as likely to be required at or near the point of crossing as elsewhere. It must have known also, what is a matter of common observation, that the breaking and entanglement of electric and telephone wires, where such lines are suspended in close proximity, are among the most fruitful causes of accident and injury, and, having this knowledge, it cannot be said as a matter of law that reasonable care in the use of such an extremely dangerous agency did not charge the defendant with any duty to guard against injuries therefrom to persons whose business or duty or rightful pursuit of mere diversion or pleasure brings them into the zone of danger created by the voluntary act of such defendant in stringing its wires over and across those of the telephone company. The duty thus imposed is not, as we have just suggested, limited to the use of all reasonable means to make the place safe for the

defendant's own employees in the course of their employment, but also embraces regard for the reasonable safety of the public generally, in so far as members of the public, without contributory fault on their part, may be exposed to the perils so arising. It was, of course, impossible for defendant to foresee in specific detail the way or manner in which the plaintiff or other person might suffer injury from the dangers created by the construction of the line in the manner described, but the gift of a prophet's vision is not a condition of liability. It is enough to impose the duty of protection if the danger created by the construction of the line above the telephone line was such that defendant knew or ought to have known that protection of some kind was necessary to save from harm all persons lawfully engaged in that immediate vicinity. To say the least, if persons other than the agents and servants of the power company had the right to be within the zone of danger created by such line, it would be a most unreasonable proposition to say that the company could not anticipate that such right would ever be exercised, and thus escape the duty of reasonable care to protect such persons from injury.

The contention made in argument that plaintiff, if not a trespasser, was at best but a mere licensee in the place where he came in contact with the electric current, is without merit. Confessedly, he was not upon premises owned or controlled by the defendant. If a licensee in any sense of the word, the license was one extended to him by the owner of the soil. The telephone company, in extending its telephone wire to the Sheetz residence, will be presumed to have been acting lawfully and with the consent of the landowner, and the right to construct and maintain the line implies the right to make repairs thereon. Plaintiff, as the servant of the telephone company engaged in that work, was, therefore,

2. NEGLIGENCE:
acts or omissions con-
stituting: tres-
passers and
licensees:
condition and
use of lands,
etc.

neither a wrongdoer nor a mere naked licensee for whose safety no duty rested upon the defendant.

Upon this, and other points to which we have referred, but few of the cases cited by appellant have any direct bearing or application. The quotations made from such decisions are largely of an argumentative character suggested by the peculiar facts of the case in hand, rather than a statement of legal rule or principle of general application. Indeed, while we would neither adopt nor approve the discussion indulged in by some of the courts to whose decisions we are cited, we are of the opinion that they announce no rule of law which, if held to be entirely sound, would require us to hold that the trial court in this case erred in refusing to dispose of the question of defendant's negligence as one of law rather than fact.

3. NEGLIGENCE:
acts or omis-
sions con-
stituting
negligence per
se; unguarded
electric wires.

Thus far we have omitted any mention of statutory law affecting the matters here in issue, and have reached the conclusion above stated upon what we regard as approved rules of the common law of negligence; but the subject is one of which the legislature has taken cognizance. Chapter 94, Acts of the Thirty-third General Assembly (Code Supplement, 1913, Sec. 1527-c), permits or authorizes boards of supervisors to grant the right to maintain electric power lines in the public highway, and in the same act makes it the duty of the grantee to use "only strong and proper wires, properly insulated." It also provides that guard nets, or other equally effective devices, be suspended over or under power line wires wherever they pass or cross other wires. The power line in this case was not covered with any insulating material, nor was it guarded or protected by nets or other devices, except as the protection provided for by the statute may have been the

incidental result of the maintenance of the two private telephone wires attached to its poles below the power wires.

4. **APPEAL AND ERROR:** presentation of grounds of review; theory of case: inconsistent attitudes.

The record presented by the abstracts as to this feature of the case is somewhat peculiar. The petition charges that the line was erected along the public highway, and the original answer admitted the truth of this statement. Later, an amendment was filed to the answer, alleging that its line was erected along the highway but outside of its boundary, and upon a privately owned right of way. On the trial, plaintiff examined the county surveyor as a witness, and, having shown by him that he had surveyed and definitely located the highway where the power line crossed the Sheetz service telephone line, and had made measurements to determine where the electric line and the telephone line were located, plaintiff's counsel then asked: "How far did you find the power line from the center line of this highway, measuring under the telephone wire leading north?" To this the defendant objected, as "immaterial, irrelevant and incompetent whether the electric line is inside the public highway or not." The objection was sustained, and the answer excluded. Thereupon, plaintiff offered to show that a proper survey of the highway at the point in controversy disclosed defendant's transmission line to be within the boundary line of the highway a distance of 11 feet. Again the defendant objected, and caused the offer to be rejected as being both irrelevant and immaterial. A like offer, objection and ruling were had as to the location of the telephone line and as to the width of the highway at that point. In presenting its defense, appellant put in evidence some alleged measurements and certain photographs and plat, but in none was there any attempt to specifically show that its power line was outside of the highway boundary. Before the cause was submitted

to the jury, the defendant requested that the jury be instructed as follows:

"4. The allegation of plaintiff that it was unlawful for defendant to maintain its wires upon the public highway without having them protected against contact with other wires is withdrawn from your consideration, because said wires were erected before the statute on this subject was passed, and such statute does not apply to said wires."

This request was denied, and the cause was submitted to the jury without specific mention of this feature of the controversy. Notwithstanding this record, appellant urges in argument to this court that its line is constructed outside of the highway and upon a private right of way. This claim is not only unsupported by the evidence but is also wholly inconsistent with the attitude taken by the appellant on the trial below, and with its request for the instruction of the jury. In producing its evidence, as we have seen, it not only failed to prove its alleged location outside of the right of way, but succeeded in excluding most of the direct evidence offered by plaintiff to show the exact location, on the ground that the fact was wholly immaterial whether its line was inside or outside the boundaries of the highway.

6. EVIDENCE:
opinion evi-
dence: contra-
diction of
statutory re-
quirement:
competency.

In apparent harmony with this view, defendant's testimony was largely directed not to the precise location of its line, but to the attempt to show that electric companies generally do not make use of nets and guards or insulating covers, and that, in the judgment of its witnesses, such protection was not efficient in practice.—a fact which, however well established, would constitute no defense if the evidence otherwise showed failure to comply with a specific statutory regulation. We are of the opinion that the statute is by its terms applicable to the situation as shown by the undisputed evidence, and that

failure to comply with its requirements was negligence. Such failure is made none the less vital by showing that the requirement is, in the opinion of experts, unwise, or that the prescribed protection would be lacking in efficiency. To hold otherwise would be to substitute the opinion of the witnesses for the legislative judgment, and make obedience to the statute optional with the companies for whose regulation it was enacted.

6. STATUTES : construction : police regulation : application to prior construction. The suggestion by the appellant that the statute is not applicable because it was passed after the power line was constructed cannot be upheld, for the reason that the record does not show that alleged fact, and for the still better reason that the statute does not exempt from its operation companies or power lines already in existence.

7. NEGLIGENCE : acts or omissions constituting : jury question. Plaintiff makes a further charge of negligence based on the following alleged facts. The defendant's power plant is equipped with what is known as an automatic circuit breaker, the operation of which, if we understand the witness, was such that, if its power line became grounded at any point, the circuit breaker would instantly open and shut off the current over the grounded wire, and, so long as it was allowed to remain open, there was no danger of injury to one coming in contact with the wire. Defendant's servant in charge of the power plant admits that on this occasion the circuit breaker opened; that he was near at hand at the time and at once closed it, when it flew open again, and he permitted it to remain open about three quarters of an hour. The claim of the plaintiff is that the opening of the circuit breaker gave information to the men in charge of the plant of the grounding of the power wire; that he must have known that his act in closing the circuit breaker and restoring the current over the grounded wire

rendered it a source of great danger to anyone who might come in contact therewith, and that, but for such act, the plaintiff would not have been injured. Responding to this claim, defendant says that the closing of the breaker was only for a brief moment, which must have been passed and the breaker re-opened long before the plaintiff could have descended from the telephone pole and gone back to the point where he was hurt. It is further argued for the defendant that the breaker must have been re-opened and the current cut off before plaintiff came in contact with the wire, and if he received an electric shock, it must have been from static electricity accumulated on the wire, for which condition the defendant was not responsible. Static electricity is electricity at rest. In that condition, if we understand it, the wire, or other conductor or container, is charged with electric power or energy which may have been accumulated from the clouds or the atmosphere, and which becomes active and a source of injury only when some ground connection affords it a means or way of escape. But the fact that the current from the power plant was restored for at least a short time after being cut off by the breaker is admitted, and it was for the jury to say whether the current was on at the moment of plaintiff's injury, and, if on, it was equally for the jury to say whether, in closing the breaker, the defendant's servant acted with the prudence and care reasonably required of him. True, if the servant's story is to be taken as correct in all its details, the injury to plaintiff could not be attributed to the electric current from the power plant; but it was the exclusive province of the jury to give to his testimony only such credence as they believed it entitled to, in view of all the circumstances. Assuming that the plaintiff was injured by an electric shock, and the jury has so found, it seems much more probable that it was occasioned by the grounded current from defendant's line than by static electricity. The

telephone wire which passed over the power wires also lay upon the ground. With this connection with the earth, an accumulation of static electricity upon the wires overhead would seem contrary to the laws of nature controlling these forces.

Moreover, we can perceive no good reason why the duty of the defendant to provide protection against dangers from its system of transmission lines, whether it be the common-law duty of reasonable protection or the statutory duty of maintaining specifically named or designated guards, is any less applicable to dangers from the static electricity accumulating upon its wires than to such dangers as attend the transmission of currents intended for power uses. Neither danger would exist but for the construction and maintenance of the lines. While the generated current is the result of a voluntary act, and the static power is an unintended or undesired result, both are brought into existence and become a source of danger because of conditions which the company has created for its own private advantage and profit, and the necessity and propriety of protection therefrom in the public interest is no less apparent in the one case than in the other. As tending to sustain our conclusions in the foregoing respects, see *Yeager v. Edison Electric Co.*, 242 Pa. 101; *Staab v. Rocky Mt. Bell Tel. Co.*, 23 Idaho 314; *Musolf v. Duluth Edison Elec. Co.*, 108 Minn. 369; *Newark E. L. & P. Co. v. Garden*, 23 C. C. A. 649; *Potts v. Shreveport B. R. Co.*, 110 La. 1; *Rowe v. New York & N. J. Tel. Co.*, 66 N. J. Law 10; *Spires v. Middlesex & M. Electric Co.*, 70 N. J. Law 355; *Mahan v. Newton & B. St. Ry.*, 189 Mass. 1; *Rowe v. Taylorville Electric Co.*, 213 Ill. 318.

8. **ELECTRICITY:**
negligence:
common-law
and statutory
obligations.

II. The question of contributory negligence is also raised by appellant. It is argued, and justly, that, if defendant was under a duty of reasonable care to protect plaintiff against the dangers arising from the construction of the transmission line at this point, then plaintiff was likewise under duty to use reasonable care for his own protection. No fault can be found with this proposition, and the trial court so charged the jury. As we have often said, the question of contributory negligence is peculiarly one of fact and not of law, save only in those exceptional cases where the plaintiff's want of reasonable care is so manifest and flagrant as to at once convince all fair and candid minds that he did not exercise the caution for his own safety which marks the conduct of ordinarily prudent men. He is not held to an ideally high standard of care as being free from all grounds of criticism. It is enough if the evidence be such that the jury may properly say that he acted as carefully as ordinary men of ordinary judgment and experience usually do under like circumstances. In our judgment, the record does not make such an exceptional case, and the trial court properly left this issue to the jury. It may be conceded that plaintiff knew of the existence of the power line and the dangerous character of the current carried thereon. He may also have known that the line was not guarded at that point, and yet we cannot say as a matter of law that he was manifestly and clearly negligent in failing to discover at once that the wire which escaped him had bounded or recoiled over the power line. In attempting to fasten the wire about the glass insulator, he was clinging to the telephone pole near its top, with his back toward the next pole on the Sheetz line. The power lines were also behind him, and several feet higher than his head. His action in backing down the pole and turning and "trotting," as he says, in the direc-

9. NEGLIGENCE:
contributory
negligence:
when ques-
tion of law.

tion of the next pole, where he expected to find and did find the wire which had pulled from his grasp, was, to say the least, a very natural thing for a man intent upon the business in hand to do. It would seem equally natural for him, when he reached the line, to seize it and pull it out of the weeds into which it had fallen, and if, in so doing, he did not see or know that the loose end of the wire had gone over or rested on the power lines, we do not think it conclusively shows an entire lack of reasonable care on his part.

10. APPEAL AND ERROR: harmless error: incompetent testimony: preliminary offer.

III. Of the rulings upon the introduction of evidence to which exceptions have been preserved, we find none disclosing reversible error. The one of which the most serious complaint is made relates to a question put to a witness by plaintiff: "Do you remember the occurrence of a boy being killed on that power line a short time ago near your place?" Counsel further say that this question was admitted on the plea that it was merely preliminary, and when it was answered in the affirmative, the witness was dismissed without further examination. If this statement fairly reflected the record, the conduct so described would be indefensible. But the statement as made in the appellant's abstract is incomplete, and not quite fair either to plaintiff or to the trial court. An amendment by appellee shows that, after the witness had answered that he remembered the incident, counsel for the plaintiff then made an offer of the matter they intended to prove by such witness, the court sustained the defendant's objection, ruled the evidence out, and clearly and distinctly cautioned the jury not to consider anything which had been said relative to any other person's having been killed or injured. As thus explained, we find nothing in this episode on which to ground an order for a new trial.

IV. Appellant finally insists that the damages allowed are excessive. We do not find them so large as to fairly indicate passion or prejudice on the part of the jury. The plaintiff, at the time of his injury, was 31 years old, in apparently good health, had been employed in telephone service for a considerable period and was receiving wages at the rate of \$55 per month and expenses, and was in line of promotion. He was married, and, so far as appears, was a young man of good habits and average ability. The evidence on his part tends to show that the electric shock of which he complains has resulted in serious and permanent injury to his nervous system, and crippled him to a material extent in his power to do physical labor. At the request of the defendant, he submitted to an examination by experts of its choosing, by one of whom it was sought to show that plaintiff exaggerated or may have exaggerated the extent of his injuries,—a theory which the jury evidently did not find well established. Other physicians testified that plaintiff's condition seems to be chronic and permanent, and, if the jury believed the showing made in his behalf, the verdict is not excessive.

V. At or near the close of the trial, the court permitted the plaintiff to amend his petition to include a claim for expenses incurred for medical treatment, and upon this ruling, error is assigned. Testimony had been offered and admitted, apparently on the theory that the issues were broad enough to permit the recovery of such expenses. Amendments to conform the pleadings to the proof are within the discretion of the trial court, and we discover no abuse of that discretion in this instance. Had defendant expressed a desire to offer further proof on the issue so raised, it is to be presumed that leave to do so would have been granted.

11. TRIAL: verdict: \$8,500: excessiveness.

12. PLEADING: amendment: conforming pleadings to proof.

No good reason appears for remanding the case for a new trial, and the judgment of the district court is—*Affirmed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

E. G. WALKER, Appellee, v. W. H. LAUBSCHER, Appellant.

APPEAL AND ERROR: Findings of Fact, Etc.—Conflict of Testimony—Verdict—Conclusiveness. Rarely will the appellate court disturb a verdict on irreconcilable testimony. So declared on appeal in a cause involving a controversy over a division of commission received on the sale of a farm.

Appeal from Cedar District Court.—JOHN T. MOFFIT, Judge.

WEDNESDAY, MAY 16, 1917.

REHEARING DENIED SEPTEMBER 24, 1917.

Action at law to recover upon an alleged oral contract to share in commissions earned in the sale of real estate. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

C. O. Boling, for appellant.

C. J. Lynch, for appellee.

APPEAL AND ERROR: findings of fact, etc.; conflict of testimony; verdict; conclusiveness.

WEAVER, J.—The plaintiff alleges that both he and the defendant have, for a considerable period, been engaged in business as real estate agents, and that, in May, 1914, they entered into an oral agreement, by which they would render mutual assistance in such transactions, and by which, upon all sales brought about by their joint or common effort, the commissions so earned should be divided between them on the basis of 40 per cent to the plaintiff and 60 per cent to the defendant, the latter furnishing the use of an automobile in the business. He

further alleges that thereafter, and in pursuance of their agreement, the defendant and himself did jointly solicit buyers for various tracts of land, and that together they brought about the sale of a large farm by one Tracht to William Marsh, for which service they became entitled to receive a commission or margin of \$2,000, which sum was in fact paid to the defendant, who, though requested so to do, neglects and refuses to pay over or to account to plaintiff for any part thereof. On the claim thus stated, a recovery of \$800 is demanded.

The defendant denies the contract pleaded by the plaintiff, and denies that plaintiff had any part in negotiating the sale of the land in question, or that he has any right to or interest in any part of the commissions earned upon said sale. He admits, however, that he verbally agreed with plaintiff, who was then principally engaged in another line of business, that, if plaintiff should find and turn over to him any prospective purchaser of land, of which purchaser defendant did not have previous knowledge, then he would give or pay to plaintiff 40 per cent upon all commissions received upon sales so brought about. He further avers that, at the time the agreement was made, he (defendant) already had the Tracht farm listed, and that he alone was the procuring cause of the sale to Marsh, and that the commission earned thereon was in no manner subject to the agreement between him and plaintiff.

On the issues thus joined, the jury found for plaintiff for the full amount of his claim.

The sole exception argued by appellant upon which he seeks a reversal of the judgment below, is that the evidence is insufficient to support the verdict, and that the verdict is manifestly the result of passion and prejudice.

That there was evidence which, if true, tended directly to sustain the plaintiff's claim, can hardly be denied by any candid reader of the record. The plaintiff swears to the

agreement substantially as alleged in the petition. He further swears that he had upon his own list the farm of one Woods, which he reported to defendant; that together they started out to meet Marsh & Marsh and endeavor to sell them the Woods farm; and that, while on the road for that purpose, the defendant made to him the proposition: "Let's switch them fellows over onto the Tracht place. There is more commission in it for both of us." To this plaintiff says he agreed, and together they went with Marsh & Marsh to the Tracht farm, where a sale was accomplished. He concedes that defendant took the lead or principal part in talking with the seller and purchaser, but avers that he himself did, to some extent, take an active part in bringing the deal to a successful conclusion. Both plaintiff and defendant went with the buyers and seller to the notary's office, where the written contract of sale was made.

Defendant positively denies making any agreement with plaintiff except as pleaded in the answer, and positively denies the conversation related by the plaintiff with reference to switching the buyers from the Woods farm to the Tracht farm, or that he spoke of there being a better commission for both of them in a sale of the latter. He further swears that he took plaintiff in his car on the day of the sale solely because plaintiff asked permission to ride, and in so doing, voluntarily said he would make no claim to any share in the commission. This testimony is denied by the plaintiff. In addition to the denials by the defendant as a witness, the defense relies principally upon the testimony of Tracht and the Marshes that, at the meeting at the farm where the sale was made, plaintiff had little, if anything, to say, and they did not know that he was an agent in the transaction.

It will be seen at once that, in so far as the terms of the agreement between the parties are concerned, the conflict is one which involves their veracity as witnesses. Both

cannot be telling the truth. If plaintiff is to be believed, he is clearly entitled to recover. If defendant is to be believed, no recovery should be had against him. That the credibility of witnesses and the value of their testimony are matters for the jury alone is among the most elementary principles of the law governing actions of this kind. There are, of course, exceptional cases where the apparent weight and value of the evidence is so clearly against the finding of the jury that the court, in the interest of justice, will order a new trial; but it must be a very clear case indeed in which this court will assume to override the judgment of both jury and trial court upon a question of this nature. So far as the truthfulness of a witness is concerned, the judgment of the average conscientious juror, who sees the witness, notes his appearance, demeanor and tone of voice, and compares him with other witnesses and his testimony with other testimony, is, to say the least, quite as sure to be correct as that of the average conscientious judge upon the bench, who must reach his conclusion upon the basis of the printed page alone. There is nothing inherently unlikely or unreasonable in the story told by the plaintiff, and the finding of the jury that the contract was made as he pleads it and testifies to it is to be accepted as conclusive. The fact, if it be a fact, that he took but a minor part in the negotiation at the farm, or even if he remained silent, and left the defendant to do all the talking, is not necessarily sufficient to defeat his right to share in the commission. If the contract was as he alleges and as the jury found it to be, and if he and the defendant started out to induce the Marshes to buy the Woods farm,—a deal in which he would admittedly be entitled to share,—and then he agreed, at defendant's suggestion, to "switch" their customers "onto the Tracht farm," where a better commission was obtainable, and they did so, he was as much entitled to a part of the commission as if he had personally con-

ducted the negotiation; and the fact that Tracht and the Marshes did not know of his connection with the deal was entirely immaterial. All these matters and circumstances were before the jury, and its verdict thereon is against the defendant.

We discover no ground for saying that the verdict must have been influenced by passion or prejudice.

No other assignment of error has been argued. The exception which has been presented must, for reasons above stated, be overruled, and the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

GEORGE L. PIERCE, Appellee, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

RAILROADS: Injury to Animals—Double Damages—Excessive Demand—Effect. Double damages, for loss of stock killed or injured by a railway company by reason of failure to fence its track, may not be recovered when claimant, in his written notice of loss, demands damages in excess of the *fair and reasonable value of the stock* as finally determined by the verdict of the jury, even though the company makes no tender of the actual damages. (Section 2055, Code, 1897.) So held where the demand was for \$200 actual damages and the jury found the same to be \$120.

CONSTITUTIONAL LAW: Due Process, Etc.—Double Damages for Stock Killed—Excessive Demand. A statute so construed as to penalize a railway company for failure to pay an excessive claim for damages would be violative of the constitutional guaranty of (a) due process and (b) equal protection of the law.

Appeal from Marshall District Court.—B. F. CUMMINGS, Judge.

WEDNESDAY, SEPTEMBER 26, 1917.

ACTION for damage consequent on the alleged killing of

a two-year old colt on defendant's right of way resulted in judgment against defendant, from which it appeals.—*Reversed.*

Binford & Farber, James C. Davis and George E. Hise,
for appellant.

Bradford & Johnson, for appellee.

LADD, J.—The defendant's line of rail-
 1. RAILROADS: in- way extends through the town of Quarry,
 jury to ani- and is double tracked. A highway extends
 mals: double damages: ex- north and south immediately west of the
 cessive de- town, and intersects the railway. In the
 mand: effect. morning of December 2, 1912, at about 6:10 o'clock, a two-
 year colt was found lying dead on the cattleguard at the
 east side of the highway. Suit was brought for the value
 of the colt, it being alleged that it had gotten on the right
 of way in consequence of defendant's failure to maintain a
 sufficient fence along the railroad, and was killed by the
 operation thereof. The jury so found, and allowed in their
 verdict double damages in the sum of \$380, thereby fixing
 the reasonable value of the colt as \$190. Thereupon de-
 fendant moved that judgment be entered for this latter
 amount only, for that plaintiff had demanded more than
 the reasonable value of the colt in his notice and affidavit,
 and this being so, he was not entitled to double damages.
 The same thought was included in several instructions,
 which were refused. We are of opinion that the motion
 should have been sustained. To hold otherwise would, in
 effect, result in penalizing defendant for not yielding to an
 unjust demand.

Section 2055 of the Code, 1897, declares that:

"Any corporation operating a railway, and failing to
 fence the same against live stock running at large and
 maintain proper and sufficient cattleguards at all points

where the right to fence or maintain cattle-guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle-guards for the full amount of the damages sustained by the owner on account thereof, unless it was occasioned by his wilful act or that of his agent; and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such corporation fails or neglects to pay such damages within thirty days after notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by said corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him."

The notice and affidavit of plaintiff fixed the value of the colt at \$200, and demanded payment thereof within 30 days. A statement of the value was an essential part of the notice and affidavit. *Manwell v. Burlington, C. R. & N. R. Co.*, 80 Iowa 662; *Mendell v. Chicago & N. W. R. Co.*, 20 Iowa 11. No other demand was essential to the recovery of double damages.

The statute has been upheld as constitutional (*Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 [32 L. Ed. 585]), and evidently was enacted to assure to the owners of live stock prompt payment of actual damages for the loss or injury thereof consequent on the failure of railroad corporations to maintain a sufficient fence along their right of ways. Nothing contained therein, however, evidences a purpose of aiding the owner to exact anything in excess of the reasonable value of stock destroyed or the fair remuneration for injuries done. The object is to induce prompt, not excessive, payment. The fair implication is that the amount demanded in order to exact payment within 30 days,

is the fair and reasonable measure of the loss or injury suffered, and if more is claimed, the penalty of doubling the damages will not be enforced. In refusing to pay an excessive claim, the company is guilty of no wrong. On the contrary, it is to be commended for not paying it and thereby encouraging efforts at extortion. The owner is in much better situation than the railroad company to ascertain the value of his own stock when killed or the amount of damages when injured, and, to the end that adjustment shall be prompt and controversy avoided, he should ask no more than he is fairly entitled to claim, and, if he does, there is no tenable ground in law or good morals for punishing the railroad company for not satisfying his demand. In *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U. S. 354 (56 L. Ed. 799), the statute involved was similar to ours, exacting payment of double damages and attorney's fees if actual damages were not satisfied within 30 days after notice. Two horses were killed, and in the notice their value was stated to be \$500. The defendant did not pay within the time required, whereupon suit was brought for \$400 as damages, and, on trial, the damages were found to be as so alleged. The trial court, deeming the statute applicable, entered judgment for \$800 and attorney's fees. It will be observed that the owner admitted and the jury found that the demand was excessive, and yet the statute was so construed as to penalize defendant for refusing to pay the excess together with the actual damages suffered. The Supreme Court, in reversing this judgment, speaking through Van Devanter, J., said:

"We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable incentive for the prompt settlement, without suit, of just demands of a

class admitting of special treatment by the legislature, as was the case with the statute considered in *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 52 L. Ed. 108, 28 Sup. Ct. Rep. 28, but attaches onerous penalties to the nonpayment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law."

See annotation to this case in 42 L. R. A. (N. S.) 102.

The decision was applied in *Chicago, M. & St. P. R. Co. v. Polt*, 232 U. S. 165 (58 L. Ed. 554). A statute of South Dakota, after making a railway company absolutely liable for all property destroyed by fire communicated from its locomotive engines, and for double damages unless the full amount is paid within 60 days, provides that if, within 60 days, it shall "offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept the same, then in any action thereafter brought for such damages, when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages, and the railway company shall recover its costs." A verdict was returned for \$780, and judgment was entered for double this amount with interest, though defendant had tendered \$500, which was less than the amount of the verdict, and plaintiff had demanded more than the verdict, or \$838.20. The Supreme Court, in reversing the judgment, speaking through Holmes, J., said:

"No doubt the states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent

to the amount that was tendered, although the tender was obviously futile because of an excessive demand. The case is covered by *St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne*, 224 U. S. 354, 56 L. Ed. 799, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 57 L. Ed. 193, 33 Sup. Ct. Rep. 40."

See, also, *Kansas City S. R. Co. v. Anderson*, 233 U. S. 325 (58 L. Ed. 983); *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642 (58 L. Ed. 1135).

These decisions seem conclusive on the proposition that to penalize defendant on its failure to satisfy the demand in the notice and affidavit, found by the jury to have been excessive, by enforcing payment of double the actual damages, would be taking property without due process of law, and denying defendant the equal protection of the law, as exacted by the Fourteenth Amendment to the Constitution of the United States. These decisions were reviewed in *Binder v. Chicago & N. W. R. Co.*, 162 Iowa 550, but there the only contention was that the owner, in making his demand, had acted in bad faith, and therefore was not entitled to double damages where the actual damages were found to be less than the demand. The suggestion that the railway company should make a tender of actual damages equal to the amount found by the jury, in order to avoid the penalty, is disposed of in *Railroad v. Polt*, supra. Moreover, the railway company is made liable for the penalty only in case of compliance by the claimant with the statute, and no hardship is involved in exacting that the owner's claim be restricted to the fair and reasonable measure of damages suffered, as a condition to the imposition of the penalty for failure to pay.

2. CONSTITUTIONAL LAW: due process, etc.: double damages for stock killed: excessive demand.

To hold otherwise would, as we think, and as held in the cases from which we have quoted, punish the defendant for no breach of duty, and thereby deny it the equal protection of the law, and take its property without due process of law. It follows that the motion for judgment for the actual damages, as found by the jury, or \$190, should have been sustained.

GAYNOR, C. J., WEAVER, EVANS, SALINGER and STEVENS, JJ., concur.

PRESTON, J., dissents.

JOHN RAFFERTY et al., Appellants, v. TOWN COUNCIL OF CLERMONT et al., Appellees.

ELECTIONS: Ordering, Calling and Notice—Non-Mandatory Re-
1 **quirements.** An election is not necessarily invalidated because the proposition upon which the people voted did not reach them with all the strict formalities required by law, and the state of the vote cast may be very potent to show that no prejudice resulted from lack of formality. So held with reference (a) to the signing by the mayor of a resolution ordering an election, and (b) to the recording of service of notice of a special meeting of the city council.

CERTIORARI: Proceeding and Determination—Return—Supple-
2 **mentary Testimony, Limit On.** Testimony in addition to the return to a writ of certiorari may be received *provided it bears on jurisdiction*. So held with reference to testimony whether a mayor signed the resolution in question.

CERTIORARI: Procedure and Determination—Return—Amend-
3 **ments.** Filing an amended return in the absence of opposing counsel affords no basis for complaint when counsel was promptly informed of the filing and recognized the procedure by a motion to strike.

MUNICIPAL CORPORATIONS: Proceedings of Council—Special
4 **Meetings—Notice.** Proceedings of a city council at a *special* meeting are not rendered invalid by the failure to serve one

member with notice of the meeting when such member was in favor of the proposition as finally adopted by the council, left the city with full knowledge that said meeting would be called, and at the time of the meeting was in a distant state.

Appeal from Fayette District Court.—A. N. HOBSON, Judge.

WEDNESDAY, SEPTEMBER 26, 1917.

THE incorporated town of Clermont asserts that it has annexed to its territory certain lands owned by plaintiffs. The plaintiffs challenge the legality of this annexation. On their petition, the district court issued a writ of certiorari to review the legality of the proceedings. Upon hearing, it annulled the writ, and plaintiffs appeal.—*Affirmed.*

H. P. Hancock, for appellants.

Pickett, Swisher & Farwell, for appellees.

SALINGER, J.—I. On the authority of *Moore v. City Council of Perry*, 119 Iowa 423, and some of our later decisions in school district cases, it is settled that, unlike statute requirements which are safeguards against the loss of substantial rights of the public, statutes are not mandatory which are mere directions as to method in the formal steps preparatory to an election at which there is the right and opportunity to accept or reject what such formalities present for action. That a proposition upon which the people have the final word does not reach them in a manner which is an exact compliance with the Code loses the electors nothing of substance. Omissions to cross and dot do not, as seems to be contended, go to jurisdiction to bring on an election. The proceedings of town councils and the acts of town officers should be liberally construed, with a view to upholding the transaction of essential public business. *Union Pac. R. Co. v. McLean*,

1. ELECTIONS:
ordering, call-
ing and notice:
non-manda-
tory require-
ments.

(Neb.) 139 N. W. 679. And see *President, etc. of Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *State v. Siemens*, (Ore.) 133 Pac. 1173; *McCloud v. City*, (Ohio) 44 N. E. 95; 36 Cyc. 1157; *Erhardt v. Schroeder*, 155 U. S. 124; *French v. Edwards*, 13 Wall. (U. S.) 506; *United States v. Eaton*, 169 U. S. 331.

2. CERTIORARI:
proceeding
and determina-
tion: return:
supplementary
testimony, lim-
it on.

One complaint is that the court erred in holding that the resolution for the election was properly and legally signed by the mayor. Elaborating, appellant says that the notice of election and the proclamation of the result of the election were signed by the mayor, but the record of said meeting was signed by the clerk, and not by the mayor; that, while a copy of the resolution was by the mayor taken to the printer for publication and then signed by him in the office of and in the presence of said printer, this was a mere piece of paper to guide the printer in the publication of said notice, and there is no record that the signature was attached to the original resolution as recorded; that the record of the meeting does not show that the mayor ever signed said resolution "of record." In one view, the controversy over the signing by the mayor of the initial resolution is a moot one. The real dispute is on whether the fact that he signed it might be shown by an amendment to the return, or by parol testimony, the contention being that the latter may not be permitted because a variance of the return, and that the amendment was not authorized. In other words, if the method of proof was proper, it is established that the mayor did sign. Appellant insists that the failure to sign went to jurisdiction, and that, without such signature, there was no resolution which was effective and nothing to publish, and that publishing such unsigned resolution effected nothing. If failure to sign does not go to jurisdiction, the failure does not, for reasons stated and presently to be stated, afford basis for

substantial complaint; for, if the signing *was* jurisdictional, then additional evidence upon what was done on a jurisdictional point was competent. *Hatch v. Board*, 170 Iowa 82, at 85. The statement that the clerk "made no record of said signature" we do not quite understand. We know of no requirement that the signature as a thing of itself shall be made of record, and it seems to us that, if the resolution be signed, that is all that even literal compliance with the statute requires on that head.

Assume, with appellant, that there was no power to act until the mayor signed, and it follows that oral testimony on whether he did or did not sign was rightly received. That being so, it becomes unnecessary to go into the further contention that, though Code Sec. 4159 permits the return to be amended if the original return is defective, here there was no defective return. The question then narrows to whether the court was justified in finding, as it did, that the resolution was signed. We think this is established by the testimony of the witness Scott; and it may be added to the statement that such testimony was competent that it was not until after it had been given that any objection thereto was made; and the vital point of the objection was that the testimony was not the best evidence, which, as we have seen, is, in any event, not well taken, since it is the appellants' own theory that it was upon a point concerning which testimony additional to the return was permitted. It may be added further that the objection was not ruled on, and that consequently we have no exception to proceed upon.

Complaint is made that the amended return, which differed from the original one only in exhibiting the signature of the mayor, was filed too late, and when counsel were not present. It is conceded that the attorneys of the plaintiff were informed of the fact of fil-

3. CERTIORARI:
procedure and
determination:
return;
amendments.

ing, and it appears of record that they filed a motion to strike the amendment. How to deal with the time at which the amendment was filed was very largely in the discretion of the trial court, and nothing appears here to justify us in interfering with it, and, at all events, in view of what has been said concerning the oral testimony, there was no prejudice in permitting this amendment to stand.

We have no quarrel with the very large number of authorities cited by appellant for the general proposition that the return is conclusive as to all matters questioned in the certiorari proceeding, and that the determination is to be made upon the return, which imports absolute verity, and do not question the soundness of the decisions in other jurisdictions that the lower court can take nothing from nor add anything to the evidence after the writ is served. But, notwithstanding these generalities and applications of it in other jurisdictions upon their own statutes, we are controlled by our own statutes and our interpretations of them, and therefore hold that there was no improper dealing with the record in this case.

Incorporated Town of Hancock v. McCarthy, 145 Iowa 51, relied on by appellant, is not based on want of formalities, and in fact holds that what was done did not work as matter of substance that the mayor had not approved. Whatever is said in *Moore v. City Council of Perry*, 119 Iowa 423, refers to action by which the council attempts to prevent the mayor from approving or vetoing ordinances, and holds that, where he fails to approve in such circumstances, there is no resolution which may be effectively published. *Stutsman v. McVicar*, 111 Iowa 40, holds that, where the mayor vetoes a resolution to pay a claim, he is justified in refusing to sign a warrant to pay that claim. *Altman v. City*, 111 Iowa 105, is merely that an ordinance which requires that a mayor shall sign or veto, and return resolutions passed before the same take effect, is mandatory,

the resolution being one authorizing street improvements and assessing special taxes in payment therefor. That is, in effect, the holding of *Heins v. Lincoln*, 102 Iowa 69, at 74, as applied to an ordinance selling bonds, putting the cash in the treasury, and therewith redeeming old bonds.

Though appellant contends that the fact is immaterial, we are of opinion that the vote actually cast on the annexation is worthy of great consideration upon whether any substantial wrong was done the electorate by any alleged irregularity in the steps through which they were invited to act. On the election of town officers, only 126 votes were cast, while on the election in review, 127 votes were cast for annexation, 105 being in favor thereof and 14 against. The central object of all the steps is to procure an expression upon the final issue, and where, as here, that was accomplished, we should not be hypercritical as to the steps. The alleged failure of the mayor to sign the resolution requiring an election did not induce a single voter to refrain from voting nor mislead one of them. This is inherently manifest. Moreover, the resolution which was published and which was the only one seen or to be seen by the voters did purport to be signed by the mayor. We think this complaint is not tenable, and was rightly overruled.

I-a.

We agree with the trial court, and indeed see no serious room to question it, that all publication required was duly made.

II. We have no quarrel with the general definition of what constitutes notice. As a general proposition, whenever notice is required or authorized by statute, written notice is understood (29 Cyc. 1117, and citations under Note 33), though this court has been inclined to limit this to notice in judicial proceedings.

4. MUNICIPAL
CORPORATIONS:
proceedings of
council: special
meetings:
notice.

We do not question the general proposition that, in the absence of notice to even one member of the council, a special meeting may not legally act, even though all the other members of the council are present and concur in the action; nor are we out of accord with the reasoning for this rule, to wit, that the majority may not presuppose that the absent member might not change its views were he present, and that he may not be eliminated by taking steps to keep him away, or by deliberate failure to take steps that might insure his presence. For instance, there may not be a setting of the clock ahead to keep one member out, as, it is said in *Town of Springfield v. People's Dep. Bank*, (Ky.) 63 S. W. 271, was done in the Gold-Erie Railroad case. We concede that the privilege of attending is not that of the alderman, but that of his constituents. See *People v. Batchelor*, 22 N. Y. 128. The majority may decide, but the law demands that all confer together before deciding. *People v. Walker*, 23 Barbour (N. Y.) 304. The people are entitled to have the joint and collective judgment of all their representatives at the special meeting. *Shugars v. Hamilton*, (Ky.) 92 S. W. 564. While the majority may act, it is not authorized to do so without notice to all. *Wiggin v. Elders & Deacons of Baptist Church*, 8 Metcalf (Mass.) 301, 312. The attendance of a mere quorum is not sufficient, for every member has a right to be present and participate. *Beaver Creek v. Hastings*, (Mich.) 18 N. W. 250. Indeed, the statute provides that for special meetings notice shall be served personally or left at the usual place of residence of the member, and that the clerk shall make a record of such service. Code Sec. 668, Subd. 4.

It seems to be conceded that one councilman was out of the state for substantially a month—had been away something like two weeks when the resolution was adopted. There is an affidavit in the record which perhaps should not be there, but its presence is not objected to nor challenged

before us. From it, it appears that the absentee knew before he went away that there would be a special meeting for this purpose, and that he would have favored it, had he been present. He went away knowing this, and, at the time of the meeting on March 5th, was in Oregon, and could not have attended if he had been notified of the special meeting.

In *Mayor, etc., v. Knoxville Water Co.*, (Tenn.) 64 S. W. 1075, the first and last readings of an ordinance were had pursuant to charter on March 9th, 15th, and 30th. The first and last of these readings were made at special meetings, calls for which were made about 12 hours before they were held. On March 9th, one alderman was absent from the city and state, and his exact whereabouts unknown. On March 30th he was likewise absent, and about 300 miles from Knoxville (his residence was within the city); and it was held that a finding that the ordinance was void because, though legally practicable, no notice of the special meetings was given the absent alderman, was erroneous, as the evidence disclosed that such notice was not legally practicable. The case concedes the general rule to be that every member is entitled to reasonable notice of special meetings, and that no important action can be lawfully done by such meeting unless such notice has been given, or unless the members not notified actually attend and participate in the business of the meeting—citing *London & N. Y. Land Co. v. City of Jellico*, (Tenn.) 52 S. W. 995. In the *Jellico* case, it appeared that the alderman was in the building where the meeting was held, and the inference might be that he was purposely omitted from the notice, as he was hostile to the ordinance that was considered, and the meeting was at the instance of the persons interested in the passage of the ordinance. But in the case which refers to and distinguishes the *Jellico* case, as here (*Mayor etc., v. Knoxville Water Co.*), it developed afterwards that the alderman was in favor of the ordinance, and would

have voted for it if he had been present at the meeting. So the facts are as like those in this case as it is usual to find in two cases. The main case concedes the general rule, but holds that one exception exists where giving notice is impracticable. It says:

"We are of opinion that, when a member of the council removes from the state or is continuously absent from the state, and when he is shown to have been absent from the state and beyond reach on the occasion and at the time of the call, as appears in this case, it is not legally practicable to give him notice of called meetings."

Dillon, in his work on *Municipal Corporations*, recognizing the above rule, says (Sec. 534) :

"An order to serve all is not sufficient; all, if practicable, must be served, but if the party entitled to notice is absent from the municipality, and it is impracticable to give him notice in proper form, the service of notice is excused."

In *State v. Kirk*, 46 Conn. 395, 397, the court held that a good reason was shown why actual notice was not given. The member absent was not only gone from the state, but his whereabouts appear not to have been known until afterwards. The fact upon which lack of applicability might be urged is that a notice in writing was left at the store of his son, where the alderman was in the habit of visiting every day when in town. The court says that no other notice could well have been given, and the law never required impossibilities. We fail to see how the leaving of this notice at the store was better than none. It was one that could not possibly reach the one to be notified in time to bring him to the meeting. *Pike v. Rowland*, 94 Pa. 238, holds that, where notice of special meeting is necessary, it must be personally served, if practicable, upon every member entitled to be present.

We do not lose sight of the fact that the statute, Code

Sec. 668, Par. 4, provides that notice of such meetings be given to each of the members, and be personally served, or left at his usual place of residence. In this case, it does not appear whether the absentee alderman had a usual place of residence. But it would not change the essential situation if he had had. Leaving it at such place of residence would not and could not have brought him on from Oregon and to this meeting. There is but one way to hold with the appellant, and that is to declare that this statute is absolutely mandatory, and that all reason must fail in its consideration. To do this, we must disregard the weight of authority and, in effect, overrule the holdings elsewhere and in this jurisdiction that, notwithstanding the language of the statute, the notice need not be served if the member attend the meeting. We apprehend, of course, how unreasonable it would be to demand notice to one who came without it. But the unreasonableness of the requirement can either be taken into consideration whenever there is an unreasonableness presented, or else the question whether carrying out the words of the statute would work an unreasonable result must not be touched, no matter what the unreasonableness is. We think the trial court selected the better of two alternatives, and that where, as here, an alderman knew that a meeting would be had, knew what was to be done at it, approved of the proposal and would have supported it had he been present, it would be straining the statute beyond the uttermost pale of reason to hold that failing to serve him with notice of that meeting at a time when he was thousands of miles away destroys the act of a municipality supported by the overwhelming majority of its electors.

This is so of a further requirement of the statute that the service of a notice shall be recorded. If that, too, is mandatory instead of directory, the failure to record the

service would vitiate the proceedings though every member was duly served, and even if all members attended.

In our opinion, *Barclay v. School Township*, 157 Iowa 181, at 183, does not militate against these our conclusions. The vitals of that case are that no notice of a special meeting was given a director who was in fact at home, and that it was not given because the secretary was misled by erroneous information, derived from another, that the director was not at home and could not be reached personally, whereupon the secretary deposited in the mail, properly addressed to the director, a notice of the meeting, which the director in fact never received. He left home on the morning of the following day and was absent from the state until after the proposed meeting was held. It is upon this that it is decided that the fact that the secretary made what was, under the circumstances as they appeared to him, reasonable effort to give notice, and that, later, service would have been unavailing, will not meet the statute.

It is plain that, in our opinion the judgment of the court below must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

INDEX, VOL. 180

ABATEMENT

TO

APPEAL AND ERROR

ABATEMENT. See DIVORCE, 4.

ACTIONS.

JOINDER.

Parties Guilty of Concurrent Negligence. Parties may so situate themselves that, while they are not engaged in a common enterprise, in such sense that the negligence of one will be imputed to the other, the negligence of both may be so concurrent that both may be joined as defendants in the same action. *Daggy v. Miller*, 180—1146.

ADVANCEMENTS. See DESCENT AND DISTRIBUTION.

APPEAL AND ERROR. See CRIMINAL LAW.

JURISDICTION.

Recitals in Abstract—Presumption. A general statement in the
1 abstract that appellant perfected an appeal by due service and filing of notice thereof, *without any statement as to what was specifically appealed from*, creates the presumption, under Section 4139, Code Supplement, 1913, that said notice is comprehensive enough to confer jurisdiction on the appellate court to review every appealable matter appearing in the abstract, unless appellee, ten days prior to submission, by specific printed objections, shows to the contrary. *Franke v. Kelsheimer*, 180—251.

APPEAL AND ERROR Continued

DECISIONS REVIEWABLE.

Overruling Motion for More Specific Statement. An order over-
2 ruling a motion for more specific statement is appealable;
otherwise as to an order overruling a motion for the di-
vision of a petition into counts. *Northwestern Trading Co.*
v. Western L. S. Ins. Co., 180—878.

WAIVER.

Seeking to Enforce Judgment. An appellant who secured a
3 personal judgment in the lower court for the full amount
prayed for, but was denied a lien on certain property to
secure payment of the claim, and appeals, does not waive
his appeal by filing his claim, subsequently to the taking
of the appeal, against the estate of the one against whom
personal judgment had been entered. *Watrous v. Watrous*,
180—884.

PRESENTATION AND RESERVATION OF GROUNDS.

Necessity—Constitutional Law. Questions in no manner brought
4 to the attention of the trial court will not be reviewed
on appeal. So held as to a constitutional question relative
to the Federal Interstate Commerce Act. *St. Joseph & G.*
I. R. Co. v. Des Moines Union R. Co., 180—1292.

Naked Objection. A naked objection, without specification of
5 any kind, presents no question on appeal. *State v. Powers*,
180—693.

PARTIES.

Execution Defendant and Garnishees. A defendant in execution
6 and one garnished as his supposed debtor are not "co-par-
ties." (Sec. 4111, Code, 1897.) *Ober v. Seegmiller*, 180—462.

**Garnishment Proceedings—When Judgment Defendant not Nec-
7 sary Party.** A judgment defendant is not a necessary party
to an appeal by a garnishee if a reversal would not preju-

APPEAL AND ERROR Continued

dicially affect such judgment defendant. (See Secs. 3591-3953, 4111, Code, 1897; Secs. 3947, 3948, Code Supp., 1913.) Ober v. Seegmiller, 180—462.

SUPERSEDEAS OR STAY OF PROCEEDINGS.

Non-Final Orders—Staying Trial in Lower Court. An appeal
8 from an order overruling a motion for more specific statement does not necessarily act as a stay of the trial in the lower court. Northwestern Trading Co. v. Western L. S. Ins. Co., 180—878.

ABSTRACTS OF RECORD.

Evidence—Necessity. On appeal by plaintiff from an order dis-
9 charging two of three defendants in an action to enjoin a disorderly house nuisance (Sec. 4944-h1, Suppl. Supp., 1915), the court may not, *in the absence of the evidence*, review the order of discharge on the appellant's presented theory that the court, having enjoined one defendant, ought to have enjoined all the defendants. State v. Talbott, 180—220.

Appeal by Both Plaintiff and Defendant. Appeals by two hos-
10 tile litigants in the same action do not require separate and duplicate abstracts. An abstract by one appellant may, by amendment, be so completed as to cover both appeals. Watrous v. Watrous, 180—884.

Repetitions—Costs. Unnecessary repetition will be penalized by
11 the taxation of the cost thereof to the one offending. Rothert v. Chicago, R. I. & P. R. Co., 180—328.

ASSIGNMENT OF ERROR.

Sufficiency. An assignment of error which, if considered, would
12 force the court to wander aimlessly through the record in quest of errors, will be wholly disregarded. So held where the assignment was: "The court erred in admitting certain evidence offered by contestants and objected to by proponents as shown by the official reporter's notes." Liddle v. Salter, 180—840; Cohen v. Hayden, 180—232.

APPEAL AND ERROR Continued

BRIEFS.

Disregard of Rules. Total disregard of the rules governing the
13 preparation of briefs on appeal justifies a total disregard
of the appeal. Rule 53. *Campbell v. Davis*, 180—314.

REVIEW, SCOPE OF.

Undue Cross-Examination—Absence of Adequate Record. The
14 court, on appeal, cannot say that undue cross-examination
was permitted on a certain matter, when complainant con-
cedes that said matter was touched upon to some extent
in the direct examination, but fails to present the record
relative thereto so that the court may be able to judge
whether the cross-examination was undue. *Schultz v. Starr*,
180—1819.

Challenge to Appealability of Order. In passing on a challenge
15 to the appealability of an order overruling a motion for
more specific statement, the court will not pass on the
merits of such latter motion. *Northwestern Trading Co.
v. Western L. S. Ins. Co.*, 180—878.

PARTIES ENTITLED TO ALLEGE ERROR.

Inconsistent Attitudes. On appeal, one may not contend for the
16 materiality of a fact which, on trial in the lower court, he
successfully excluded on the plea of immateriality. *Toney
v. Interstate Power Co.*, 180—1362.

Error Favorable to Appellant. Principle recognized that a non-
17 appellant may not complain of errors detrimental to him-
self, nor may an appellant complain of errors favorable to
himself. *Babcock v. City of Des Moines*, 180—1120.

Complainant as First Offender. The fact that he who alleges
18 error was the first offender in the matter complained of is
a quite persuasive reason why the error, if any, should be
disregarded. *Ingwersen v. Carr & Brannon*, 180—988.

Invited Error—Requesting Instructions. Requesting instructions
19 or special findings on disputed questions of fact is a con-

APPEAL AND ERROR Continued

cession that the evidence is such as to justify the giving of such instructions and the submission of such questions, and precludes a subsequent change of front and an insistence *that the evidence is insufficient to support the verdict or findings returned*. *Hanley v. Fidelity & Cas. Co.*, 180—805; *Hatfield v. Iowa State Trav. Men's Assn.*, 180—39.

Estoppel by Asking Instructions, Etc.—Avoidance of Estoppel.

20 Whether unsuccessful insistence, at all proper stages of the trial, that all questions arising on the record are questions of law and not of fact, would arm the party with right to ask, under protest, instructions and special findings, without forfeiting his right to insist on the insufficiency of the evidence to support a verdict or finding adverse to the party, *quære*. *Hanley v. Fidelity & Cas. Co.*, 180—805.

Pleadings—Related Objections. A party may not face an in-

21 definite and ambiguous pleading in the trial court, make no objection thereto, permit the trial court to place an allowable construction thereon, and, on appeal, for the first time, raise an objection of insufficiency. *Murphy v. Williamson*, 180—291.

PRESUMPTIONS.

Questions Failing to Disclose Proposed Evidence. When the

22 form of a question does not disclose (a) what the answer would have been, or (b) whether its exclusion was prejudicial, counsel must disclose what fact he desires or expects to prove, in order to render the objection to its exclusion reviewable. *Glendy v. National Trav. Ben. Assn.*, 180—572.

Equity Causes—Disregarding Incompetent Evidence. On appeal

23 in an equity cause, it must be presumed that the trial court disregarded all incompetent testimony. *Mitchell v. Mutch*, 180—1281.

QUESTIONS OF FACT, ETC.

Law Actions—Trial to Court. Principle recognized that, on ap-

24 peal in a law action tried to the court, that version of the

APPEAL AND ERROR Continued

testimony most favorable to the prevailing party must be accepted. *Chaney v. Murphy*, 180—716.

Conflict of Testimony. Rarely will the appellate court disturb
25 a verdict on irreconcilable testimony. *Walker v. Laubecher*,
180—1381; *Schultz v. Starr*, 180—1319.

Misconduct of Counsel—New Trial. The appellate court will not
26 settle a war of affidavits as to just what did take place and
what did not take place in the trial court on the subject of
misconduct of counsel, as a basis for new trial. *A finding of
facts by the trial court is essential.* *Hein v. Waterloo, C.
F. & N. R. Co.*, 180—1225.

HARMLESS ERROR.

Incompetent Testimony. The reception of incompetent testi-
27 mony, preliminary to a further offer, which latter is wholly
rejected, followed by distinct direction to the jury to disre-
gard the incompetent evidence already received, may fully
cure the error. *Toney v. Interstate Power Co.*, 180—1362.

Improper Exclusion of Evidence on Damages. Improper exclu-
28 sion of evidence bearing upon the amount of damages be-
comes quite harmless when the jury finds that plaintiff has
no cause of action. *Schultz v. Starr*, 180—1319.

Incorrect Measure of Damages. Incorrect instruction on the
29 measure of damages becomes quite harmless when the jury
finds that plaintiff has no cause of action. *Vandevanter v.
Nelson*, 180—705.

More Favorable Instruction Than Requested. It is harmless er-
30 ror to refuse a correct instruction which is less favorable
to the one requesting it than one given by the court on its
own motion. *Schultz v. Starr*, 180—1319.

Transactions with Decedent—Improper Reception. Reversible
31 error may not be predicated on the reception of evidence of
personal transactions with a deceased person, within the
meaning of Sec. 4604, Code, 1897, when the matter in issue

APPEAL AND ERROR Continued

was fully established by other competent testimony. (Probate case tried to court.) In re Estate of Hoyt, 180—1250.

Necessity for Prejudice. Reception of incompetent testimony, in
32 an action tried to the court, is not reversible error if, from the entire competent record, it is manifest that the judgment is the only one which could be properly arrived at. In re Estate of Hoyt, 180—1250.

Misleading Instruction. An affirmative finding by a jury, under
33 adequate evidence, that a will was the product of both mental incompetency and undue influence, may render confusing and misleading instructions harmless on such issue. Liddle v. Salter, 180—840.

Rejected Testimony Otherwise Received. Error in improperly
34 excluding testimony is rendered harmless by the subsequent reception of the same. Hatfield v. Iowa State Traveling Men's Assn., 180—39; Liddle v. Salter, 180—840.

Jury Negating Fact on Which Refused Instruction is Based.
35 When, at defendant's request, the jury passes on the question whether a deceased was suffering from any disease that contributed to his death, and finds in the negative, defendant suffers no prejudice by being refused an instruction which directed the jury as to the rule to follow if it found it equally consistent that death might have been caused by accident or by disease. Hanley v. Fidelity & Cas. Co., 180—805.

Errors Against Prevailing Party. Errors against appellant on
36 issues on which he prevailed are harmless. Dunning v. Burt, 180—754.

Improper Questions—Innocuous Answer. An improper question
37 followed by an innocuous answer works a harmless error. Stutsman v. Des Moines C. R. Co., 180—524.

Reception of Evidence. Error, if any, in allowing a witness to
38 answer "yes" to the question whether he had told anyone his purpose in calling upon the party in question, is clearly harmless. In re Estate of Hoyt, 180—1250.

APPEAL AND ERROR Continued to ATTACHMENT

Motive Inducing Settlement. Allowing evidence to the effect
39 that one party to a boundary line controversy agreed to a
certain line "in order to get things settled and get done
with the controversy," is harmless. *Koppes v. Koppes*, 180
—1268.

APPEARANCE. See ATTORNEY AND CLIENT, 1.

ARREST. See HOMICIDE, 3.

ASSESSMENTS. See CEMETERIES.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

REQUISITES AND VALIDITY.

Consent of Creditors—Effect. The fact that creditors are, under
1 the statute (Section 3071, Code, 1897), conclusively pre-
sumed to consent to an assignment for the benefit of cred-
itors, in no wise obviates the necessity of a delivery of the
deed of assignment to the assignee and an acceptance there-
of by him, before there can be any change in the title of the
assignor. *Bartemeier v. Central F. Ins. Co.*, 180—354.

Acceptance by Assignee—Necessity. Concede, *arguendo*, that,
2 when it clearly appears that a debtor intends to make a
general assignment for the benefit of creditors, the court
will, in event the assignee refuses to accept, appoint a new
assignee and thereby save the trust, yet, until such court
action, the debtor's title and right of possession are indis-
putable. *Bartemeier v. Central F. Ins. Co.*, 180—354.

Recording—Effect on Question of Delivery. The mere recording
3 of an assignment for the benefit of creditors does not, in and
of itself, conclusively establish a delivery of the deed to
the assignee. *Bartemeier v. Central F. Ins. Co.*, 180—354.

ATTACHMENT.

DISSOLUTION.

Motion—Sufficiency of Showing. A clear, satisfactory and undis-
1 puted showing, by motion, that attached property is exempt

ATTACHMENT Continued **TO** **BANKRUPTCY**
 from levy, should be sustained. (Sec. 3929, Code, 1897.)
 Franke v. Kelsheimer, 180—251.

WRONGFUL ATTACHMENT.

Exemplary Damages—Excessive Verdict. A jury will not be permitted to exercise unbridled license in assessing exemplary damages. Some reasonable ratio ought to exist between such damages and the actual damages suffered. A recovery of \$5 actual damages, with no evidence of harsh treatment, will not support an allowance of \$125 exemplary damages and \$65 added as attorneys' fees. Soesbe v. Lines, 180—943.

ATTORNEY AND CLIENT.

AUTHORITY.

Appearance to Action. An attorney retained in a controversy
 1 "to settle and not to get into a law suit," possesses no authority to appear in an action based on the controversy, nor to authorize another attorney to do so, and a personal judgment based on such an appearance is void for want of jurisdiction. Fuehr v. Ewert v. Richter, 180—518.

DUTIES AND LIABILITIES OF ATTORNEYS.

Attorney Drawing Will, as Beneficiary. An attorney at law, in
 2 the drawing of a will, acts in a confidential relation to testator, he being specially called because he was such attorney, and because of testator's long friendship for him. Graham v. Courtright, 180—394.

BANKRUPTCY.

JURISDICTION, ETC.

Partnerships and Members Thereof. Principle recognized that
 1 a partnership and the individuals composing it are distinct legal entities, and proceedings in bankruptcy against one do not of necessity involve the other. Peterson v. Perego & Moore Co., 180—325.

BILLS AND NOTES Continued TO BONDS

holder to consent to indefinite extensions of time of payment. *Held*, the following clause rendered a note non-negotiable: "All parties to this note * * * hereby severally * * * consent to extensions of time on this note." *Cedar Rapids Nat. Bank v. Weber*, 180—946.

"Without Recourse"—Effect. Indorsements "without recourse" do not destroy or impair the negotiability of a negotiable instrument. *Higby v. Bahrenfuss*, 180—316.

HOLDERS IN DUE COURSE.

Past-Due Interest—Effect. Notice of dishonor of a negotiable instrument is not imparted to a purchaser by the fact that the interest thereon is past due. *Higby v. Bahrenfuss*, 180—316.

Evidence. Evidence reviewed, and held to show that plaintiff was a holder in due course. *Higby v. Bahrenfuss*, 180—316.

BONDS. See PRINCIPAL AND SURETY.

REQUISITES AND VALIDITY.

Statutory Bonds—Defects—Rectification. Section 357, Code, 1897, providing that defects in bonds shall be non-prejudicial if rectified within reasonable time, has no application to a defect which consists of a failure to secure, as required by statute, the approval of a non-defective bond. *McCord v. City of Cherokee*, 180—448.

CONSTRUCTION AND OPERATION.

Words and Phrases Foreign to Purpose. A bond will be construed and given an effect in harmony with the manifest purpose for which it was given, as reflected in the record facts and circumstances, even though such construction may, in effect, exclude a large portion of the bond as surplusage. *Tewksbury v. Title Guar. & Surety Co.*, 180—1350.

BOUNDARIES

TO

BROKERS

BOUNDARIES**ESTABLISHMENT.**

Agreement Between Parties. Mutual and executed agreements between adjoining owners as to the location of boundary lines are final, even though subsequent surveys establish inaccuracy in the agreed line. *Koppes v. Koppes*, 180—1268.

BROKERS.**EMPLOYMENT AND AUTHORITY.**

"To Find Purchaser"—"To Sell." An allegation that a broker
1 was employed "to find a purchaser" may be sustained by evidence that he was employed "to sell," but without power to fix the terms of sale. *Fawley v. Sheldon*, 180—795.

COMPENSATION.

Broker Becoming Purchaser. A broker may not base a claim to
2 commission on the finding of a purchaser for his principal's property on terms materially different from those authorized by the principal, nor on a manipulation of the deal without the knowledge or consent of the principal, by which he (the broker) was to become both purchaser and seller of the property. *Braden v. Hollen*, 180—309.

Producing Purchaser—Essentials. An agent, to be entitled to
3 recover commissions upon an alleged sale, or for the production of an alleged purchaser, must show what authority was given him by the principal, what terms he was authorized to make, and that he made a sale on the very terms authorized, or produced a purchaser ready, willing and able to purchase upon the precise terms authorized. Where the agent had *forgotten* part of the terms, *held*, he was not entitled to recover. *Wilson v. Gibbs*, 180—491.

Mutual Substitution of Contract—Effect. A broker forfeits his
4 right to base a claim for commission on a certain specified contract negotiated by him, when, after so negotiating it, he, without making any claim to a commission thereunder,

BROKERS Continued

to

CARRIERS

acquiesces in the substitution of a new agreement between the parties. *Wilson v. Gibbs*, 180—491.

Express Contract—Evidence and Conclusions. A broker who
5 bases his right to recover commission on an express contract providing a stated sum per acre, must establish such express contract by *showing the language used by the parties*, not his (the broker's) legal conclusion drawn from such language. *Wilson v. Gibbs*, 180—491.

Sale to One Not Known to be Broker's Customer. A broker
6 armed with simple authority to find a purchaser, on terms to be dictated by the owner of the property, or a broker armed with authority to find a *cash* purchaser in an amount to be dictated by the said owner, is entitled to no commission on a sale by the owner to a purchaser *not known to the owner to have been procured by the broker*. *Fawley v. Sheldon*, 180—795.

Sale to One Not Known to be Broker's Customer. The effect of
7 want of knowledge on the part of an owner of property that he was selling to a customer secured by his broker is *not* sufficiently presented to the jury by a statement, in effect, that the failure of the broker to apprise the owner that he (the owner) was dealing with a customer secured by the broker, bore only on the question as to whether the broker did procure such purchaser. *Fawley v. Sheldon*, 180—795.

Evidence—Sufficiency. Evidence reviewed, and held insufficient
8 to show such *performance* by a broker of his alleged contract for commission (assuming the same to be established) as to justify recovery. *Wilson v. Gibbs*, 180—491.

Evidence—Sufficiency. Conflicting evidence reviewed, and held
9 to present a jury question on the issue whether a broker was entitled to a commission. *Johnson v. Buckley*, 180—439.

CARRIERS.

INTERSTATE SHIPMENTS.

Interstate Bill of Lading. The "*remedy or right of action*" which
1 is reserved to the holder of an interstate commerce bill of

CARRIERS Continued

lading, by the Carmack Amendment to the Interstate Commerce Act, in addition to the grant of a right of action against the initial carrier, is measured by the general common law *as declared by the Federal courts*, and not by the diverse statutes and public policies of the several states. *Erisman v. Chicago, B. & Q. R. Co.*, 180—759.

Interstate Commerce—Non-Exemption of Connecting or Terminal
2 Carrier. The Carmack Amendment to the Hepburn Interstate Commerce Act does not relieve a connecting or terminal carrier from liability on interstate shipments for loss or damage caused by such carrier, even though such amendment does grant the shipper a right of action against the initial carrier for all loss or damage, irrespective of the line on which the same may have occurred. *Erisman v. Chicago, B. & Q. R. Co.*, 180—759.

Action Against Initial Carrier—Notice to Guilty Connecting Car-
3 rier to Defend. Notice by an initial carrier to a subsequent connecting carrier that the initial carrier has been sued for damages occurring to a shipment, and demand that such subsequent carrier appear and defend, is, while proper practice, not necessary in order to arm the initial carrier with right to recover of the subsequent carrier the amount of the resulting judgment, provided the damages occurred on the line of such subsequent carrier. *St. Joseph & G. I. R. Co. v. Des Moines Union R. Co.*, 180—1292.

Damages—Recoupment by Initial Carrier. In an action by an
4 innocent initial carrier against a guilty subsequent connecting carrier for recoupment of the amount paid by the initial carrier on judgment for injury to the shipment, such judgment, along with the pleadings, evidence, instructions, and verdict attending the judgment, is admissible, the former to show the amount of the recoupment, the latter to identify the judgment and to show that the exact injury for which the initial carrier had to pay occurred on defendant's line. *St. Joseph & G. I. R. Co. v. Des Moines Union R. Co.*, 180—1292.

Judgment Against Initial Carrier—Conclusiveness Against Con-
5 necting Carrier. A foreign non-collusive judgment, rendered under the Federal Interstate Commerce Act, against an

CARRIERS Continued TO CEMETERIES

initial carrier for damages to a shipment, is, in an action by the initial carrier against a subsequent connecting carrier to recoup the damages, a final adjudication as to the amount of damages, even though the subsequent connecting carrier was not a party to the action against the initial carrier. Act Congress June 29, 1906, Amending Act Feb. 4, 1887 (34 Stat. at L., Part 1, page 595). *St. Joseph & G. I. R. Co. v. Des Moines Union R. Co.*, 180—1292.

CARRIAGE OF GOODS.

Receipt in Good and Delivery in Bad Condition—Carmack Amend-
6 ment—Presumption. The Carmack Amendment to the Interstate Commerce Act has in no wise abrogated the rebuttable rule of the common law that, when goods are received by the initial carrier in good condition and delivered by the terminal carrier in bad condition, it will, in an action against the terminal carrier, on an interstate shipment, be presumed that the damage was caused by such terminal carrier. *Erlsman v. Chicago, B. & Q. R. Co.*, 180—759.

Conversion by Carrier. Limited liability clauses in interstate
7 bills of lading are valid, under the Carmack Amendment to the Interstate Commerce Act, even though it be conceded that the carrier, after issuing the bill of lading, was *guilty of conversion* by turning the entire carriage of the goods over to another carrier without authority from the consignee so to do. (For Carmack Amendment, see Act June 29, 1906, Chap. 3591, page 595, 34 Stat. at L.) *Richter & Sons v. American Exp. Co.*, 180—1037.

Interstate Commerce—Limiting Liability—Reasonableness. The
8 condition in an interstate bill of lading that claims for loss of or damages to the shipment shall be made in writing to the initial or delivering carrier *within four months* after the delivery or apparent loss, is reasonable and binding, and the exclusion of such condition is reversible error. *Erlsman v. Chicago, B. & Q. R. Co.*, 180—759.

CEMETERIES.

TITLE OF LOT OWNER.

Assessment for Sidewalks. It may not be said that, owing to the nature of cemetery lots, the sale thereof to divers persons

CEMETERIES Continued TO COMPROMISE AND SETTLEMENT

does not break the integrity of the original tract out of which the lots have been carved, and that an assessment for the cost of a sidewalk may be levied against the tract as a whole, irrespective of such sales. *Northern Light Lodge v. Town of Monona*, 180—62.

CERTIORARI.

PROCEDURE AND DETERMINATION.

Return—Amendments. Filing an amended return in the absence
1 of opposing counsel affords no basis for complaint when counsel was promptly informed of the filing and recognized the procedure by a motion to strike. *Rafferty v. Town Council*, 180—1391.

Return—Supplementary Testimony, Limit On. Testimony in ad-
2 dition to the return to a writ of certiorari may be received *provided it bears on jurisdiction*. *Rafferty v. Town Council*, 180—1391.

COMMERCE. See CARRIERS.**COMPROMISE AND SETTLEMENT.**

VALIDITY.

Fraud—Inability to Understand Language. Evidence reviewed,
1 and held insufficient to set aside and annul, for fraud and misrepresentation, a compromise and settlement of property interests, and decrees entered in accordance therewith, between a wife, husband and stepchildren, even though the wife was unable to read the English language, was not of strong mind, and was easily influenced and imposed upon. *Hill v. Victoria*, 180—417.

CONSIDERATION.

Settlement of Family Controversy. A contract entered into for
2 the purpose of avoiding litigation, and thereby settling family difficulties growing out of an estate, is supported by a sufficient consideration. *Watrous v. Watrous*, 180—884.

COMPROMISE AND SETTLEMENT Contd. TO CONTRACTS

Dismissal of Groundless Suit. The dismissal of a groundless suit
3 not brought in good faith is not a sufficient consideration for a contract of compromise and settlement. It follows that admissions by the party instituting a suit, tending to show its groundless nature and his knowledge thereof, are admissible. *Watrous v. Watrous*, 180—884.

CONSTITUTIONAL LAW.

DUE PROCESS, ETC.

Double Damages for Stock Killed—Excessive Demand. A statute so construed as to penalize a railway company for failure to pay an excessive claim for damages would be violative of the constitutional guaranty of (a) due process and (b) equal protection of the law. *Pierce v. Chicago & N. W. R. Co.*, 180—1385.

CONTRACTS.

NATURE AND ESSENTIALS.

Implied Agreements—Purchases on Credit of Another. One who
1 authorizes purchases to be made on his personal credit impliedly agrees to pay for such purchases when made. Liability is not dependent on such promisor's knowing at the time of such purchase that credit had been extended on his account. *Anderson v. Lemker*, 180—167.

Implied Obligations. One who contracts to furnish a home to
2 another and his family impliedly agrees to treat such other and all members of the family with reasonable kindness and consideration. *Murphy v. Williamson*, 180—291.

PARTIES, PROPOSALS, AND ACCEPTANCE.

Implied Acceptance. A contract between a brother and sister
3 may be sufficiently shown by evidence that the brother stated the terms of the proposed contract to his mother, in a conversation in which the sister took no part, and that the sister thereafter acted on such stated terms, especially where the fact that such contract was made is supported by

CONTRACTS Continued

disinterested corroborating testimony. *Francis v. Francis*, 180—1191.

CONSIDERATION.

Detriment to Promisor. Detriment to a promisor furnishes as
4 adequate a consideration for a contract as a benefit to promisor. *Anderson v. Lemker*, 180—167.

VALIDITY OF ASSENT.

Mental Weakness. Something more than mental weakness is
5 necessary in order to overthrow a contract. It must appear that the one seeking to avoid the contract was incapable of reasonably understanding the meaning of the instrument. *Watrous v. Watrous*, 180—884.

LEGALITY OF OBJECT AND CONSIDERATION.

Restraint of Trade. Permissible restraint on trade must be pro-
6 vided for by specific agreement—may not rest on inference only; therefore the simple sale of a business and the good will attending the same, without more, does not preclude the seller from engaging in a *separate and independent* business of the *same kind*, and from soliciting the customers of the old business, especially at a point remote from the location of the business sold. *Dare v. Foy*, 180—1156.

Unlawful Practice of Profession—Recovery for Services. *Recovery*
7 *may not be had for services which constitute a crime.* More concretely, when the practice of a vocation or profession is punishable by fine or imprisonment unless certain specified statutory conditions are first complied with, one who assumes to practice without strictly complying with all such conditions may not recover for his services, even though he possessed high qualifications, acted in good faith, and was even misled by a public officer, in attempting to comply with said conditions. *Lynch v. Kathmann*, 180—607.

CONSTRUCTION.

Entire or Severable Contracts. It is persuasive that a contract
8 is *non-severable* when the value of the different elements

Contracts Continued.	TO	CORPORATIONS
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of benefit accruing thereunder cannot be separately determined with any fair degree of accuracy. *Murphy v. Williamson*, 180—291.

RESCISSION AND ABANDONMENT.

Default of Both Parties. One who is in default in the performance of a contract may not rescind, even though the other party is also in default. So held under a building contract, where the contractor was seeking to rescind, but was in default in the completion of the building at the time agreed, and the owner was likewise in default in making payments as provided by the contract. *Schmidt Bros. Const. Co. v. Raymond Y. M. C. A.*, 180—1306.

Indivisible Contract. There may not be a partial rescission of an indivisible contract. *Brechwald v. Small*, 180—22.

PERFORMANCE OR BREACH.

Abandonment of Building Contract—Right of Owner. An unjustifiable abandonment of a building contract arms the owner, nothing appearing in the contract to the contrary, with right to complete the building and charge the reasonable cost and expense thereof to the defaulting contractor. *Schmidt Bros. Const. Co. v. Raymond F. M. C. A.*, 180—1306.

CONTRIBUTION. See **TENANCY IN COMMON.**

CORPORATIONS.

CERTIFICATES OF STOCK.

Insurance for Property Other Than Money—Conditions. Stock issues to the amount of the money invested in a partnership whose general assets were turned over to the corporation are unauthorized, without obtaining the consent of the executive council to such issue after due application to and appraisalment by such council. Section 1641-b, Code Supplement, 1913 *Fish v. White*, 180—1177.

Full Payment to Corporation—Burden of Proof. One contending 2 that shares of stock were issued only after full payment in

CORPORATIONS Continued TO COSTS
 money or its full equivalent to the corporation has the burden to so show. *Fish v. White*, 180—1177.

TRANSFER OF SHARES.

Stock Issued for Other Than Money. The sale, by the original & incorporators, of corporate shares of stock which have been issued for property *other than money*, to one ignorant of such fact, is of itself a representation that such shares were issued:

(1) Only after due application had been made to the executive council for permission to so issue;

(2) Only after due appraisalment of such property by said council;

(3) Only after the said council had authorized said issuance; and

(4) Only in the amount so authorized.

(Section 1641-b, Code Supplement, 1913.) And if such representation be false, a rescission of the sale may be had. *Fish v. White*, 180—1177.

COSTS. See APPEAL AND ERROR, 11.

TAXATION.

Voluntary Defendant. Heirs voluntarily appearing on the trial of a claim in probate, and asking and being granted the right to defend in place of the administrator (who had formerly allowed the claim), must suffer a judgment for costs in case of allowance of the claim. *Parnham v. Weeks*, 180—649.

COURTS.

MUNICIPAL COURTS.

Pleadings—Original Notice—Sufficiency. The Municipal Court Act does not require written petitions in Class B actions, to wit, those wherein the amount in controversy is \$100 or less. (Sec. 694-c21, Code Supplemental Supp., 1915.) Of necessity, it follows that that part of Sec. 694-c22, Code Supplemental Supp., 1915, requiring the original notice of suit to state "the date * * * the petition will be filed," has no reference to said Class B actions. *Model Laundry Co. v. Barnett*, 180—55.

CRIMINAL LAW

CRIMINAL LAW. See HOMICIDE; LARCENY.

NATURE AND ELEMENTS OF CRIME.

Motive. Proof of motive is not absolutely essential to conviction for crime. State v. Meyer, 180—210.

CAPACITY TO COMMIT CRIME.

Insanity—Degree of Proof. It is not reversible error to instruct the jury that defendant must “clearly” establish his plea of insanity, though it is preferable to omit such qualifying term. State v. Wegener, 180—102.

EVIDENCE.

Relevancy—Drinking Habits of Defendant. Evidence that defendant, on the evening preceding the day on which deceased was killed, had, to some undefinable extent, “been drinking,” is wholly irrelevant. State v. Meyer, 180—210.

Remoteness—Possession of Weapon. Evidence that defendant, 15 months prior to the homicide in question, had in his possession a weapon different from that found with deceased at the time her dead body was discovered, is too remote for admissibility. State v. Meyer, 180—210.

Suicides—Percentage of Nonfelonious Homicides. Evidence of the percentage of suicidal and accidental homicides has no bearing whatever on whether a particular homicide was either, or whether it was or was not felonious. State v. Meyer, 180—210.

Suicidal Tendency. Evidence tending to show suicide opens the door to nonremote evidence tending to show (and for no other purpose) a predisposition toward self-destruction; i. e., despondency, melancholy and depression on the part of deceased. State v. Meyer, 180—210.

Opinion Evidence—Effect of Gunshot Wounds. A witness must not be permitted to testify to the relative effects of gunshot wounds on alleged suicides and on one alleged to be a non-

CRIMINAL LAW Continued

suicide unless similarity of conditions is first shown; i. e., similarity of weapon, kind and quantity of explosive, distance of weapon from body, etc. *State v. Meyer*, 180—210.

Opinion Evidence—Insanity—Form of Question. A question to
8 a nonexpert witness as to the insanity of a person must be confined to and based on the facts *previously detailed by the witness*. *State v. Towne*, 180—339.

Nonconclusive Character—Relation of Parties. Unpleasant rela-
9 tions existing between defendant and the deceased may be shown, though the testimony bearing thereon may be far from persuasive. *State v. Meyer*, 180—210.

TRIAL—INSTRUCTIONS.

Punishment—Duty of Court and Jury. It is not error for the
10 court to instruct that the punishment to be meted out to the accused, in case of conviction, is a matter for the consideration of the court, and not of the jury. *State v. Powers*, 180—693.

Order of Stating Propositions. The particular order in which
11 propositions are stated or grouped in instructions is not of controlling importance. The all-important consideration is the accuracy and fullness of the charge when construed as a whole. *State v. Clark*, 180—477.

Assumption of Fact. An inferential assumption of fact in one
12 instruction will not constitute error when, in other instructions, the jury is repeatedly told that it is for it to determine whether such fact actually exists. *State v. Clark*, 180—477.

Withdrawing Fact Issue. Instruction reviewed, and held not to
13 withdraw a fact issue from the jury. *State v. Clark*, 180—477.

Expressions by Court of Weight of Testimony. Instruction re-
14 viewed, and held not to contain any expression or opinion by the court of the weight or credibility of the testimony. *State v. Clark*, 180—477.

CRIMINAL LAW Continued

Uxoricide—Presumption of Innocence. Under a charge of uxoricide, defendant is not entitled, *as a matter of law*, to an instruction that the ordinary presumption of innocence is strengthened by reason of the marital relation. *State v. Meyer*, 180—210.

Differentiating Phases of Insanity. Different phases of insanity properly in issue before the jury should be carefully differentiated in the instructions. But confusing and intermingling such phases is not necessarily reversible error. *State v. Wegener*, 180—102.

Assailing Credibility of Defendant. An instruction that the testimony of a witness should not be taken as true if the jury believe "he" was mistaken, affords no basis for the objection that the court committed a special assault on the credibility of the defendant—a male person. *State v. Clark*, 180—477.

Unduly Narrowing Issues. Specifically and correctly stating, at the beginning of instructions, the ultimate elements which must be established before an accused may be convicted, furnishes no basis for the claim that the issues were unduly narrowed, or that the jury were "coerced and urged" to convict without consideration of other matters militating in defendant's favor. *State v. Clark*, 180—477.

TRIAL—MISCONDUCT.

Misconduct of Juror—Recital of Former Crimes. Statements asserting the guilt of an accused of former crimes, wholly foreign to the one on trial and aside the record, and of a nature such as would prejudice the jurors against the accused, in view of the record, made by a juror to his fellow jurors during the deliberations of the jury in a cause in which the evidence of guilt and innocence is in sharp conflict, and made with strong and apparently positive assurance of their truthfulness, constitute such misconduct as to demand a new trial. *State v. Wegener*, 180—102.

Offer of Testimony. The act of the county attorney, in attempting to offer the testimony which the accused had given in another case, does not constitute reversible misconduct
Vol. 180 1A.—90

CRIMINAL LAW Continued

when, by the sustaining of objections, neither the purpose of the county attorney nor the nature of the other case was revealed. *State v. Powers*, 180—693.

Misconduct in Argument—Ouring Error. Sustaining objection to
21 improper argument, with prompt direction to the jury to disregard the same, held to render the error harmless, in view of the record. *State v. Powers*, 180—693.

Misconduct in Argument—Withdrawal. Statements of the re-
22 spective counsel as to the extent of the punishment attending a conviction, resulting in a withdrawal by the county attorney of his statement, and the substitution of the statement that the jury has nothing to do with the punishment, which latter statement was confirmed by the court orally and in the formal charge, work no prejudicial error. *State v. Towne*, 180—339.

TRIAL—CUSTODY OF JURY.

Separation of Jury After Submission. The separation of the jury,
23 after submission in a criminal case, for the purpose of answering the calls of nature, or for other innocent purposes, without speaking to nonmembers of the jury, results in no prejudicial error, especially when such jurors were usually attended by the bailiff or in his sight. *State v. Towne*, 180—339.

APPEAL.

Law of Case. A holding on appeal and reversal that certain tes-
24 timony is admissible, becomes the law of the case and conclusive on retrial. *State v. Giudice*, 180—690.

Appellate Jurisdiction—Void Judgment—Time Limit. Even
25 though a judgment in a criminal cause be void, no jurisdiction is conferred upon the appellate court by a so-called appeal taken after the expiration of the six months allowed for an appeal. From *final* judgments only may appeals be taken in criminal causes, and overruling a motion for new trial is not a *final* judgment. (Sec. 5443, Code Supplement, 1913.) *State v. Olsen*, 180—97.

CRIMINAL LAW Continued TO DAMAGES

Decisions Reviewable. Constitutional questions not raised and
26 preserved in the trial court will not be reviewed on appeal.
State v. Meyer, 180—210.

Harmless Error—Waiver. An accused may not, on appeal, com-
27 plain that the court denied him the right to examine a wit-
ness at a certain period and on a certain point, when such
right was later accorded to him and he failed to avail him-
self of it. State v. Chamberlin, 180—685.

Modification of Sentence. On appeal from conviction for carry-
28 ing concealed weapons, held, in view of the record and the
immature age of the accused, that an indeterminate sen-
tence of two years in the reformatory should be reduced to
30 days in the county jail. State v. Powers, 180—693.

DAMAGES. See ATTACHMENT, 2; CONSTITUTIONAL LAW;
LANDLORD AND TENANT, 1; MASTER AND SERVANT, 2.

COMPENSATORY DAMAGES.

Abnormal Childbirth. An injured party may show that, follow-
1 ing an accident to her, the birth of her child was attended
with far greater suffering than that attending all her pre-
vious confinements, and, by other testimony, that such add-
ed suffering was caused by the accident in question. Stuts-
man v. Des Moines C. R. Co., 180—524.

Permanent and Continuing Injuries Contrasted. An instruction
2 that, if the jury finds that plaintiff's injuries are reasonably
certain to continue in the future, she would be entitled to
recover therefor, is not a submission of the question of per-
manent injuries. Stutsman v. Des Moines C. R. Co., 180
—534.

MEASURE OF DAMAGES.

Breach of Contract—Failure to Furnish Abstract. The obliga-
3 tion to furnish an abstract showing good, merchantable title
does not embrace the obligation to defray the cost of exam-
ining the abstract after it has been furnished or procured.
Chaney v. Murphy, 180—716.

DAMAGES Continued

TO

DEMOE

Fraudulently Induced Leases. The difference between the value
4 of what a tenant did raise on the leased premises and what he would have raised had the premises been in the condition represented by the landlord, is *not* the measure of damages for fraudulent representations as to the condition of the premises; therefore, allegations relating thereto are properly stricken. *Franke v. Kelsheimer*, 180—251.

DEATH.

EVIDENCE OF.

Unexplained Absence—When Presumption Arises. The presump-
1 tion of death, from the unexplained and continuous absence of a person for seven years, without knowledge of his whereabouts on the part of his family and other relatives, arises only at the *expiration* of said period. With the aid of facts and circumstances in addition to the *absence*, a *prima-facie* presumption of death at an earlier period may be established. *Haddock v. Meagher*, 180—264.

Unexplained Absence—Presumption. The seven-year period of
2 continuous and unexplained absence of a person from his usual place of residence as a basis for the common-law presumption of death is not lengthened to *ten* years by the statute (Section 3307, Code Supplement, 1913) relating to administration on the estates of *absentees*. *Haddock v. Meagher*, 180—264.

Absentees—Proceedings for Administration. An *ex parte* order
3 for letters of administration on the estate of an *absentee* (Section 3307, Code Supplement, 1913), not being granted on any finding of the death of the absentee, is inadmissible, in another and subsequent proceeding, to prove death. *Haddock v. Meagher*, 180—264.

DEEDS.

REQUISITES, ETC.

Scope of Term. Principle recognized that the term "execution," when applied to a deed of conveyance, properly embraces

Deeds Continued

TO

DIVORCE

the due (a) making, (b) signing, (c) acknowledgment, and (d) delivery. So recognized in actions on policies of insurance, the validity of which insurance depended on whether the execution, delivery and acceptance of conveyances were such as to effect a change in title to the insured property, and thereby avoid the policy. *Bartemeier v. Central F. Ins. Co.*, 180—354.

DESCENT AND DISTRIBUTION. See WILLS.

SURVIVING SPOUSE.

Sale of Part Prior to Admeasurement. A surviving spouse, prior to the setting off of his or her distributive share in the lands of the deceased intestate spouse, may not, as against other cotenant heirs, validly sell, encumber or charge with an easement, *any definite aliquot part* of such undivided lands. *Waterloo, C. F. & N. R. Co. v. Harris*, 180—149.

ADVANCEMENTS.

Cancellation Agreement—Sufficiency of Evidence. Strongly contradictory evidence reviewed, and held insufficient to establish the making of an agreement canceling an advancement made in full of the heir's interest in an estate. *Chidester v. Harlan*, 180—171.

DIVORCE

GROUNDS.

Cruelty. Evidence, revealing a large degree of mutual blame, reviewed, and held insufficient to justify a decree of divorce on the grounds of cruel and inhuman treatment. *Lomax v. Lomax*, 180—442.

JURISDICTION, PROCEEDINGS, ETC.

Residence—Pendency of Proceeding in Another County. The existence of an order of court in the county of the husband's residence (entered on the husband's unsuccessful application for a divorce), requiring the husband to pay certain

DIVORCE Continued

to

DRAINS

monthly support money to the wife, is no obstacle to the wife's taking up a bona fide residence in another county and there instituting divorce proceedings on her own behalf. *Main v. Main*, 180—616.

Pleading—Nonessential Allegations. No allegation "that the action is brought in good faith and for the purpose of obtaining a divorce only" is necessary when plaintiff and defendant are both residents of this state. (Sec. 3172, Code, 1897.) *Main v. Main*, 180—616.

Abatement—Pendency of Another Action. An action for annulment of marriage on stated grounds by the husband in the county of his residence may not be pleaded in abatement of an action for divorce on different grounds by the wife in another county which is the county of her residence. *Main v. Main*, 180—616.

Death—Reopening Proceedings. Principle recognized that, while a divorce proceeding is abated by the death of the defendant, yet it may be, upon proper showing, reopened, in so far as it affects property interests. *Hill v. Victoria*, 180—417.

Adjudication. A wife's plea for divorce on the grounds of desertion for two years, wholly accruing after the termination of a prior action by the husband for divorce, is not adjudicated by the decree in such prior action wherein the wife asked and received separate maintenance on the grounds of desertion and cruel and inhuman treatment. *Main v. Main*, 180—616.

DOWER. See DESCENT AND DISTRIBUTION; ESTOPPEL, 7; HUSBAND AND WIFE, 1; WILLS.

DRAINS. See PRINCIPAL AND SURETY.

ESTABLISHMENT, MAINTENANCE, ETC.

Boundaries of Appropriated Land. The exact boundaries of the land to be appropriated by a proposed public drainage improvement should specifically and definitely appear from the engineer's return—that is, from his report or plat. Omit-

DRAINS Continued

slon to so show will not undermine jurisdiction to proceed—is a mere irregularity, and waived if not duly raised before the board of supervisors and by appeal from an adverse decision—*when the report or plat contains such facts as that therefrom such exact boundaries may be determined.* (Sec. 1989-a2, Code Supplement, 1913.) *Simpson v. Board of Supervisors*, 180—1330.

Right of Way—Insufficiency. Upon discovering that the land
2 condemned for a public drainage improvement is insufficient, the board of supervisors has no power to condemn additional land except by strict compliance with the procedure governing an original condemnation. So held where the board attempted to condemn such additional lands by the simple expedient of a resolution, and by entering, in favor of the landowner, an additional allowance as damages. (Sec. 1989-a2, Code Supplement, 1913.) *Simpson v. Board of Supervisors*, 180—1330.

Recommendations of Engineer—Conclusiveness. Principle recog-
3 nized that a public drainage improvement must be established in accordance with the recommendations of the engineer, or not established at all. *Simpson v. Board of Supervisors*, 180—1330.

Contract—Presumption. It will, in the absence of evidence to
4 the contrary, be presumed that a contract relet after proper forfeiture was relet at a reasonable price, when such reletting was on proper advertisement, and on notice to the defaulting contractor and surety, and without objection from them. *Wykoff v. Stewart and National Surety Co.*, 180—949.

Breach of Contract—Effect. A contractor for a public drainage
5 improvement arms the public authorities with legal right (1) to withhold payment of estimates as provided in the contract, (2) to forfeit the contract, and (3) to relet the work, when said contractor (a) becomes insolvent subsequent to entering into the contract, (b) fails to pay just and valid bills for labor and materials, as required by the contract, and permits claims therefor to be filed with the county auditor, and (c) abandons the contract. (See Sec. 1989-a10, Code Supp., 1913.) *Wykoff v. Stewart*, 180—949.

DRAINS Continued

TO

EMINENT DOMAIN

Appeal—Scope of Inquiry. Principle recognized that, upon appeal to the district court from an order establishing a public drainage improvement, no objections will be considered except those *which have been properly raised before the board of supervisors.* (Sec. 1989-a3, Code Supplement, 1913.) *Simpson v. Board of Supervisors*, 180—1830.

ASSESSMENTS.

Power of Commissioners—Excluding Lands. Commissioners appointed to apportion the cost of a public drainage improvement are wholly without power to apportion the entire cost upon part of the lands within the district, on the theory that the remaining lands will receive no benefit from the improvement—a question conclusively settled by the establishment of the district. Nor has the board of supervisors any power to entertain such a report. (Sec. 1989-a12, Code Supp., 1913.) *Wood v. Honey Creek Drain. & L. Dist.*, 180—159.

ELECTIONS.

ORDERING OR CALLING, ETC.

Non-Mandatory Requirements. An election is not necessarily invalidated because the proposition upon which the people voted did not reach them with all the strict formalities required by law, and the state of the vote cast may be very potent to show that no prejudice resulted from lack of formality. *Rafferty v. Town Council*, 180—1391.

ELECTRICITY. See NEGLIGENCE, 1-3.

EMINENT DOMAIN.

NATURE OF POWER.

Strict Compliance. Principle recognized that, in the exercise of the power of eminent domain, strict compliance with statutory procedure is exacted. *Simpson v. Board of Supervisors*, 180—1330.

EQUITY

TO

ESTOPPEL

EQUITY.**DECREES.**

Making New Contract for Parties. Equity, under a prayer for general equitable relief, may, in an action to enforce a contract which proves utterly impractical, so shape its decree as to depart from the strict terms of the contract when, by so doing, the actual purposes of the parties will be carried out and justice be done to both parties. So held where, by contract, a tile drain was to be placed in a specified course across certain lands, which course proved utterly impracticable, owing to the topography of the land. (See Sec. 3775, Code, 1897.) *Calhoun v. Robinson*, 180—538.

ESTOPPEL. See PARTNERSHIP, 2-6.

EQUITABLE ESTOPPEL.

Non-change of Position. A "change of position" is an essential
1 element of an estoppel. *Drees v. Armstrong*, 180—29.

Performance of Legal Duty. An estoppel *in pais* may not be
2 predicated on the doing of exactly that which the law requires to be done. *Howe v. Sioux County*, 180—580.

Silence—Duty to Speak. Silence, when there is no moral or legal
3 duty to speak, cannot work an estoppel *in pais*. *Anfenson v. Banks*, 180—1066.

Diligence to Learn the Truth. One setting up an estoppel by conduct
4 is under obligation to exercise good faith and due diligence to know the truth. Therefore, the creditors of a bank who seek to hold defendant as a quasi partner because of his having been held out by another as a partner, may not recover if they had ample opportunity to learn, with trifling trouble or expense, that defendant was not such partner, and failed to avail themselves of such opportunity. *Anfenson v. Banks*, 180—1066.

Opportunity to Avoid Injury. An estoppel may not be based on
5 alleged misleading conduct of another, when such conduct

ESTOPPEL Continued

to

EVIDENCE

was fully known to complainant at a time such that he had ample opportunity to resume his former advantageous position, and avoid all injury by reason of such conduct. *Watrous v. Watrous*, 180—880.

Implied Fraud. Conduct which will work an estoppel *in pais*,
6 in those cases *where there is no affirmative evidence of wrongful design or fraudulent purpose*, must be so grossly negligent or of a character so manifestly misleading to others that it would be tantamount to a fraud to permit the actor to escape liability to those who, in the exercise of reasonable diligence, have been misled to their injury. *Anferson v. Banks*, 180—1066.

Sale of Part of Unassigned Dower—Knowledge of Heir. An heir
7 is not estopped to assert the invalidity, as to him, of a contract by which a surviving spouse (his mother) assumed to grant a railway right of way over lands held in common, from the fact that he learned that his mother had made such a contract, did not object thereto, and permitted the company to construct its road. *Waterloo, C. F. & N. R. Co. v. Harris*, 180—149.

EVIDENCE. See CRIMINAL LAW; DEATH; HOMICIDE.

PRESUMPTIONS.

Withholding Evidence. No unfavorable presumption is raised
1 against one who fails to call physicians on the issue as to the cause of death of a party in question, when such physicians are equally accessible to both parties. *Semmons v. National Trav. Ben. Assn.*, 180—666.

Fiduciary Relations—Legatee-Draughtsman. The doctrine that
2 undue influence is to be presumed as between parties *inter vivos*, dealing with each other when fiduciary relations exist between them, *has no application to testamentary gifts*. *Graham v. Courtright*, 180—394.

Inconsistent Conduct—Effect. Principle recognized and applied
3 that the long-continued and unexplained failure, under urgent circumstances, to make known the existence of an in-

EVIDENCE Continued

strument conferring a valuable right on the grantee, furnishes persuasive evidence that such instrument never in fact validly existed. *Chidester v. Harlan*, 180—171.

RELEVANCY, MATERIALITY, AND COMPETENCY.

Negligence—Immaterial Custom, Etc. Whether an ordinary motor cycle was adaptable to the carrying of more than two passengers, and the custom relative to more than one person's riding thereon, is wholly immaterial in defense of an action for the negligent operation of such a vehicle. *Schultz v. Starr*, 180—1319.

Symptoms of Injury. A physician, from a personal examination of an injured person, may testify, when relevant to the issues, that he did or did not find symptoms of a certain injury. *Ingwersen v. Carr & Brannon*, 180—988.

Excluding Immaterial Part of Exhibit. Principle recognized that it is proper for the court to exclude an offered exhibit in so far as it does not bear on the matters in issue. *Parham v. Weeks*, 180—649.

SIMILAR FACTS AND TRANSACTIONS.

Malice, etc. In an action for slander based on an imputation of theft, the matter covered by the files and pleadings in a former civil action by defendant against plaintiff, having no relation to the subject matter of the slander action, is too remote to have any proper bearing on the issue of malice. *Manning v. Meade*, 180—932.

Malpractice. On the issue whether long delayed union of a broken limb was the result of negligent treatment, evidence is inadmissible that plaintiff, some years prior, had suffered a dissimilar fracture which readily united. *Snearly v. McCarthy*, 180—81.

BEST AND SECONDARY.

Loss of Writing—Sufficiency of Showing. Evidence reviewed, and held, at the best, to be very unsatisfactory on the question of the loss of a written instrument. *Chidester v. Harlan*, 180—171.

EVIDENCE Continued

DECLARATIONS.

As Showing Intent and Purpose on Issuable Fact. When the very
10 issue is whether a deceased party *did* do a certain act, i. e.,
execute a certain alleged instrument, the declarations of
such party showing his intent and purpose not to do, or in-
consistent with the doing of, such alleged act, made prior
or subsequent to the time when it is *alleged* that he did such
act, are competent as bearing on whether he actually did
said act. *Chidester v. Harlan*, 180—171.

HEARSAY.

For Purpose of Impeachment. Statements incompetent as hear-
11 say, if offered to prove the fact, may be perfectly competent
for purpose of impeachment. *Rose v. City of Fort Dodge*,
180—331.

DOCUMENTARY EVIDENCE.

Medical Works. Medical works being, as a general rule, inad-
12 missible, it follows that oral testimony of what such works
teach is equally improper, whether brought out on direct, re-
direct or cross-examination. *Ingwersen v. Carr & Brannon*,
180—988.

Books of Original Entry. A so-called "ledger" may constitute a
13 book of original entries. *Duffy v. Hardy Auto Co.*, 180—745.

PAROL AS AFFECTING WRITING.

Fraud-Induced Contract. Allegations of the fraudulent repre-
14 sentations which induced a written contract are provable
even though they contradict said writing. *Franke v. Kela-
heimer*, 180—251.

Past Transactions. A written contract dealing with future trans-
15 actions is no obstacle to the reception of oral evidence of a
compromise entered into on the same day solely with refer-
ence to *past transactions* between the parties. *Empire
Cream Separator Co. v. Bair, Ferrell & Co.*, 180—375.

EVIDENCE Continued

OPINION EVIDENCE.

Conclusions—Rate of Speed. Whether an object was moving
16 slowly or rapidly is an allowable conclusion—the best that
can be had under the circumstances. *Schultz v. Starr*, 180
—1319.

Contradiction of Statutory Requirement. Opinion evidence, con-
17 tradictory of the requirements of a statute, is wholly incom-
petent. So held where it was sought to show by opinion evi-
dence that insulation and other guards for electric wire
were unnecessary, though required by statute. *Toney v. In-
terstate Power Co.*, 180—1362.

Nonexpert Opinion as to Mental Competency. Nonexpert opin-
18 ions as to the mental competency of a person not based on
the matters detailed by the witness, are inadmissible. *Parn-
ham v. Weeks*, 180—649.

Time of Death. When a person died is not the subject of opin-
19 ion evidence. *Haddock v. Meagher*, 180—264.

Value of Services. Testimony placing the value of services, in
20 view of the record, at a manifestly moderate figure, af-
fords no just basis for complaint, even though the witness
did not fully qualify as an expert. *Ahlson v. High Bridge
Coal Co.*, 180—302.

Purpose or Motive of Another. One may not give his opinion
21 as to the unknown and undiscoverable motive or purpose of
another. *Rolfs v. Mullins*, 180—472.

Results Flowing from Assumed Facts—Form of Question. Opin-
22 ions as to results need not go beyond a statement of the
probable results. Like results from other causes need not
be negatived. The latter is properly left to cross-examina-
tion. *Stutsman v. Des Moines C. R. Co.*, 180—524.

Hypothetical Questions—Referring Witness to Record. A hy-
23 pothetical question which, in *part* and in an *inferential*
way, assumes knowledge on the part of an expert witness
of the condition of the record as bearing on certain material

EVIDENCE Continued

facts, without detail of such facts, is not necessarily subject to the vice of turning the witness loose to give an opinion upon all the evidence in the record. *Ingwersen v. Carr & Brannon*, 180—988.

Hypothetical Question—Improper Assumption of Fact. A hypothetical question so framed as to require the expert witness to base his opinion upon what he *remembers* of the testimony of another witness on a certain point is not necessarily a prejudicial way of assuming the facts, when the facts thus sought to be injected into the question are undisputed. *Ingwersen v. Carr & Brannon*, 180—988.

Nonexpert Opinions—Detail of Facts. Evidence revealing a series of acts by testatrix, some apparently trivial and others concededly out of the ordinary, reviewed, and held to afford proper basis for nonexpert opinions on the issue of insanity. *Liddle v. Salter*, 180—840.

WEIGHT AND SUFFICIENCY.

Testimony Impossible of Contradiction. Reasonable testimony from credible witness may not be disbelieved simply because it is not and cannot be contradicted. *Francis v. Francis*, 180—1191.

Testimony Absurd and Impossible. Before the court may peremptorily stamp certain testimony as a nullity on the grounds that it is absurd, impossible, and contrary to fixed, known, scientific and physical facts and laws, it must be very certain, from the entire record, that no reasonable mind could entertain the truth of said testimony. Evidence reviewed as to the very unusual way in which it was claimed an explosion of oil occurred, and held not so inherently impossible as to justify its withdrawal from the jury. *Anderson v. Standard Oil Co.*, 180—1054.

Inherent Improbability. Principle recognized that the inherent improbability of testimony may destroy it, even though, in a technical sense, it may be said that such testimony is undisputed. *Chidester v. Harlan*, 180—171.

Number of Witnesses. The number of witnesses is not necessarily controlling on disputed fact questions. Testimony

EVIDENCE Continued

to

EXECUTION

of one witness that he did not have notice of a prior unrecorded mortgage, aided by corroborating facts and circumstances, may overcome the positive testimony of two interested witnesses that they did give such notice to first party, when the conduct of such two witnesses has not been consistent with their assertion. *Clark Bros. v. Watson*, 180—721.

EXECUTION.**LEVY.**

Indorsement of Levy on Writ. Principle recognized that it is
1 essential to a valid levy under execution that the sheriff enter the *fact of levy* upon the writ when such levy is made, and that the entry of such matters in the incumbrance book will not satisfy this requirement. *Drake v. Brickner*, 180—1166.

Excessive Levy. When a judgment defendant owns an un-
2 divided interest in separate and distinct tracts of land, it is the duty of a sheriff to levy only upon the interest of the defendant in that tract which will, as nearly as practicable, realize the exact amount due under the judgment. Held that, under an execution for some \$320, a levy upon the defendant's \$6,000 undivided interest in a tract of land, instead of a levy upon the defendant's \$600 undivided interest in another tract, was excessive. *Drake v. Brickner*, 180—1166.

SALE.

Sales En Masse. Principle recognized that a sale of tracts of
3 land *en masse* which could advantageously have been sold separately may be set aside, either by motion or by proceeding in equity. *Drake v. Brickner*, 180—1166.

Sale Without Redemption—Essentials of Notice. Principle recognized that notice of the sale of real estate on execution must distinctly state that such sale will be made *without the right of redemption*, when such is the fact. *Drake v. Brickner*, 180—1166.

EXECUTION Continued

TO EXECUTORS AND ADMINISTRATORS

Adjournment—Inadequate Bids. A sheriff, charged as he is with
 5 the duty to be absolutely fair and impartial between the plaintiff and defendant in execution, abuses the discretion lodged in him by not adjourning a sale when the bids on the property are *grossly inadequate*. So held where the property levied on, under an execution for some \$320, was worth \$6,000, and the highest bid was \$800 by a stranger to the execution. *Drake v. Brickner*, 180—1166.

When Inadequate Bid Nullifies Sale. The rule that a sale of
 6 property on execution for a grossly inadequate price does not necessarily work a setting aside of the sale does not apply when the sale is a *nonredeemable* one, and the judgment defendant has property subject to execution other than that levied upon, out of which, had levy been made thereon, the amount due on the execution might have been made without great disparity between bid and the value of the property. So held where, under an execution for some \$320, property worth \$6,000 was sold for \$800, when another tract worth \$600 was subject to execution. *Drake v. Brickner*, 180—1166.

Inadequate Price Combined with Unfairness—Inadequacy of
 7 price, plus circumstances indicating a purpose on the part of the successful bidder to unfairly take advantage of the judgment defendant's financial embarrassment, may be sufficient to stamp a sale as fraudulent. *Drake v. Brickner*, 180—1166.

EXECUTORS AND ADMINISTRATORS.**COLLECTION AND MANAGEMENT OF ESTATE.**

Real Property—Leases—Personal Liability. An executor or ad-
 1 ministrator who enters into a lease without authority from the court or under the will, is personally liable thereon. (Sec. 3333, Code, 1897.) *Cohen v. Hayden*, 180—232.

ALLOWANCE AND PAYMENT OF CLAIMS.

Care of Parent—Mutual Expectation to Pay and Receive Com-
 2 pensation. Evidence reviewed, and held to sustain a finding by the jury that services by a son in caring for an aged

EXECUTORS AND ADMINISTRATORS Contd. to EXEMPTIONS

parent were performed with the mutual expectation on the part of the parent of paying for such services, and on the part of the son of receiving such payment. *Parnham v. Weeks*, 180—649.

ACCOUNTING AND SETTLEMENT.

Appointment of Referees. The appointment of referees in probate under Sec. 3398, Code, 1897, for the purpose of examining probate reports, etc., need not be a separate appointment for each and every report presented, but may be in the form of a standing order for all reports. *Burlingame v. Hardin County*, 180—919.

EXEMPTIONS. See ATTACHMENT, 1; BANKRUPTCY, 2, 3.

PERSONS ENTITLED.

Head of Family—Divorced Person. A debtor who lives alone and apart from his wife and children, who is unmarried and divorced from his wife and under no obligation to support her, who, by said decree, has no custody of or control over his minor children except to visit them, and who furnishes them no support except occasional voluntary contributions, and who, by an executed transfer of property, has obligated another to care for and support his children, which obligation is being complied with, is not the "head of a family," and therefore not entitled to exemption of his personal earnings. (Sec. 4011, Code, 1897.) *Armstrong-McClenahan Co. v. Rhoads*, 180—710.

PROPERTY AND RIGHTS EXEMPT.

Threshing Machine Separator. A threshing machine separator is not exempt from execution. *Vandeventer v. Nelson*, 180—705.

Jury Question. The issue whether a traction engine is one of the instrumentalities by which a debtor habitually earns a living for himself and family is, on conflicting evidence, necessarily a jury question. *Vandeventer v. Nelson*, 180—705.

EXEMPTIONS Continued

TO

FRAUD

PROTECTION AND ENFORCEMENT OF RIGHT.

Wrongful Levy—Damages—Notice to Officer. Written notice by
 4 a judgment defendant to the levying officer of exemption claim is a condition precedent to the right to recover damages of the officer by reason of the wrongful detention by the officer of exempt property under levy. (See Secs. 3991, 4017, Code, 1897.) *Vandeventer v. Nelson*, 180—705.

FRAUD.

ACTS CONSTITUTING FRAUD.

Exercising Legal Right. Principle recognized that the exercise
 1 of a legal right cannot constitute a fraud. *Waterloo, C. F. & N. R. Co. v. Harris*, 180—149.

Duty to Enlighten Ignorant Person. Principle recognized that
 2 one dealing with a person unable to understand or read the language in which an instrument is written, owes the duty to such person to fully apprise such person of the contents and meaning of such paper. *Hill v. Victoria*, 180—417.

Duty to Investigate—Inadequate Opportunity. One may not
 3 avoid the effect of fraudulent representations by the plea that his victim did not exercise an *inadequate* opportunity to examine the subject matter of the contract, before executing the contract, especially when the wrongdoer discouraged the making of an examination. *Franke v. Kelsheimer*, 180—251.

Opinion (?) or Fact (?) The following are fact representations:

- 4 1. That certain land was a good farm, and as good as the average in that locality.
2. That the land was level, not rough nor hilly, and lay well.
3. That the land was tillable and in a good state of cultivation.
4. That the land was capable of producing a certain number of bushels of grain per acre, and would, in its production, equal the average of farms in that locality.

FRAUD Continued TO FRAUDULENT CONVEYANCES

5. That a certain number of acres had been fall plowed.
6. That the land was free from noxious weeds. *Franke v. Kelsheimer*, 180—251.

Reliance on Fraud—Inspection Following Representations. One who makes an unimpeded examination of premises, prior to purchase, and after certain false representations as to value had been made to him by another, may not thereafter assert that he relied on such false representations. *Michaelson v. Schulke*, 180—201.

Reliance on Representations—Necessity. One may not rescind a contract of sale or exchange on the grounds of fraud when he did not rely thereon, but did rely on his own personal judgment and examination. *Brechwald v. Small*, 180—22.

FRAUDS, STATUTE OF.**DEBT OR DEFAULT OF ANOTHER.**

Contract not Within Statute. A promisor's oral agreement that another may make purchases for such other and have such purchases charged to the promisor, is an agreement by promisor to pay his own debt. (Sec. 4625, Par. 3, Code, 1897.) *Anderson v. Lemker*, 180—167.

FRAUDULENT CONVEYANCES.**GROUND OF INVALIDITY.**

Consideration—Good-Faith Purchase for Inadequate Price. A creditor may not, even for the sole purpose of protecting himself, buy the property of his insolvent debtor for less than its fair value, knowing that other creditors will thereby be defeated in collecting their claims. In such case, the conveyance will be deemed without consideration, and therefore fraudulent, to the extent of the difference between what he did pay and the value of the property. *Nolan v. Glynn*, 180—870.

GARNISHMENT

TO

HIGHWAYS

GARNISHMENT. See **APPEAL AND ERROR**, 7.**PERSONS SUBJECT TO GARNISHMENT.**

Interest of Devisees—Conditions Attending Creation of Debt. If the bringing into existence of a debt depends upon the exercise of a condition *personal to the one to whom the debt would be due*, then no one can create the debt for such person without his consent, and thereby open the door to the garnishment of the debtor. *Ober v. Seegmiller*, 180—462.

GRAND JURY. See **INDICTMENT AND INFORMATION**, 2.**QUALIFICATIONS OF JUROR.**

Citizenship—Presumptions. Principle recognized that a strong presumption of citizenship arises from the fact that the party has voted, held office, or otherwise performed the functions and exercised the rights of citizenship. *State v. Chamberlin*, 180—685.

GUARDIAN AND WARD.**SALES AND CONVEYANCES.**

Collateral Attack. Principle recognized that sales of real estate by guardians may not be collaterally attacked. *Kile v. Hogan*, 180—1263.

Failure to Appraise. Omission to *appraise* the real property of an insane person will not, of itself, invalidate a sale and conveyance thereof by the guardian, such omission being a matter not going to the *jurisdiction* of the court to order a sale. See Secs. 3312, 3325, Code, 1897. *Kile v. Hogan*, 180—1263.

HIGHWAYS.**ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.**

Dedication—Acceptance—Sufficiency. Unequivocal recognition

HIGHWAYS Continued **TO** **HOMESTEAD**

1 by a city of a highway constitutes sufficient acceptance of the dedication thereof. *City of Valley Junction v. McCurnin*, 180—510.

Dedication—Evidence—Sufficiency. Evidence reviewed, and held
2 ample to establish the dedication of a highway by the three tenants in common. *City of Valley Junction v. McCurnin*, 180—510.

Boundaries—Evidence. Evidence as to the true line of a high-
3 way reviewed, and held insufficient to justify the decree of the trial court. *Meyers v. Wonick*, 180—286.

Alteration, Etc.—Uncertain Record—Acquiescence. Changes by
4 the public authorities in the location of a highway will be permanently enjoined when it appears: (a) That the present location is *substantially* on the lines called for in the original establishment; (b) that such present location has been acquiesced in as correct for more than half a century by the public generally, by the public authorities, and by the adjoining property owners; and (c) that a laying out of the road on the uncertain lines pointed out in the original order of establishment would be practically impossible—at least would not locate the road either on its present location nor on the location to which it is proposed to remove it. *Merrill v. Hutchins*, 180—1276.

REGULATION AND USE FOR TRAVEL.

Automobile Accident—Negligence—Insufficient Lights. Evidence
5 reviewed, and held to clearly present a jury question on the charge of negligence based on the insufficient lighting of defendant's automobile. *Daggy v. Miller*, 180—1146.

HOMESTEAD

RIGHTS OF SURVIVING SPOUSE.

Distributive Share Embracing Homestead—Exemption. A sur-
1 viving spouse who takes as his or her distributive share that part of the homestead which includes the ordinary dwelling house, takes the said part exempt from execution

HOMESTEAD Continued

TO

HOMICIDE

sale, as in case of any other homestead, *provided there has been no abandonment of the homestead right and possession since the death of the owner.* *Coleman v. Bosworth*, 180—975.

RIGHTS OF HEIRS.

Liability of Homestead for Antecedent Debts of Issue. Homestead property passing to children of a deceased owner is not exempt from the debts of such children:

(a) If the property passes by *devise*, or

(b) If the property passes by *descent* and a spouse *survives* the owner. (Sec. 2985, Code, 1897.) *Voris v. West*, 180—138.

HOMICIDE. See INDICTMENT AND INFORMATION, 1.

MANSLAUGHTER.

Defining Murder—Effect. It is not error to define murder in instructions covering a charge of manslaughter, the instructions covering the latter offense being unobjectionable. *State v. Towne*, 180—339.

Instructions—Careless Handling of Gun. The court may properly explain to a jury when and under what circumstances the negligent or careless handling of a dangerous weapon may constitute manslaughter, even though the indictment does not specifically charge that there was such negligence. *State v. Towne*, 180—339.

EXCUSABLE OR JUSTIFIABLE.

Arrest by Private Person for Misdemeanor—Use of Deadly Weapon. Instructions reviewed, and held correct as to (a) the circumstances under which a private party may make an arrest for a misdemeanor; (b) the acts necessary to constitute a valid arrest; (c) the degree of force permissible in effecting such arrest; (d) the arrester's duty to refrain from using a deadly weapon in a deadly man-

HOMICIDE Continued

ner in making such arrest; and (e) the result, in law, to the arrester if such a weapon was so used as to result in a homicide. *State v. Towne*, 180—339.

EVIDENCE.

Self-defense—Evidence—Specific Quarrel with Others. Under a
4 plea of self-defense to a charge of manslaughter, defendant may not interrogate witnesses as to a specific quarrel had by deceased with other people. *State v. Towne*, 180—339.

Self-Defense—Mental Condition of Deceased—Materiality. Un-
5 der a plea of self-defense, evidence as to the mental condition of a deceased is material only on the question of the attitude of the deceased at the time of the fatal encounter. *State v. Towne*, 180—339.

Self-Defense—Insanity of Deceased—Refusal to Permit Showing.
6 Under a plea of self-defense to a charge of manslaughter, defendant suffered no prejudice because denied the privilege of showing by opinion evidence that deceased was insane, when decedent's previous conduct was fully shown to the jury by evidence tending to show his unbalanced condition of mind, with attending delusions, and when there was no question as to who made the first assault at the time of the fatal encounter. *State v. Towne*, 180—339.

Self-Defense—Character of Deceased as to Quarrelsomeness, etc.
7 Under a plea of self-defense to a charge of manslaughter, witnesses may not be asked as to the "character" of deceased as to quarrelsomeness and viciousness, or as to his general "character" as to habit of attacking people generally. His general reputation in this respect should have been called for. *State v. Towne*, 180—339.

Dying Declarations. Instructions reviewed, and held correct
8 as to (a) the circumstances under which alleged dying declarations were such in fact, and could be considered at all; (b) the evidence proper to be considered by the jury in determining whether the deceased was under the full belief of impending death; (c) the duty of the jury to disregard all matters of mere opinion, if any, expressed by the deceased; and (d) the duty of the jury to consider only

HOMICIDE Continued TO INDICTMENT AND INFORMATION

such dying statements of the deceased as pertained to the facts and circumstances attending the fatal shot. *State v. Towne*, 180—339.

TRIAL.

Aiding and Abetting—Nonapplicable Instructions. Instructions § authorizing a conviction for homicide by “aiding and abetting” the actual killing by another is reversible error when the record is bare of any evidence of such aiding and abetting. *State v. Meyer*, 180—210.

HUSBAND AND WIFE.

MARRIAGE SETTLEMENTS.

Dower—Waiver by Division of Property. A fair, equitable and 1 *executed* agreement between husband and wife, preceding a marital separation, for a complete division of property, in such manner as to free the portion of each spouse from all possible dower right of the other, and, therefore, to enable each spouse to thereafter individually handle and dispose of his or her respective portion without regard to the other spouse, estops both parties, *immediately upon the execution of such agreement*, from thereafter enforcing a claim for dower in the property of the one first deceased. (Sec. 3154, Code, 1897.) *Martin v. Farmers Loan & Trust Co.*, 180—359.

ACTIONS.

Personal Injury to Wife—Recovery—Effect. It is stated, *arguen-* 2 *do*, that a recovery by the wife for her own personal injury, *without claim for loss of time*, bars the husband's claim for such loss of time, in view of Sec. 3477-a, Code Supp., 1913, investing the wife with right to recover for loss of time, etc. *Rose v. City of Fort Dodge*, 180—321.

INDICTMENT AND INFORMATION.

REQUISITES AND SUFFICIENCY.

Nonspecific Allegations—Waiver. A failure to specifically al- 1 lege, in an indictment for murder, that the accused, in

INDICTMENT AND INFORMATION Contd. to

INSURANCE

making the assault, actually used the weapon with which he is alleged to have been armed, is waived by going to trial without objection thereto. *State v. Giudice*, 180—690.

MOTION TO QUASH OR DISMISS.

Noncitizenship of Grand Juror. He who moves to quash an indictment on the ground of the noncitizenship of a grand juror has the burden to establish such grounds. *State v. Chamberlin*, 180—685.

INFANTS.

ACTIONS.

Defense Without Guardian. Judgment may not be rendered against a minor in the absence of a defense by a guardian. The entry of judgment without such defense will be arrested on motion when made within the statutory time after verdict, even though the fact of such minority was not pleaded, but was revealed during the course of the trial, and neither party then asked for the appointment of a guardian. (Sec. 3482, Code, 1897.) *Daggy v. Miller*, 180—1146.

INJUNCTION.

NATURE AND FORM OF REMEDY.

Existence of Other Remedy. One may not resort to injunction when a special remedy is provided for the correction of voidable acts. *Simpson v. Board of Supervisors*, 180—1330.

INSANE PERSONS.

GUARDIANSHIP.

Allowances. Reasonable allowances to guardians ad litem for services rendered in the cause are proper. (Sec. 3485, Code, 1897.) *Steffen v. Berend*, 180—127.

INSURANCE.

CANCELLATION OF POLICY.

Right to Paid-Up Insurance—Deducting Loans. Loans distinctly standing, by agreement, *against a policy* of insurance on

INSURANCE Continued

which two full annual premiums had been paid prior to default in paying premiums, should be subtracted from the net value of the policy at the time of default, and the amount of insurance which the remainder would then buy in the way of paid-up insurance represents the full liability of the company. *Cotnam v. Massachusetts M. L. Ins. Co.*, 180—1141.

AVOIDANCE OF POLICY.

False Representations. Inaccurate representations, made in the good-faith belief that they were true, will not avoid a policy. *Snyder v. National Trav. Ben. Assn.*, 180—1344.

FORFEITURE OF POLICY.

Change of Title—Assignment for Benefit of Creditors. No change of title or interest in insured property is effected by the execution and recording by the insured of a general assignment for the benefit of creditors *without any delivery of said deed to, or acceptance by, the assignee.* *Bartemeier v. Central Nat. F. Ins. Co.*, 180—354.

Additional Insurance—Mistake as to Expiration of Former Policy. The act of taking out insurance from a specified date, on the mutual but mistaken assumption on the part of the insurer and insured that a former policy on the same property but in a different company *expired on said date*, with no intention to effect concurrent, additional or double insurance, instantly works a complete surrender of all rights under the unexpired portion of the former policy, and thus leaves the property with but one insurance thereon, to wit, the new policy. *Magarrell v. American Ins. Co.*, 180—1015.

RISK AND CAUSES OF LOSS.

Accident Insurance—"Accident" Defined. An "accident," within the meaning of a policy insuring against accident, is an event happening without any human agency, or, if happening through human agency, an event which, under

INSURANCE Continued

the circumstances, is unusual and unexpected to the person to whom it happened. *Hanley v. Fidelity & Cas. Co.*, 180—805; *Hatfield v. Iowa St. Trav. Men's Assn.*, 180—39.

Accidental Injury and Sole Cause of Death. Harmonious, consistent and related facts and circumstances may be such as to establish, *prima facie*, (a) that an injury was accidental, and (b) that such injury was the sole cause of death, even though there is no expert medical testimony in support of the latter. *Semmons v. National Trav. Ben. Assn.*, 180—666.

What Constitutes Accident. Evidence reviewed, and held to establish bodily injury through external, violent and accidental means, and that the blindness resulting therefrom occurred within the period of time covered by the contract. *Matheson v. Iowa State Trav. Men's Assn.*, 180—1019.

Cause of Death—Direct Versus Expert Testimony. Evidence reviewed, and held that the manner in which one was injured, and what happened to the injured party immediately thereafter, as described by an interested eyewitness, made a *prima-facie* showing of death from accident, which was not overcome, as a matter of law, by a strong array of adverse expert testimony tending to show death from disease. *Hatfield v. Iowa State Traveling Men's Assn.*, 180—39.

Health and Accident—"Illness Within 30 Days," Construction.
9 On the issue whether illness began "within 30 days from the date of a policy" of health insurance, illness following a surgical operation performed *after* said 30 days will not be held to be a continuance of the illness following a surgical operation *within* said 30 days, from which latter operation the patient had apparently fully recovered, even though the physical condition which necessitated the last operation existed when the first operation was performed. *Snyder v. National Trav. Ben. Assn.*, 180—1344.

NOTICE AND PROOF OF LOSS.

Waiver—Evidence. A waiver of formal proofs of death is shown by evidence that, promptly following the death of deceased, the beneficiary repeatedly requested the company

Insurance Continued

to furnish the necessary blanks, and was refused, the company taking the exclusive position that deceased died of disease, and not of accident, as provided in the policy. *Hanley v. Fidelity & Cas. Co.*, 180—806.

Actions on Policies.

Accrual of Action. A cause of action on an accident policy
11 of insurance accrues on the expiration of 40 days from the date on which the insured *actually gives notice and proofs of loss*. (Sec. 1744, Code Supplement, 1913.) *Matheson v. Iowa State Trav. Men's Assn.*, 180—1019.

Negligent Failure to Issue Policy—Evidence. Evidence reviewed,
12 in an action for negligence in the non-issuance of a policy of accident insurance, and, in view of the short time elapsing between the making of the application and the injury of the applicant, and the further fact that payment of the required first premium was not made to an alleged agent until less than two days prior to said injury, held not to establish the negligence charged. *Glendy v. National Trav. Ben. Assn.*, 180—572.

MUTUAL BENEFIT—CONSTRUCTION OF CONTRACT.

Warranties and Representations. Statements and answers in an
13 application for insurance will not be treated as technical warranties, even though repeatedly stated to be such. (a) when, from their very nature, they are necessarily expressions of opinions, and (b) when, elsewhere in the contract, there can be found reason to suppose that such was not the clear understanding of the parties. In such case, the warranty is simply of the applicant's good-faith opinion. So held as to statements as to the physical condition of the insured, and as to the nonexistence of tubercular disease. *Murray v. Brotherhood of Am. Yeomen*, 180—626.

Representations and Warranties. On the issue of applicant's
14 good faith in making representations in an application for insurance, evidence of what applicant had been told concerning the subject matter of the representation may be admissible. *Held*, evidence competent that applicant, who had represented that her brother had died of lead poison-

INSURANCE Continued TO INTEREST

ing, had been informed, prior to the making of the representation, that the doctors had so diagnosed the brother's malady. *Murray v. Brotherhood of Am. Yeomen*, 180—626.

Amendments to By-Laws—Notice to Member. A member of a mutual benefit society may not complain, in the absence of allegation and proof of fraud, that his attention was not called to amendments to the constitution and by-laws adopted shortly before he became a member. *Hunt v. Iowa State Traveling Men's Assn.*, 180—434.

Amendments to By-Laws and Constitution. The force and effect of a reasonable amendment to the by-laws and constitution of a mutual benefit insurance association, duly adopted prior to a member's becoming such, are not obviated by the fact that, at the time of delivering a certificate to such member, the association also delivered to him a copy of its by-laws and constitution which did not show said amendment, no fraud or estoppel being pleaded. *Hunt v. Iowa State Traveling Men's Assn.*, 180—434.

Prior Existence of Disease—Evidence. The confidential report of an insurer's expert medical examiner, preliminary to the issuance of a policy of insurance, in which he recommended applicant as a fit subject for insurance and made no mention of any disease affecting the applicant, is quite persuasive proof that no disease existed. *Murray v. Brotherhood of Am. Yeomen*, 180—626.

INTEREST.

UNLIQUIDATED DEMANDS.

When Allowable. Whether interest is allowable on an unliquidated demand depends largely (a) upon the nature of the liability and (b) upon the defendant's duty in the premises. *Held*, in an action for damages for breach of an implied covenant for quiet enjoyment, that the lessee was entitled to interest on the damages from the time they accrued. *Cohen v. Hayden*, 180—232.

INTOXICATING LIQUORS

TO

JUDGMENT

INTOXICATING LIQUORS.**ABATEMENT AND INJUNCTION.**

Judgments—Life of Lien on Real Estate. A judgment for fine and costs in an intoxicating liquor prosecution necessarily ceases to be a lien on the defendant's real estate *at the expiration of the life of the judgment*, to wit, 20 years from the date thereof, irrespective of the declaration in Section 2422, Code, 1897, that such a judgment shall act as such lien "until paid." *Payette v. Marshall County*, 180—660.

JUDGMENT. See **INFANTS; INTOXICATING LIQUORS.****ON MOTION.**

Judgment on Pleadings, Etc.—When Allowable. Motions for
1 judgment (a) on the pleadings and (b) on matters of record properly before the court (while not to be encouraged) are allowable when defendant has fully pleaded all matters relied upon as a defense, and when a demurrer will not lie because of the fact that the said record matters are not embraced in the pleadings. *Tewksbury v. Title Guar. & Surety Co.*, 180—1350.

ENTRY OF JUDGMENT.

When Judgment Exists. Principle recognized that no judgment
2 can exist until the same is entered on the record book. *Cooley v. Ayres*, 180—740.

AMENDMENT, CORRECTION, ETC.

Incomplete Record. Principle recognized that, if the entry of
3 a judgment upon the record book is incomplete, the court has authority to order a correction. *Drake v. Brickner*, 180—1166.

CONCLUSIVENESS.

Pendency of Motion to Set Aside. It is futile to attempt to rely
4 on a judgment as a final adjudication so long as direct proceedings are pending to set it aside. *Main v. Kick*, 180—50.

JUDGMENT Continued TO JUSTICES OF THE PEACE

Unborn Children. The *contingent* interest of *unborn* children
5 in real estate may be validly cut off by a judgment in a
good-faith action to quiet title. For instance, if all living
children who are interested in the property are brought
before the court, and they have identically the same in-
terest which an after-born child would have, then a decree
that the living children have no interest is binding on un-
born children, on the necessary theory that, in said action,
the living children represent the unborn. *Buchan v. Ger-*
man American Land Co., 180—911.

Interested Non-Party Aiding Defense. One is not bound, by the
6 judgment in an action to which he is not a party, by the
fact that he (a) actively interests himself in such action
on behalf of one of the parties thereto, and (b) is directly
interested in a property way in the litigated subject mat-
ter. *Coleman v. Bosworth*, 180—975.

Non-Modification by Collateral Record. The date of a judgment
7 may not be controlled by a collateral record relating there-
to. *Cooley v. Ayres*, 180—740.

LIEN.

Loss of Lien—Subsequently Acquired Real Property. Judgments
8 are, by statute, liens on the real estate of the judgment de-
fendant only during the ten years following the date of the
judgment. It necessarily follows that real estate owned by
the defendant at the expiration of said ten years, or subse-
quently acquired and later passed to heirs under the laws
of inheritance, is wholly beyond the reach of said judg-
ment. (See Sec. 3891, Code, 1897) *Payette v. Marshall*
County, 180—660.

JUSTICES OF THE PEACE.

WRIT OF ERROR.

Return—Non-Responsiveness—Procedure. A non-responsive re-
turn by a justice of the peace to a writ of error and the affi-
davit accompanying the same should be met by an order of
court compelling an amended return, even, if necessary, to
the certification, in accordance with the truthful recollec-

JUSTICES OF THE PEACE Continued TO

LIBEL AND SLANDER

tion of the justice, of the evidence taken before the justice.
(Sec. 4574, Code, 1897.) *Rothert v. Chicago, R. I. & P. R.*
Co., 180—328.

LANDLORD AND TENANT.**LEASES.**

Fraudulently Induced Leases—Measure of Damages. The measure
1 of damages for fraudulently inducing a lease of lands by
false representations as to its condition is the difference
between the rent reserved and the value of the use of the
premises had the lands been in the condition represented.
Franke v. Kelsheimer, 180—251.

PREMISES, AND EMPLOYMENT AND USE THEREOF.

Covenant for Quiet Enjoyment. A covenant for quiet enjoy-
2 ment, even in the absence of the word "devise," etc., is
implied in every mutual contract of leasing. *Cohen v. Hay-*
den, 180—232.

Quiet Enjoyment Covenant—Breach. It is no defense to an ac-
3 tion for breach of an implied covenant in a lease for quiet
enjoyment that the lessee knew when the lessor executed
the lease that an action for the partition of the property
was then pending. *Cohen v. Hayden*, 180—232.

LARCENY.**SUBJECTS OF LARCENY.**

Check Obtained by Duress and Fear. A check obtained from
the maker by duress, fear and compulsion, is a subject of
larceny. (Sec. 4831, Code, 1897.) *State v. Wegener*, 180—
102.

LIBEL AND SLANDER.**ACTIONABLE PUBLICATION.**

Malice and Defamation. An allegation that defendant pub-
1 lished a named writing (a) maliciously, (b) of and con-

LIBEL, AND/SLANDER Continued TO

LIENS

cerning plaintiff, (c) in a named defamatory sense, and (d) falsely, states a good cause of action for libel, irrespective of the literal language of said writing. (Sec. 3592, Code, 1897.) *Codner v. Central Cr. Rating Agency*, 180—105.

PRIVILEGED COMMUNICATIONS.

Malice—Effect. Actual malice destroys qualified privilege. *Codner v. Central Cr. Rating Agency*, 180—188.

ACTIONS.

Instructions—Imputation of Theft. A defendant in an action for slander is adequately protected by an instruction to the effect that, even though he spoke the words charged, no recovery could be had if he did not intend to impute the crime charged by the pleadings. *Manning v. Meade*, 180—932.

Evidence—Sufficiency. Evidence reviewed, and held sufficient to support a verdict for plaintiff. *Manning v. Meade*, 180—932.

Damages—Excessiveness. The legal presumption that damages follow the speaking of words which impute a charge of theft will not, *alone and of itself*, sustain a verdict of \$2,500. *Manning v. Meade*, 180—932.

LIENS.

STATUTORY LIENS.

Automobile Repairs. Whether one has a lien, under Section 3130, Code, 1897, on an automobile for repairing the same, *quære*. *Duffy v. Hardy Auto Co.*, 180—745.

FORFEITURE.

Bailment for Repairs—Excessive Claim. Claiming, in good faith, a lien on an article for repairs, in an amount in excess of what is ultimately found to be due, does not work an entire forfeiture of the lien. *Duffy v. Hardy Auto Co.*, 180—745.
Vol. 180 1A.—92

LIMITATION OF ACTIONS

LIMITATION OF ACTIONS.

APPLICABILITY OF STATUTE.

State and Municipalities—Nominal Appearance—Strictly County

- 1 **Matters.** The State, when appearing in a purely nominal capacity, and a municipal corporation, when appearing simply as the representative of the people of such corporation, are not exempt from the operation of the statute of limitation. So held as to a county (with intervention by the State) seeking to collect an obligation due the temporary school fund of the county. *Payette v. Marshall County*, 180—560.

INJURIES TO PERSON.

Defective Bridge—Notice—Sufficiency. An action for injury to

- 2 the person on account of a defective road, bridge, etc., is barred in three months from the time the action accrues, unless the written notice, which is designed to extend said period to two years, specifies the time of the injury. So held where the notice stated the place and circumstances but not the time of the injury. (Sec. 3447, Par. 1, Code Supp., 1913.) *Howe v. Sioux County*, 180—580.

Defective Bridge—Insufficient Notice. The good-faith act of the

- 3 board of supervisors in investigating and rejecting a claim for personal injury on account of a defective bridge, does not estop the county, when sued on the claim, to plead the insufficiency of the written statutory notice which was served on the county, and which was designed to prevent the bar of the claim after the expiration of three months from its accrual; neither will the county's right to a sufficient notice be waived by such investigation and rejection. *Howe v. Sioux County*, 180—580.

COMPUTATION OF PERIOD.

Contract Without Time for Performance. The statute of limita-

- 4 tions, on a contract calling for the performance of a specified act without designation as to time of performance, will commence to run only from the time the one obligated repudiates the contract. *Chaney v. Murphy*, 180—716.

MALICIOUS PROSECUTION TO MASTER AND SERVANT
MALICIOUS PROSECUTION.

CIVIL ACTION.

Bankruptcy Proceedings Against Firm. Maliciously and without probable cause filing a petition in bankruptcy against a *partnership firm only*, with no seizure or threatened seizure of the individual property of the members of the partnership, affords no basis for an action for damages in favor of an individual member of the partnership, even though the petition alleged the names of such members. *Peterson v. Perego & Moore Co.*, 180—325.

MANSLAUGHTER. See HOMICIDE.

MASTER AND SERVANT.

SERVICES AND COMPENSATION.

Contract Providing for Compensation—Quantum Meruit. An allegation that services for which recovery is sought were rendered under a contract *which specified the compensation receivable*, does not necessarily exclude evidence of the reasonable value of the services. *Murphy v. Williamson*, 180—291.

Non-Severable Contract—Breach—Measure of Damages. A breach by a master of a non-severable contract of employment arms the servant with the right to recover the *reasonable value* of the services already performed, irrespective of the compensation provided by the breached contract. *Murphy v. Williamson*, 180—291.

LIABILITY FOR INJURIES TO SERVANT.

Place for Work—Scaffolds—Directions to Use. Consent on the part of a vice-foreman that a servant might “use” a certain plank may not, under the circumstances attending the consent, amount to an express or implied direction to the servant to go upon the plank in its then condition and use it as a platform. *Wood v. Minneapolis & St. L. R. Co.*, 180—223.

Tools, Etc.—Evidence of Repairs Subsequent to Injury. A master who contends that an instrumentality was in good re-

MASTER AND SERVANT Continued

pair before, at the time of, and after, an accident, thereby voluntarily creating an issue as to its condition after the accident, may not complain (a) that the injured servant, for the sole purpose of showing the actual condition at the time of the accident, and not for the purpose of showing negligence, was permitted to counter with testimony that the master repaired the said instrumentality on the day following the accident; and (b) that the court specifically instructed the jury to consider such testimony for said purpose of determining the condition of such instrumentality at the time of the accident. *Beck v. Beck Coal & Mining Co.*, 180—1.

Warning Servant—Obvious Dangers. Principle recognized that
5 there is no duty to warn when the danger is obvious. *Wood v. Minneapolis & St. L. R. Co.*, 180—223.

Use of Instrumentality Furnished by Independent Fellow Servant.

6 Liability of a master may not be predicated on the act of a servant in using, without the express or implied direction of the master, an instrumentality known by the servant to have been supplied by another fellow servant solely for the independent, separate and temporary use of the latter. *Wood v. Minneapolis & St. L. R. Co.*, 180—223.

Contributory Negligence—Working According to Direction of

7 **Master.** It requires a very clear case of danger so imminent or so great that the court will say, as a matter of law, that the servant is chargeable with contributory negligence in operating an instrumentality which he knows is out of repair, when the master, after learning of its defective condition, directs the servant to continue its use. *Beck v. Beck Coal & Mining Co.*, 180—1.

Contributory Negligence—Custom. The particular manner in

8 which servants, *other than plaintiff*, did a certain thing, may be admissible, not to bind the master to a negligent custom, but as bearing solely on the question whether the injured servant was guilty of contributory negligence. *Beck v. Beck Coal & Mining Co.*, 180—1.

MECHANICS' LIEN TO MUNICIPAL CORPORATIONS
MECHANICS' LIEN. See **CONTRACTS**, 11.

MUNICIPAL CORPORATIONS.

TERRITORIAL ADDITIONS.

Statutory Plats—Council may not Refuse to Approve. A city
1 council has no discretion in the matter of approving a plat
of an addition to the city, when such plat is in full compli-
ance with the law. Secs. 914 to 916, Code, 1897. So held
where the council demanded, as a condition to its approval,
that the owner safeguard the city by bond against expendi-
tures which it might be compelled to make in the way of
grading streets, etc. *Carter v. City Council of Council*
Bluffs, 180—227.

PROCEEDINGS OF COUNCIL.

Special Meetings—Notice. Proceedings of a city council at a
2 special meeting are not rendered invalid by the failure to
serve one member with notice of the meeting when such
member was in favor of the proposition as finally adopted
by the council, left the city with full knowledge that said
meeting would be called, and at the time of the meeting
was in a distant state. *Rafferty v. Town Council*, 180—1891.

OFFICERS, AGENTS, AND EMPLOYEES.

Services by Officers—Recovery. A city or town officer may not
3 perform services for the municipality outside his official
duties and legally recover therefor, even though, in perform-
ing such services, he acted in the utmost good faith. (Sec.
872-q, Code Supp., 1913.) *Peet v. Leinbaugh*, 180—937. See
Polk County v. Parker, 178—936.

Reimbursing Officer—Criminal Acts. The discretionary power
4 of the governing body of a municipal corporation to reim-
burse its officers for expenses incurred while such officers
were lawfully and in good faith acting in the interest of
the municipality, does not embrace the power to reimburse
one of its officers for expenses incurred in attempting, in a
civil action, to retain money unlawfully and criminally ob-

MUNICIPAL CORPORATIONS Continued

tained from the municipality, even though the officer, in the original receipt of the money, personally acted in good faith, and did not realize that he was committing a crime. *Peet v. Leinbaugh*, 180—937.

PUBLIC IMPROVEMENTS.

Assessments—“Abutting” and “In Front of” as Synonymous.

5 Principle recognized that, in the assessment of property for public improvements, the terms “abutting” and “in front of” are synonymous. *Northern Light Lodge v. Town of Monona*, 180—62.

Assessments—What Constitutes Abutting Property. A tract of

6 land “abuts” upon a street only where such property and street have a boundary line in common; and, where a tract of land has been lawfully platted into smaller lots for reasonable and proper purposes, only such lots as have one of their boundary lines in common with the line of the street can be said “to abut” on such street. So held as to a tract of land divided into cemetery lots, the occasion of the holding being an attempt to assess the entire tract for the cost of a permanent sidewalk. (See Section 779, Code Supplement, 1913.) *Northern Light Lodge v. Town of Monona*, 180—62.

Assessments—Assessments Against Cemeteries. Whether ceme-

7 teries are impliedly exempt from special assessments for public improvements, *quære*. *Northern Light Lodge v. Town of Monona*, 180—62.

Assessments—“Frontage” as an Element. “Frontage” may very

8 properly be taken into consideration as one of the elements bearing on benefits. *Snyder v. City of Belle Plaine*, 180—679.

Assessments—Front-Foot Rule Levy. The presumption that an

9 assessment of benefits for a public street improvement is according to benefits received is not overcome by evidence that consideration of the so-called front-foot rule was not wholly disregarded. *Snyder v. City of Belle Plaine*, 180—679.

Assessments—Identical Amounts on Small and Large Tracts. It

10 may not be presumed, from the mere fact that two separate

MUNICIPAL CORPORATIONS Continued

tracts of materially different areas are assessed in the same amount, that such assessment is inequitable, and not according to benefits. *Snyder v. City of Belle Plaine*, 180—679.

Assessments—Distribution of Excess Costs. An assessment of
11 benefits for a public street improvement is not necessarily limited to the cost of the improvement in front of the lot assessed. It follows that, if the cost of an improvement in front of a specified lot or lots is in excess of the special benefits, or is in excess of 25 per cent of the value of the lot, such excess need not be paid out of the general fund of the city if such excess can, by an equitably apportioned assessment, be so distributed among other lots within the improvement that no lot will bear an assessment in excess of the special benefits received, or in excess of 25 per cent of the value thereof, even though, by such assessment, some lots may be compelled to bear a burden exceeding the cost of the improvement fronting thereon. (Secs. 792-a, 792-b, Code Supplement, 1913.) *Snyder v. City of Belle Plaine*, 180—679.

Assessments—Injunction to Restrain Collection. Injunction to
12 restrain the collection of a special assessment for the cost of a public improvement will lie *when there is a total lack of jurisdiction to levy any assessment*. *Northern Light Lodge v. Town of Monona*, 180—62.

Permanent Sidewalks—Procedure. A permanent sidewalk, con-
13 structed under Section 779, Code Supplement, 1913, is not a "public improvement" within the meaning of Section 792 *et seq.* (Title V, Chap. 7), Code, 1897, governing the construction of paving, sewers, etc. It follows that such sidewalks may be constructed and valid assessments for the cost thereof made without pursuing the procedure provided for the construction of paving, sewers, etc. *Northern Light Lodge v. Town of Monona*, 180—62.

Tracks on Paved Street—Reimbursement of Property Owners. A
14 street railway company which, under franchise, lays its tracks upon a paved street, prior to any legal proceedings by the city to repave the street, and in so doing replaces, in accordance with the franchise, the old pavement in the space between its rails and one foot outside thereof with a

MUNICIPAL CORPORATIONS Continued

new pavement, becomes obligated to pay the city, for refund to the abutting property owners, the reasonable value of the old pavement removed, even though, *following* the laying of the tracks, the city did proceed to repave said street; and especially is this true when the necessity for repaving was traceable, in some degree, to the damages done to the old pavement by the company in laying its tracks. (Sec. 835, Code Supp., 1913.) *Cedar Rapids & M. C. R. Co. v. City of Cedar Rapids*, 180—567.

Assessment—Appeal—Non-Approval of Bond. Filing appeal
15 bond in proper amount, but without securing the approval thereof, as required by Sec. 839, Code, 1897, is not sufficient to maintain the appeal. *McCord v. City of Cherokee*, 180—448.

DEFECTS, ETC., IN STREETS.

Notice of Injury—Specification of Negligence. The "notice of
16 injury" on account of defective streets, etc., required by Sec. 3447, Par. 1, Code Supplement, 1913, in order to permit the bringing of the action after the expiration of three months, need not specify wherein the municipality was negligent. Therefore, the pleadings as to negligence are not controlled by such notice. *Rose v. City of Fort Dodge*, 180—331.

Icy Condition—Question for Jury. Evidence that an accumula-
17 tion of ice on a public sidewalk was "slippery" and "smooth" and "slick" does not, as a matter of law, show that the condition was solely a climatic one, there being evidence that the ice was "rough" and "humpy." *Rose v. City of Fort Dodge*, 180—331.

Icy Condition—Cause. Evidence reviewed, and held to justify
18 the jury in finding that the condition which caused plaintiff's fall was due, not to a thawing of snow and ice, followed by sudden freezing, but to the negligence of the city in permitting the snow and ice to become, by reason of traffic, rough and uneven. *Rose v. City of Fort Dodge*, 180—331.

Authorization by City—Effect. The erection of obstructions in a
19 public street, under license or permission of the municipal-

MUNICIPAL CORPORATIONS Continued to

NEGLECT

ity, does not necessarily render the erector immune from an action for damages for maintaining a nuisance. So held as to telephone guy wires, so constructed as to discommode the public. (Sec. 2159, Code, 1897.) *Erickson v. Town of Manson*, 180—378.

NEGLECT. See ACTIONS; HIGHWAYS, 5; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; PHYSICIANS AND SURGEONS; RAILROADS.

ACTS OR OMISSIONS CONSTITUTING.

Unguarded Electric Power Wires. The court may not say, as a
1 matter of common law, that an electric power company was not negligent in failing to insulate or otherwise guard its power wires from contact with other wires lawfully constructed in the same vicinity, even though the power company could not, in all cases, foresee in specific detail the way or manner in which other wires might come in contact with such power wires. Former holdings, disapproving the so-called doctrine of "reasonable anticipation" in case of torts, reaffirmed. *Toney v. Interstate Power Co.*, 180—1362.

Unguarded Electric Wires. Unguarded electric light or power
2 wires along public highways constitute negligence *per se*. (Section 1527-c, Code Supplement, 1913.) Applied where a telephone wire slipped from the hands of a lineman, sprang back, and, unknown to the lineman, was, before it struck the ground, carried over and in contact with an un-insulated or otherwise guarded electric power wire. *Toney v. Interstate Power Co.*, 180—1362.

Electricity—Common-law and Statutory Obligations. The com-
3 mon-law obligation to provide reasonable protection against dangers from electric wires, and the statutory obligation to provide specified guards, apply to wires carrying any kind of electricity, "static" as well as that generated for light or power purposes. *Toney v. Interstate Power Co.*, 180—1362.

Jury Question. Where a circuit breaker was installed in an
4 electric power plant and automatically opened when the line was grounded, held to be a jury question whether the serv-

NEGLIGENCE Continued

ant in charge was negligent in closing it when it opened at the time in question. *Toney v. Interstate Power Co.*, 180—1362.

Trespassers and Licensees—Condition and Use of Land, Etc. A
5 telephone lineman engaged in repairing a telephone line on premises over which the line extended, is neither a trespasser nor a mere naked licensee—at least not in such sense that an electric power company owes him no duty with reference to its near-by power wires. *Toney v. Interstate Power Co.*, 180—1362.

Inadvertent Mixing of Oils—Evidence. Evidence quite closely
6 analyzed, and held to present a jury question on the issue whether defendant oil company, in delivering oil to a customer, had placed gasoline in a tank intended for kerosene only, and was therefore guilty of negligence. *Anderson v. Standard Oil Co.*, 180—1054.

Attractive Agencies—Turntables. Maintaining an unlocked and
7 unguarded railway turntable at a place where it may attract, and for a space of some two years has attracted the attention of children, and enticed them to play on and about the same, with the express or implied knowledge of the company so maintaining, presents a jury question on the subject of negligence, even though the turntable was located 400 feet outside the platted portion of a city and abutted upon farm lands with no buildings thereon. *Taylor v. Minneapolis & St. L. R. Co.*, 180—702.

Attractive Nuisance—Unloading Menagerie. Negligence may not
8 be pronounced on the mere act of unloading a menagerie from railway cars in proximity to a schoolhouse. *Carlisle v. Sells-Floto Shows Co.*, 180—549.

Absence of Barricades and Warnings—Self-Evident Dangers.
9 Omitting barricades and warnings furnishes no basis for a charge of negligence, when the dangers sought to be guarded against are equally evident to everybody. *Carlisle v. Sells-Floto Shows Co.*, 180—549.

Obstructing Street with Circus—Evidence. Unloading, under mu-
10 nicipal license, a circus and attending paraphernalia in a

NEGLECT Continued

public street, does not necessarily constitute a public nuisance, under Section 5078, Code, 1897. *Carlisle v. Sells-Floto Shows Co.*, 180—549.

Menagerie on Public Street—Odor of Animals—Fright of Teams.

- 11 Taking a lawful thing upon a public street, with a degree of care commensurate with the danger, excludes all basis for a charge of negligence, even though the thing so taken upon the street is liable to frighten horses thereon. So held as to a licensed menagerie, in brilliantly painted wagons and flapping canvas, with an odor from the animals which was calculated to frighten horses. *Carlisle v. Sells-Floto Shows Co.*, 180—549.

Acts not Negligent Per Se—Necessity for Evidence.

- 12 An act not negligent *per se* may not, manifestly, be denominated negligence, unless accompanied by evidence so showing. So held where negligence was sought to be predicated on the flapping of canvas on circus wagons, but the record revealed no evidence beyond the naked fact that there was a high wind. *Carlisle v. Sells-Floto Shows Co.*, 180—549.

Automobile Accident—Failure to Give Signals.

- 13 Failure of the driver of an automobile to give a warning signal on approaching another vehicle from the rear is not negligence when there was no apparent necessity for such warning until practically the instant of collision. *Bishard v. Engelbeck*, 180—1132.

Inspection of Dangerous Place—Jury Questions.

- 14 The adequacy of inspections of a known dangerous place of work, and not the number of inspections, is the material inquiry on the question whether the master was negligent because of a failure to adequately inspect; therefore, repeated inspections by the master, just prior to an accident, of an admittedly treacherous mine entry roof, do not necessarily establish the master's freedom from negligence. *Ahlson v. High Bridge Coal Co.*, 180—302.

Automobile Accident—Evidence.

- 15 Evidence attending the death of a boy by being hit by an automobile reviewed, and held insufficient to show any negligence on the part of the driver

NEGLIGENCE Continued

in operating the car or giving warning signals. *Bishard v. Engelbeck*, 180—1182.

Evidence—Sufficiency—Automobile Accident. Evidence reviewed, 16 and held sufficient to establish the negligence of the driver of an automobile in running over a party who had been thrown from a buggy on account of the prior negligence of another party. *Daggy v. Miller*, 180—1146.

PROXIMATE CAUSE.

When Negligence Per Se Is Immaterial. The doing of that which 17 is negligence *per se* becomes immaterial when in no wise the cause of an accident. So held where the court refused to receive evidence to show that defendant's motor cycle was not equipped with horn, bell or other warning device, as required by Section 1571-m17, Code Supplement, 1918, and also refused to instruct relative thereto, because, concededly, both parties were fully aware of the presence of the other at a time long anterior to the collision. *Schultz v. Starr*, 180—1319.

Prior Interrupted Cause—Jury Question. Proximate cause of an 18 injury is that cause which is the *nearest, most direct, and immediate* cause, and as to which it may be said that, had such cause not occurred, the injury would not have happened. And such question is ordinarily for the jury. *Beck v. Beck Coal & Mining Co.*, 180—1.

CONTRIBUTORY NEGLIGENCE.

When Question of Law. Contributory negligence becomes a 19 question of law only in those exceptional cases where the want of care of the injured party is so manifest and flagrant as to at once convince all fair and candid minds that he did not exercise the caution for his own safety which marks the conduct of ordinarily prudent men. *Toney v. Interstate Power Co.*, 180—1362.

Knowledge of Danger—Distracted Attention. The court cannot 20 pass the sentence of guilt of contributory negligence upon the action of one with attention distracted in running against a guy wire in a public street, of the existence of

Neelgrouse Continued

TO

NEW TRIAL

which wire he had no knowledge. Erickson v. Town of Manson, 180—378.

IMPUTED NEGLIGENCE.

Common Enterprise—Automobile Accident. The owner of an au-
21 tomobile and his minor son as driver, while returning to
their home from a visit to a city, are engaged in a common
enterprise, and the negligence of the son in operating the
car will be imputed to the father, even though the father
was passive, and did not assume to exercise his presumed
control and dominion over the car. *Daggy v. Miller*, 180—
1146.

ACTIONS.

Pleading—Enumerating Grounds of Negligence—Effect. One who
22 enumerates specific grounds of negligence must stand or fall
thereon. *Snearly v. McCarthy*, 180—81.

Evidence—Statements of Mine Foreman. Statements of a mine foreman to his subordinate employee as to the reason for delaying the timbering of the entry to a mine do not constitute a mere admission of an agent, but may tend to show negligence on the part of the master, in that the master "took chances" on the falling of a known dangerous roof. *Ahlson v. High Bridge Coal Co.*, 180—302.

NEW TRIAL.

GROUNDS.

Newly Discovered Evidence—Impeaching Evidence. Newly discovered *impeaching* evidence is not grounds for new trial. *Mehlich v. Mable*, 180—450.

Newly Discovered Evidence—Diligence. The findings of the trial court on conflicting affidavits as to diligence in discovering new evidence, have the force and effect of the verdict of a jury. *Hanley v. Fidelity & Cas. Co.*, 180—805.

Excessive Verdict. Verdicts for \$8,500, \$2,500, and \$5,000, all 3 for personal injuries sustained. *Toney v. Interstate Power*

PARTIES Continued

TO

PARTNERSHIP

though such non-joined parties had originally been made parties defendant. *Tewksbury v. Title Guar. & Surety Co.*, 180—1850. .

PARTITION.

DISPOSITION OF PROCEEDS OF SALE.

Share of Absentee—Adjudication as to Death. An order turning over partitioned property to a duly appointed trustee to be held for an absentee does not work a constructive delivery to such absentee and an adjudication that he was not then dead, when the order and the proceeding relating thereto demonstrate that the interest of the absentee was treated as contingent (depending on whether he was then alive), and when the court at no time assumed to determine whether said absentee was alive or dead. (See Sec. 4243, Code, 1897.) *Haddock v. Meagher*, 180—264.

PARTNERSHIP.

CREATION AND REQUISITES.

Profits and Losses. A sharing of profits and losses is necessary
1 to the creation of a partnership. *Francis v. Francis*, 180—1191.

AS TO THIRD PERSONS.

Ostensible Partner—"Holding Out." One who has never held
2 himself out as the partner of another, and who, when he learned that he had been falsely held out by such other as such partner, promptly sought out such other and repudiated such holding out, and received a promise that such holding out would cease, is, *nothing else appearing*, under no legal or moral duty to give further publicity to his repudiation. *Anfenson v. Banks*, 180—1066.

Partnership by Estoppel—Burden of Proof. One who seeks to
3 hold another as a quasi partner, on the theory that such other had been held out as a partner, has the burden to show affirmatively: (a) That such other assented to such

PARTNERSHIP Continued

TO

PAYMENT

holding out; or (b) that such other, by negligence so gross as to be tantamount to fraud, permitted such holding out to continue, and that those dealing with the supposed partnership were deceived thereby to their damage. *Anfenson v. Banks*, 180—1066.

Partnership by Estoppel—Hearsay. On the issue of a partnership by estoppel, based on the fact that defendant had been "held out" as a partner, in a circular issued without the authority of the defendant, evidence of what a creditor who had never seen the circular had been told about the circular is inadmissible, unless some culpable act or omission with reference thereto is first brought home to the defendant. *Anfenson v. Banks*, 180—1066.

Partnership by Estoppel—Evidence. On the issue of a partnership by estoppel by reason of the defendant's having been held out as a partner, circulars setting forth that defendant was a partner in the business, though issued without the authority of the defendant, are admissible as tending to show what the creditor relied on in extending credit. *Anfenson v. Banks*, 180—1066.

Third Persons—"Holding Out"—Evidence—Reputation. Evidence that a person is generally reputed to be the partner of another, when in fact no partnership existed, is admissible solely on the one narrow issue whether the party who seeks to establish a partnership by estoppel relied on the reputed existence of such partnership. *Anfenson v. Banks*, 180—1066.

Evidence—Reputation—Knowledge. No one should be held to be under a duty to know that he is reputed to be the partner of another when in truth he does not know such fact, directly or indirectly, and when for the existence of such reputation he is in no manner responsible. *Anfenson v. Banks*, 180—1066.

PAYMENT.

RECOVERY OF PAYMENTS.

Voluntary Payments—Agreement for Return. Funds which legally belong to a public officer, but which are by him turned

PAYMENT Continued	TO	PHYSICIANS AND SURGEONS
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over to the public treasury on demand of the managing authorities, on the claim that such funds belong to the public, may be recovered by the officer making the deposit, when the deposit was made with the express or implied agreement that they should be returned to the officer in the event that the holding of the court as to the ownership of the funds was in the officer's favor. *Burlingame v. Hardin County*, 180—919.

Voluntary Payments—Strict Construction of Rule. Principle recognized that the rule that "voluntary payments made under a mistake of law may not be recovered," will not be stringently applied except in cases coming clearly within the scope of the rule, nor will it be applied in those cases where to so do would clearly work inequitable results. *Burlingame v. Hardin County*, 180—919.

PHYSICIANS AND SURGEONS. See CONTRACTS, 7; EVIDENCE, 8.

MALPRACTICE.

Abnormal Result of Treatment—Justifiable Inference. Injurious results following treatment by a physician when such results do not, as a rule, follow ordinarily careful and skillful treatment, may, in the absence of explanation, justify the jury in finding negligence, even though there be no direct evidence that the physician departed, in the treatment, from the standards of his profession. *Kopecky v. Hasek Bros.*, 180—45.

Essentials of Recovery. In an action for malpractice, it is essential to show:

1. The treatment of lack of treatment.
2. That such treatment or lack of treatment is not regarded as proper *by those skilled in the profession of medicine or surgery.*
3. That injury resulted as the proximate result of such treatment or lack of treatment.

Evidence reviewed, in the case of the reduction of a fractured limb, resulting in long delayed union and shortening of the limb, and held insufficient to establish said essentials. *Snearly v. McCarthy*, 180—81.

PHYSICIANS AND SURGEONS Contd. TO

PLEADING

Inference from Results of Treatment—Expert Testimony. A jury
 3 may not draw the conclusion of unskillfulness solely from proof of the result of the treatment (except perhaps in rare cases of exceptional and gross negligence). In other words, plaintiff may not stop at showing the *treatment* and the *results*, and then have the jury turned loose to set up their own standard as nonexperts as to what is and what is not proper and reasonable method of treatment. *The only recognized standard is essentially within the domain of expert testimony.* *Snearly v. McCarthy*, 180—81.

Failure to Utilize Means at Hand—Evidence. Evidence is admissible, in an action for malpractice, that an X-ray machine was kept in the town where the defendant practiced, and that the use of the same was available to defendant, in connection with evidence that the use of such a machine was the only means by which the condition of the patient with respect to the matter at issue could be determined with certainty. *Ingwersen v. Carr & Brannon*, 180—988.

Exercise of Skill, Etc.—Evidence. A physician or surgeon sued
 5 for malpractice should be permitted to testify that he exercised his best skill and knowledge in the treatment of the patient. *Ingwersen v. Carr & Brannon*, 180—988.

PLEADING.**FORM AND ALLEGATION IN GENERAL.**

Nuisance and Negligence. Nuisance may exist although there
 1 be no negligence; there may be actionable negligence which does not constitute a nuisance; and negligence and nuisance may combine in the same act. Pleading reviewed, and held to predicate liability on both negligence and nuisance. *Erickson v. Town of Manson*, 180—378

Certainty—Basis for Adjudication. A pleading so uncertain as
 2 not to identify the subject matter of the action furnishes no basis for an adjudication. *Koppes v. Koppes*, 180—1268.

AMENDMENTS.

Conforming Pleadings to Proof. To allow amendments which
 3 conform the pleadings to the proofs is clearly within the

PLEADING Continued

discretion of the court. *Toney v. Interstate Power Co.*, 180—1362.

New Defenses. Amendments during trial setting up new defenses are allowable when the opposite party (a) suffers no surprise, (b) does not ask for a continuance, and (c) is not legally prejudiced. *Matheson v. Iowa State Trav. Men's Assn.*, 180—1019.

Permissible in Order to Cure Careless Oversight. An amendment may be permitted in order to cure an oversight due to the negligence of the pleader. *Hanley v. Fidelity Cas. Co.*, 180—805.

Related Amendments. Amendments setting up new claims and issues, filed *subsequently to the overruling of a motion for a new trial*, without the express or implied authorization of the court, and without the knowledge or consent of opposing counsel, are wholly unauthorized and properly stricken on motion. *Carlisle v. Sells-Floto Shows Co.*, 180—549.

When Properly Rejected. An amendment is properly rejected which is offered at the close of all the evidence, and which, if allowed, would not be supported by the evidence. *Higby v. Bahrenfuss*, 180—316.

Dictating into Trial Record. An amendment, dictated to the reporter and entered in the shorthand notes of the trial without objection by the other party, has the same standing as one made on separate paper, as required by Sec. 2603, Code, 1897. *Calhoun v. Robinson*, 180—538.

MOTIONS.

Motion to Strike—Negligent Delay. A delay of some four months in moving to strike an unauthorized pleading will not be considered dilatory, when counsel, until the expiration of said time, had no reasonable occasion to know that such a pleading had been filed. *Carlisle v. Sells-Floto Shows Co.*, 180—549.

PLEADING Continued TO PRINCIPAL AND AGENT
ISSUES, PROOF, AND VARIANCE.

Matters to Be Proved—Conclusion Denials. An allegation that
10 a cause of action has been assigned to plaintiff, accompanied by undenied fact allegations sufficient to *prima facie* establish such assignment, is not put in issue by a naked allegation that defendant has no knowledge or information relative thereto sufficient to form a belief, and therefore denies the same. *Tewksbury v. Title Guar. & Surety Co.*, 180—1350.

PRESUMPTIONS. See APPEAL AND ERROR, 1, 22, 23; CARRIERS, 6; DEATH, 1, 2; DRAINS, 4; EVIDENCE; GRAND JURY.

PRINCIPAL AND AGENT.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Authority—Prima-Facie Showing. The sufficiency of the evidence to show, in a *prima-facie* way, the authority of an
1 agent to act for the principal, depends on the situation and relations of the parties. Evidence reviewed, and held to establish such *prima-facie* authority. *Empire Cream Separator Co. v. Bair, Ferrell & Co.*, 180—375.

Liability of Agent on Contract. Liability of agents on contracts entered into by them, discussed generally. *Cohen v. Hayden*, 180—232.

RATIFICATION.

Physician Called by Bystander—Ratification. One wrongfully
3 injured by another may recover the value of services rendered by a physician called, at the time of the injury, by a bystander on his own motion. The act of attempting to recover therefor is a ratification of the bystander's unauthorized act. *Ahlson v. High Bridge Coal Co.*, 180—302.

Ratification by Principal—Evidence. Evidence reviewed, and
4 held insufficient to show ratification by defendant of the fraudulent acts of an assumed agent. *McCann v. Clark*, 180—274.

PRINCIPAL AND SURETY

TO

PROCESS

PRINCIPAL AND SURETY. See SUBROGATION.**DISCHARGE OF SURETY.****Drainage Bond—Withholding Payment of Estimates—Effect.**

Withholding payment of estimates, as provided in a drainage improvement bond, because of the insolvency of the contractor and breach of contract by him, does not release the surety on the bond. *Wykoff v. Stewart*, 180—949.

PROCESS. See COURTS.**SERVICE.****Non-Essential Recitals.** A return of service of an original notice

- 1 which recites service on the defendant by name, by serving a member of defendant's family, need not again repeat the name of defendant in the recital that defendant was "not found in the county of his residence." *McWilliams v. Robertson*, 180—281.

Overcoming Return. The strong presumption of verity which

- 2 attaches to a return by the sheriff of service of an original notice is only overcome by clear and satisfactory evidence to the contrary. *McWilliams v. Robertson*, 180—281.

Verity—Evidence. The following facts are, in some degree, cor-

- 3 roborative of the truthfulness of a return of service of an original notice:

1. The positive testimony of the officer that he never made a false return.
2. That the notice and copy were delivered to the officer with the addresses of the defendants indorsed thereon, and that the officer went to that address to make service. *McWilliams v. Robertson*, 180—281.

Defendant as Resident of County—Service by Publication. Pub-

- 4 lication service on a defendant who is openly a resident of the county where action is brought, is a nullity. *Main v. Kick*, 180—50.

Service by Publication—Affidavit. An affidavit for service by

- 5 publication which fails to state that service cannot be made

PROCESS Continued TO REFORMATION OF INSTRUMENTS
 on defendant, "*within this state*," is fatally defective. (Sec. 3534, Code, 1897.) *Main v. Kick*, 180—50.

RAILROADS.

LIABILITY ATTENDING OPERATION.

Accidents at Crossings—Negligence—Evidence. A finding of
 1 negligence is justified from evidence that an interurban car was, during the nighttime, run at such a rate of speed over a publicly used and obscured crossing that the car was not under reasonable control, and that said crossing was one customarily used for the taking on and discharge of passengers. *Freidli v. Davenport & Muscatine R. Co.*, 180—387.

Accidents at Crossings—Negligence—Evidence. Evidence re-
 2 viewed, and held to present a jury question: (a) Whether plaintiff, injured on a crossing, was guilty of contributory negligence; and (b) whether defendant was guilty of negligence in operating the car at a high rate of speed. *Fontana v. Ft. Dodge, D. M. & S. R. Co.*, 180—1183.

Injury to Animals—Double Damages—Excessive Demand—Effect.
 3 Double damages, for loss of stock killed or injured by a railway company by reason of failure to fence its track, may not be recovered when claimant, in his written notice of loss, demands damages in excess of the *fair and reasonable value of the stock* as finally determined by the verdict of the jury, even though the company makes no tender of the actual damages. (Section 2055, Code, 1897.) So held where the demand was for \$200 actual damages and the jury found the same to be \$190. *Pierce v. Chicago & N. W. R. Co.*, 180—1385.

REFORMATION OF INSTRUMENTS.

PROCEEDINGS AND RELIEF.

Evidence—Weight and Sufficiency. Reformation of instruments
 1 is granted only when the evidence justifying such reformation is clear, satisfactory, conclusive, and practically beyond a reasonable doubt. Evidence held insufficient. *Dare v. Foy*, 180—1156.

REFORMATION OF INSTRUMENTS *Contd.* TO SCHOOLS AND SCHOOL DISTRICTS

Mistake and Fraud. Evidence reviewed, and held wholly insufficient to show either fraud or mistake in the insertion of a warranty clause in a policy of insurance. *Cabbage v. Standard Fire Ins. Co.*, 180—192.

RESTRAINT OF TRADE. See **CONTRACTS**, 6; **TRADE MARKS AND TRADE-NAMES.**

SALES.

CONSTRUCTION OF CONTRACT.

Delivery—Intent—Conduct of Parties, etc. Evidence, consisting of writings and course of conduct of the parties, reviewed, and held not to show delivery of property to the purchaser. *Kabrick v. Case Threshing Mach. Co.*, 180—598.

MODIFICATION OR RESCISSION OF CONTRACT.

Acceptance—Acts of Ownership—Effect. Acts of ownership, exercised by the purchaser in ignorance that the property would not be delivered to him, are no obstacle in the way of rescission, and recovery of the price paid. *Kabrick v. Case Threshing Mach. Co.*, 180—598.

PERFORMANCE OF CONTRACT.

Inspection Prior to Payment—Assumption of Dominion over Property. Full inspection by vendee of property, prior to paying therefor, as contemplated by an executory contract of sale of property by description, followed by assumption of full dominion thereover by vendee, relieves the vendor of all responsibility as to the goodness, fitness, or quality of the property. *Hoopas & Sons v. F. H. Simpson Fruit Co.*, 180—833.

SCHOOLS AND SCHOOL DISTRICTS.

GOVERNMENT, ETC.

Unlawful Demand for Tuition—Remedy. Relief from an unlawful demand for tuition based on an erroneous finding by

SCHOOLS AND SCHOOL DISTRICTS Contd. to

SPECIFIC PERFORMANCE

the school board that the pupil is a nonresident, must be reached by an appeal to the county superintendent, etc. If said demand is accompanied by an order for the expulsion of the pupil if the tuition be not paid, injunction will lie, especially where a money demand exists for the return of tuition paid under protest. (Sec. 8218, Code, 1897.) *Hume v. Independent School Dist.*, 180—1233.

SELF-DEFENSE. See **HOMICIDE**, 4, 7.

SOLDIERS' PREFERENCE ACT.**DISCHARGE.****Reduction of Salary—Abolition of Position—Bad Faith—Effect.**

- 1 One entitled to a preference in appointment or employment under the Soldiers' Preference Act may be legally deprived of his position (a) by a reduction in salary or (b) by the abolition of the position, *provided such reduction or abolition is not made with the intent to bring about the discharge of the incumbent.* (Sec. 1056-a15, Code Supplement, 1913.) *Babcock v. City of Des Moines*, 180—1120.

Abolition of Office—Bad Faith—Burden of Proof. One entitled

- 2 to a preference under the Soldiers' Preference Act, and suffering a discharge by reason of the abolition of the position held by him, has the burden to show that such abolition was in bad faith,—that is, with the intent to bring about his discharge. *Babcock v. City of Des Moines*, 180—1120.

SPECIFIC PERFORMANCE.**CONTRACTS ENFORCEABLE.****Weakness of Mind—Inadequate Consideration.** Mere weakness

- 1 of mind, unaccompanied by inequitable incidents, is insufficient to defeat the enforcement of an executory contract of sale, when such person has sufficient intelligence to understand the nature of the transaction and is left to act on his own free will. *Held*, contract enforceable, though the one objecting was quite aged, was very eccentric, was, to some extent, afflicted with senile dementia and arteriosclerosis.

SPECIFIC PERFORMANCE Continued to**STATUTES**

though the payments were long extended, and though the land was undersold, in some small degree. *Mitchell v. Mutch*, 180—1281.

Non-Discretion to Deny Relief. A definite, written contract for
2 the sale of lands, on a valuable and adequate consideration, free from fraud, and which may be enforced without hardship on either party, leaves a court of equity with no discretion to deny specific performance. *Mitchell v. Mutch*, 180—1281.

PROCEEDINGS AND RELIEF.

Defects in Title—Waiver by Plaintiff. One may not defeat spe-
3 cific performance by pleading in defense that which plaintiff waives. So held where defendant pleaded that he had rented the land and could not deliver free possession as agreed. *Mitchell v. Mutch*, 180—1281.

STATUTES.**CONSTRUCTION.**

Police Regulation—Application to Prior Construction. A statute
1 requiring insulation or other guards for electric light and power wires applies, in the absence of provisions to the contrary, to lines erected prior to the enactment of the statute. *Toney v. Interstate Power Co.*, 180—1362.

Courts may not Add Conditions. Principle recognized that, when
2 the statute makes specific enumeration of the conditions governing a subject matter, the courts may not impose additional conditions. *Carter v. City Council of Council Bluffs*, 180—227.

Connection of Words. Principle recognized that, in the construc-
3 tion of words and phrases, very much depends on the connection in which the same are used. *Roifs v. Mullins*, 180—472.

SUBROGATION

To

TENANCY IN COMMON

SUBROGATION.**SURETIES.**

Secret Sureties not Entitled to Subrogation. A *secret* surety in a note and mortgage securing the same is not entitled to subrogation to the prejudice of subsequent mortgagees without notice of such secret relation. (Secs. 3779, 3966, 3967, Code, 1897.) *Clark Bros. v. Watson*, 180—721.

TAXATION**TAX TITLES.**

Tax Deed—Insufficient Notice to Redeem—Effect. A tax deed issued on insufficient notice of expiration of right of redemption is a nullity, redemption having been made subsequent to the issuance of the deed. *Main v. Kick*, 180—50.

TELEGRAPHS AND TELEPHONES.**CONSTRUCTION AND MAINTENANCE.**

Discommoding Public—Authorization by City. Telephone guy wires so constructed as to discommode the public, in violation of Sec. 2159, Code, 1897, are actionable nuisances, even though erected under the license or permission of the municipality. *Erickson v. Town of Manson*, 180—378.

TENANCY IN COMMON.**MUTUAL RIGHTS, DUTIES, ETC.**

Mortgagee not Cotenant. A mortgagee of the interest of one
1 tenant in common does not become a tenant in common with the others. It follows that such mortgagee is not bound by and not required to take notice of secret equities existing in favor of another cotenant. *Clark Bros. v. Watson*, 180—721.

TENANCY IN COMMON Continued TO TRIAL.

Contribution. The right of one tenant in common to demand
 2 contribution on account of mortgage liens on the common
 property, arises only after payment has actually been made.
Held, in case at bar, that contribution was, in effect, granted
 by requiring each undivided fractional part of the land
 to be sold for its fractional part of the mortgage. *Clark*
Bros. v. Watson, 180—721.

Sale of Aliquot Part of Undivided Property. Principle recog-
 3 nized that a cotenant, prior to some form of partition, may
 not, as against his cotenants, sell any definite aliquot part
 of the premises. *Waterloo, C. F. & N. R. Co. v. Harris*, 180
 —149.

TRADE-MARKS AND TRADE-NAMES.

UNFAIR COMPETITION.

Sale of Business—Continuance at New Location. The gist of
 "unfair competition" is that the guilty party is expressly
 or impliedly representing that his product is in fact the
 product of another; therefore, one who has sold his busi-
 ness, good will, catalogues, etc., employed therein, without
 restraint in his future activity in the same line of business,
 is not guilty of unfair competition by operating in a new
 location a *separate, new, and independent* business, identi-
 cal in nature with the one sold, and by operating said busi-
 ness by means, in part, of catalogues and circulars intention-
 ally similar in design to those sold, especially when there
 was a time limit on the purchaser's right to use said cata-
 logues, etc., and said time limit had expired. *Dare v. Foy*,
 180—1156.

TRANSACTIONS WITH DECEASED, ETC. See WITNESSES.

TRIAL. See HOMICIDE.

RECEPTION OF EVIDENCE.

Right to Object—Waiver and Estoppel. Permitting testimony of
 1 an alleged fact to be given by one or more witnesses, with-

TRIAL Continued

out objection of any kind, works an estoppel to insist that proof by other competent witnesses to the same fact is immaterial or incompetent. *Stutsman v. Des Moines C. R. Co.*, 180—524.

Objections—Sufficiency. Principle recognized that a general objection to testimony is properly overruled when the testimony is competent for any purpose. *Stutsman v. Des Moines C. R. Co.*, 180—524.

Discretion of Court. Pending a motion for a directed verdict at the close of plaintiff's evidence, the court may allow plaintiff to reopen his case for further testimony. *Dobson v. City of Waterloo*, 180—199.

Questions Failing to Disclose Proposed Evidence. When the form of a question does not disclose (a) what the answer would have been, or (b) whether its exclusion was prejudicial, counsel must disclose what fact he desires or expects to prove, in order to render the objection to its exclusion reviewable. *Glendy v. National Trav. Ben. Assn.*, 180—572.

ARGUMENT.

Legitimate Inferences. Principle recognized that counsel in argument has the right to draw any legitimate inference from the testimony and base argument thereon. *State v. Giudice*, 180—690.

TAKING CASE OR QUESTION FROM JURY.

Directed Verdict—Conflict of Evidence—Assignments. When the evidence on a disputed question of fact is such as would support either one of opposite contentions, a jury question necessarily results. *Bartemeier v. Central F. Ins. Co.*, 180—854.

Inferential Withdrawal of Unsupported Issue—Effect. A wholly unsupported issue should be unequivocally withdrawn from the jury. An inferential withdrawal may not be sufficient, especially when the party adverse to the issue requests a specific withdrawal. *Anfenson v. Banks*, 180—1066.

TRIAL Continued

Hostile Motions for Directed Verdict—Effect. A disputed question of fact need not be submitted to the jury, when counsel, even impliedly, consents to a full and final disposition of the cause by the court. So held where, in a case presenting disputed questions of fact, both plaintiff and defendant moved for directed verdict, where the court then openly assumed the matter to be before him for full decision, and where complainant did not ask that any issue be submitted to the jury. *Murray v. Brotherhood of Am. Yeomen*, 180—626.

Directed Verdict—Overruling Motion—Right to Change Ruling. The overruling of defendant's motion for a directed verdict at the close of plaintiff's evidence is no obstacle to sustaining the same motion at the close of defendant's evidence, when, as a matter of fact, plaintiff's evidence has at no time been sufficient to present a jury question. *Glendy v. National Trav. Ben. Assn.*, 180—572.

Direction of Verdict—Overcoming Prima-Facie Case. Principle recognized that seldom may a defense be made so complete and impregnable as to overcome, as a matter of law, an already prima-facie made case for recovery. *Hanley v. Fidelity & Cas. Co.*, 180—805.

INSTRUCTIONS TO JURY.

Province of Court and Jury—Jury Determining Materiality of Facts. An instruction which permits a jury to determine the materiality of the facts assumed in a hypothetical question, preliminary to determining the value of the opinion expressed thereon, is prejudicial error. *Ingwersen v. Carr & Brannon*, 180—988; *Hanley v. Fidelity & Cas. Co.*, 180—805.

Province of Court and Jury—Assumption of Fact. The court may well assume as true a fact testified to by both plaintiff and defendant. *Dunning v. Burt*, 180—754.

Implied License to Consider Incompetent Testimony. Instructions which limit the incompetency of testimony (which is incompetent on both of two issues) to one issue only, may be prejudicially erroneous, because impliedly leading the jury to infer that such testimony is competent on the remaining issue. *Anfenson v. Banks*, 180—1066.

TRIAL. Continued

Correct But not Explicit—Waiver. If an instruction is correct,
14 as far as it goes, though not as explicit as desired, request
must be made for the more explicit instruction, or the right
thereto, if it exists, will be waived. Especially is this true
when the instruction given is fully as explicit as the plead-
ings. *Dunning v. Burt*, 180—754.

Failure to Define Fraud. Failure to define fraud and to state the
15 elements thereof is not reversible error when the instruc-
tions clearly and accurately stated the law applicable to the
facts; and this is true though complainant objected to said
omission *but presented no instruction covering the point*.
Cedar Rapids Nat. Bank v. Weber, 180—966.

Cautionary—Limiting Purpose of Testimony. Error does not nec-
16 essarily follow a refusal to caution the jury as to the pur-
pose for which certain evidence was received. It will ordi-
narily be presumed that the jury considered the testimony
for the *professed* purpose for which it was offered, and for
no other purpose. *Hanley v. Fidelity & Cas. Co.*, 180—805.

Admitted Counterclaim. A charge which, throughout, treats a
17 counterclaim as admitted, is not insufficient because the
court did not tell the jury that it was admitted in the plead-
ing. *Johnson v. Buckley*, 180—439.

Argumentative Instructions. Argumentative instructions are
18 properly refused. *Stutsman v. Des Moines C. R. Co.*, 180
—524.

Construction as a Whole. The law is not so simple that all of
19 it can be stated in any one sentence or paragraph. *Rose v.*
City of Fort Dodge, 180—331.

Applicability to Pleadings and Evidence. Instructions not ap-
20 plicable to the pleadings and evidence are properly refused.
Stutsman v. Des Moines C. R. Co., 180—524; *Ahlson v. High*
Bridge Coal Co., 180—302.

Applicability—Paraphrasing Allegations of Negligence. It is not
21 error for the court in its instructions to paraphrase the al-
legations of the petition. *Rose v. City of Fort Dodge*, 180
—331.

TRIAL. Continued

Requests Otherwise Covered. Error may not be based on the refusal to give instructions which are otherwise substantially covered by the court's charge. *Schultz v. Starr*, 180—1319.

Objections and Exceptions—Failure to Enter. Failure to except, within three days, to a ruling on a motion, works a complete waiver of all objections to such ruling. (Sec. 3749, Code, 1897.) *Duffy v. Hardy Auto Co.*, 180—746.

Objections—Waiver. Failure to object to instructions when given, especially when counsel's attention was, by opposing counsel, specially drawn to the instruction in question, is a complete waiver of objection thereto. (Sec. 3705-a, Code Supplement, 1913, now repealed.) *Freidli v. Davenport & Muscatine R. Co.*, 180—387; *Schultz v. Starr*, 180—1319.

DELIBERATIONS OF JURY.

Possession of Exhibits. Exhibits need not be sent to the jury room, in the absence of a request for such action, especially where the court, upon admitting them in evidence, stated that they would not be sent out with the jury, and counsel, by silence, acquiesced. (Sec. 3717, Code, 1897.) *Parnham v. Weeks*, 180—649.

VERDICT.

Special Interrogatories—Non-Submission to Counsel. Special interrogatories properly submitted to the jury by the court on its own motion need not be first submitted to counsel for one of the parties, even though counsel for the other party had asked submission of substantially the same interrogatories as given by the court. (Sec. 3727, Code, 1897.) *Liddle v. Salter*, 180—840.

\$8,500. Verdict for \$8,500, for serious and permanent injuries to plaintiff's nervous system, sustained. *Toney v. Interstate Power Co.*, 180—1362.

\$2,500. Verdict for \$2,500 sustained. *Stutsman v. Des Moines C. R. Co.*, 180—524.

TRIAL Continued TO VENDOR AND PURCHASER
\$5,000. Verdict of \$5,000 sustained. *Rose v. City of Fort Dodge*,
29 180—331. See *Soesbe v. Lines*, 180—943.

\$2,500. Verdict for \$2,500 in action for slander held excessive.
30 *Manning v. Meade*, 180—932.

TRUSTS.

RESULTING TRUSTS.

Evidence—Admissions. Admissions by one whose estate is sought to be charged with a resulting trust, tending to show that he so held the property in question, are manifestly competent. In re *Estate of Hoyt*, 180—1250.

VENDOR AND PURCHASER.

MODIFICATION OR RESCISSION OF CONTRACT.

Fraud—Diligence. The right to rescind a sale or exchange may
1 be precluded by lack of diligence in asserting the right.
Brechwald v. Small, 180—22.

Forfeiture of Contract—Notice, etc. Record reviewed, and held
2 to justify the forfeiture, under Section 4299, Code, 1897, of
a contract of sale of real estate. *Buchan v. German American
Land Co.*, 180—911.

PERFORMANCE OF CONTRACT.

Title and Estate of Vendor—Marketable Title. A title which is
3 good as a matter of law is not rendered unmarketable by
the possibility that vexatious litigation might be instituted
in relation thereto, nor by the fact that attorneys had advised
against accepting the land as security for a loan. *Buchan v. German American Land Co.*, 180—911.

VENUE

TO

WILLS

VENUE.**OFFICE OR AGENCY.**

Traveling Salesman. An action growing out of a sale of machinery may be brought in the county where it was consummated by defendant's duly authorized traveling agent, especially when the agent resided in said county and the notes were made payable in said county. (Sec. 3500, Code, 1897.) *Kabrick v. Case Threshing Mach. Co.*, 180—598.

CHANGE OF VENUE.

Superior Courts—Nonresident Defendant. An action by a city to enjoin a threatened violation of a city ordinance is not an action "for the violation of a city ordinance," within the meaning of Section 260, Code Supplement, 1913. It follows that, in an action in the superior court for such threatened violation, a nonresident defendant has an arbitrary right to a change of venue to the district court, under Section 261, Code Supplement, 1913. *Corn Belt Tel. Co. v. Superior Court of Oelwein*, 180—985.

WEAPONS.**CONCEALED WEAPONS.**

Evidence—Sufficiency. Evidence reviewed, and held sufficient to sustain a conviction for carrying concealed weapons. *State v. Powers*, 180—693.

WILLS.**TESTAMENTARY POWER.**

Defeasible Fee. A testator may devise an estate in fee, and may, immediately in connection therewith, provide for the destruction of such estate and the passing of the same to a different devisee on the happening of a specified event. *Guilford v. Gardner*, 180—1210.

Vol. 180 1A.—94

WILLS Continued

TESTAMENTARY CAPACITY.

Nonexpert Opinion—Trivial Facts. Nonexpert opinions as to
2 the sanity of testator, though in part based on apparently trivial circumstances, may be sufficient to create a jury question on the issue of mental competency, when aided by the fact that testatrix was feeble, was an epileptic, was afflicted with hysteria, and had, by her conduct, manifested inability to keep control of her property. *Liddle v. Salter*, 180—840.

CONTRACT TO DEVISE, ETC.

Evidence. Evidence reviewed, and held sufficient to establish
8 the making of a contract between a brother and sister by which all property accumulated by the brother should belong to the sister on the death of the brother. *Francis v. Francis*, 180—1191.

UNDUE INFLUENCE.

Legatee-draughtsman—Presumption and Burden of Proof. A
4 legatee-draughtsman, even though holding confidential relations with testator at the time of the drawing and execution of the will, does not have the burden of proof to show that he did not secure his legacy by the exercise of undue influence. Legatee-draughtsmanship does not, *ipso facto*, create a presumption of law that the legacy was obtained by undue influence. *Graham v. Courtright*, 180—394; *Liddle v. Salter*, 180—840.

Evidence. Direct evidence of undue influence is not necessary.
5 The condition of decedent's mind, the inequalities of the will, the lack of obligation of deceased to the principal devisee, the former strained relations between the testator and devisee, the precipitate way in which the devisee secured control of testator's property, and other like and attending circumstances, may amply present a jury question on the issue of undue influence. *Liddle v. Salter*, 180—840.

Evidence—Acts and Statements by One of Several Devisees.
6 Statements made and things done in the presence of a de-

WILLS Continued

ceased testator, prior to the execution of a will or shortly thereafter, by one who was a devisee under the will, and who was accused of having exercised undue influence over testator in the execution of testator's will, and tending to show dominance over testator or a desire to persuade testator with reference to the disposition of his property, are admissible even though the one making the statements or doing the things is only one of *several* devisees under the will. *Liddle v. Salter*, 180—840.

Evidence—Declarations of Testator. Declarations of testator

- 7 subsequent to the execution of a will may be admissible as showing his condition of mind, *but not as substantive evidence that undue influence had actually been exercised over testator in the execution of the will.* *Graham v. Courtright*, 180—394.

Confusing Controlling and Non-controlling Elements. Instruc-

- 8 tions on an issue of undue influence which so confuse controlling and non-controlling elements as to render the instructions misleading and difficult of analysis, are wholly bad, and constitute error. *Liddle v. Salter*, 180—840.

ANNULMENT.

Right of Executor to Object. Executors and trustees under a

- 9 will may not object to a decree setting aside a will, on the ground of the mental incompetency of the testator, *after due hearing to the court*, simply because some of the devisees were then insane and assumed to consent to such decree. *Steffen v. Berend*, 180—127.

CONSTRUCTION.

Practical Construction by Devisees. The practical and reason-

- 10 able construction of a will by devisees is quite significant of the true meaning of said will. *Guliford v. Gardner*, 180—1210.

Duty to Harmonize All Provisions—When Codicil Controlling.

- 11 All provisions of a will must, if possible, be harmonized, and if not possible, then the provisions of a codicil, being

WILLS Continued

the last expression of testator's wish, must be followed in preference to the provisions of the will proper. So held where the will devised a life estate to children with remainder over to the descendants of the children, while a codicil devised the estate in fee "to children and their heirs." *Steffen v. Berend*, 180—127.

Conditions—"Dying Without Issue." It is not within the proper power of the court to place a strained limitation upon plain, definite and unambiguous clauses of a will. So held under a will wherein testator provided that a devise should be defeated "*if he (devisee) should die without living issue,*" and the court refused to hold that such condition was limited to the death of the devisee *during the lifetime of testator*. *Guilford v. Gardner*, 180—1210.

Words of Substitution. Principle recognized that a testator may devise a fee, and in connection therewith validly provide that, on the happening or not happening of a specified event, said devise shall be defeated or terminated, and some other devisee shall be substituted in lieu of the first devisee. *Guilford v. Gardner*, 180—1210.

Conditional Fee—Power to Sell—Effect. A devise which, by its terms, is a conditional fee, is not necessarily converted into an absolute fee by added provisions which, directly or indirectly, invest the devisee with power to sell and convey. *Guilford v. Gardner*, 180—1210.

Qualified or Defeasible Fees—Rule of Construction. The partiality of the law for vested or absolute estates is a rule of construction only, and wholly inapplicable when the testator has clearly and unequivocally provided that a devise in fee shall be defeated "*if devisee die without issue living.*" *Guilford v. Gardner*, 180—1210.

Nature of Estate Created—Limitation Repugnant to Fee. A clear devise of a conditional or defeasible fee may not be defeated by invoking the principle that a testator may not make two inconsistent or repugnant devises; for instance, an absolute devise in fee and a subsequent devise repugnant thereto. *Guilford v. Gardner*, 180—1210.

WILLS Continued

Estate Created—Obligation of Devisee to Pay Another—Garnish-
 17 **ment.** A will imposing on a devisee an obligation to pay to his father so much of a stated sum as the father "may demand" or "may be pleased to demand" *each year* during the lifetime of the father, creates no debt, and consequently no opening for a garnishment, until the father makes a demand; and, should no demand be made during any stated year, the right to make demand for such lapsed year is lost. *Ober v. Seegmiller*, 180—462.

RIGHTS AND LIABILITIES OF DEVISEES, ETC.

Attempt to Disinherit Husband—Right to Compel Election. A
 18 surviving husband who has been *wholly ignored* by the wife in the execution of her will, equally with a surviving husband who has been made a substantial devisee under his wife's will, may be put to a statutory election whether he will consent to the will, and thereby lose all interest in the wife's estate, or whether he will take his distributive one-third share. (Sec. 2376, Code Supp., 1913.) *Watrous v. Watrous*, 180—884.

Surviving Spouse—Nature of Vested Rights. A surviving hus-
 19 band who has been wholly ignored by the wife in the execution of her will does not, *eo instanti* upon the death of the wife, become vested, by operation of law, with a distributive one-third share in the estate of the wife, subject to the divesting of the same by a subsequent election by the husband to submit to the terms of the will. His vested right, in such case, is simply to choose whether he will abide by the will, or repudiate it and take his statutory distributive share. (Sec. 2366, Code, 1897.) *Watrous v. Watrous*, 180—884.

Will and Distributive Share—Election—Acts not Constituting. A
 20 surviving husband who has been wholly ignored by his deceased wife in the execution of her will does not elect to claim a distributive one-third share in the wife's property *by contracting for a lien on a one-third portion* of the wife's property, to secure a debt owed by him, when he, in truth and in fact, never intended to claim said distributive share for himself, and executed said contract under a misunderstanding as to its effect on the settlement of the wife's es-

WILLS Continued	TO	WITNESSES
tate. (Sec. 3376, Code Supp., 1913.)	Watrous v. Watrous,	
180—884.		

WITNESSES.

COMPETENCY.

Transactions With Deceased—Burden of Proof. The court will
 1 not *presume* that certain testimony constitutes or is a part of a personal transaction with a deceased person, within Section 4604, Code, 1897. Such fact must appear from the circumstances, or the objecting party must show it. *Francis v. Francis*, 180—1191; *In re Estate of Hoyt*, 180—1250.

Transactions with Deceased. A question which does not itself
 2 reveal the fact that it calls for transactions with a deceased, should not be excluded unless the objector shows such to be the fact. *Mehlich v. Mable*, 180—450.

Transactions with Deceased—Opening Door to Interested Witness.
 3 Testimony by a witness *other than an administrator*, etc., as to a transaction with the deceased, though introduced on *behalf* of the administrator, does not open the door to an interested witness, otherwise incompetent, to testify to the same transaction. (See Sec. 4604, Code, 1897.) *Mehlich v. Mable*, 180—450.

Transaction with Deceased—Inferable Facts. Conceding, *arguendo*,
 4 that one incompetent to testify to a personal transaction or communication with a deceased is competent to testify to nonprohibited facts, from which, by inference, other facts may be found, even though the fact found by inference be a fact to which the witness is not competent to testify to directly, yet such principle does not embrace the right of such witness to *testify to the contents of an instrument* constituting a personal communication between deceased and said witness. *Chidester v. Harlan*, 180—171.

Transaction with Deceased—Showing of Non-Participation by
 5 **Witness.** Conceding, *arguendo*, that, when an interested witness, within Section 4604, Code, 1897, is asked to detail a conversation had in the presence of a deceased, it should

WITNESSES Continued

be first affirmatively shown that the witness did not participate in the conversation, yet permitting an answer without such showing is non-prejudicial when the answer revealed the fact that the witness did not participate. *Liddle v. Salter*, 180—840.

Related Objection. One may not ambush his opponent by withholding his objection to the competency of a witness until the making of a motion for a directed verdict. *Franke v. Kelsheimer*, 180—251.

Attorney and Client—Confidential Communications. Principle 7 recognized that communications by a client to his attorney are not privileged unless they are *confidential*. *Mitchell v. Mutch*, 180—1281.

EXAMINATION.

Leading Question. It is not a *leading* question to ask a witness: 8 "Did you tell them you had settled up and had all your money, or anything of that kind?" or, "State whether or not you told anybody that evening that you had settled." *Mehlisch v. Mable*, 180—450.

Rebuttal—Leading Questions. On rebuttal, to disprove the making of statements attributed to the witness by others, it is proper to put the question in a *direct* form, to wit: "Did you say to them at that time and in that conversation that you had settled up?" or, "Did you tell them you had settled up and had all your money, or anything of that kind?" *Mehlisch v. Mable*, 180—450.

Leading and Suggestive Question. The question "State whether 10 or not you exercised your best skill and knowledge in the treatment of this case," is neither leading nor suggestive. *Ingwersen v. Carr & Brannon*, 180—988.

Indefinite Questions. One may not complain of the exclusion of 11 a question indefinite in fact, when he failed to comply with the implied suggestion of the court that the question be made definite. *Schultz v. Starr*, 180—1319.

WITNESSES Continued

Non-Responsive Answer—Objection. Principle recognized that
12 only an examining party may move to strike a non-responsive answer. In re Estate of Hoyt, 180—1250.

CROSS-EXAMINATION.

Discretion of Court. Principle recognized that, on appeal, the
13 discretion of the trial court as to the manner and extent of cross-examination will rarely be overturned. Schultz v. Starr, 180—1319.

Discretion of Court. In an action for damages caused by the de-
14 fective condition of a sidewalk, it is within the discretion of the court to permit evidence brought out on cross-examination to remain in the record, to the effect that a certain described defect in the sidewalk "exists at this time," the trial being a year after the injury. Rose v. City of Fort Dodge, 180—331.

Homicide. Testimony of a witness (a) that he arrived at the
15 scene of a shooting immediately after it happened, (b) that he found the defendant near at hand, and (c) that defendant did not want him (the witness) to go to where the deceased was until more help arrived, does not authorize, under the claim of cross-examination, and under the question as to what further happened, testimony that the defendant said "he did not think it safe to go" (that is, to the place where deceased was). State v. Towne, 180—339.

Nonrelevant Matters. Cross-examination should be confined to
16 matters relevant to the matters brought out on direct. Evidence reviewed, and held, certain matters were properly excluded as not proper on cross-examination. Stutaman v. Des Moines C. R. Co., 180—524.

IMPEACHMENT.

Contradictory Statements. Statements by a witness which, when
17 construed in the light of the language thereof and the record pertaining thereto, would not justify the jury in finding that the witness had even impliedly denied the truthfulness

WITNESSES Continued TO WORK AND LABOR

of her story as a witness, are necessarily inadmissible as impeaching evidence. State v. Clark, 180—477.

Collateral and Immaterial Matters. Witnesses may not be im-
18 peached on collateral and immaterial matters. So held in
an action for personal injury, wherein it was sought to
show that the injured party had stated that her husband
was drunk at the time of the injury, there being no sub-
stantive evidence that the husband was drunk. *Stutsman v.*
Des Moines C. R. Co., 180—524.

WORDS AND PHRASES.

"Abutting" and "In Front of." Northern Light Lodge v. Town of Monona, 180—62.

"Or" and "And." Tewksbury v. Title Guar. & Surety Co., 180—1850.

"Upon." Rolfs v. Mullins, 180—472.

WORK AND LABOR. See EXECUTORS AND ADMINISTRATORS, 2.

1

AUTHORITIES CITED

IN THE OPINIONS REPORTED IN THIS VOLUME

A

Adams on Equity (8th Ed.), 150, 151.....	1093
5 Am. & Eng. Encyc. of Law (1st Ed.), 340.....	258
11 Am. & Eng. Encyc. of Law (2d Ed.), 388.....	1119
11 Am. & Eng. Encyc. of Law (2d Ed.), 434.....	1106

B

2 Bailey on Personal Injuries, Sec. 480.....	18
Bigelow on Estoppel (1st Ed.), 480.....	1106
Bigelow on Estoppel (6th Ed.), 661.....	1118

C

2 Chamberlayne on Evidence, Sec. 1105 et seq.....	270
4 Chamberlayne on Evidence, Sec. 2673.....	216
2 Coke's Institutes, 275.....	246
Coke's Littleton, Sec. 384a.....	247
1 Corpus Juris, 390 et seq.....	825
5 Cyc. 413.....	327
6 Cyc. 491.....	794
7 Cyc. 725.....	730, 733
7 Cyc. 726.....	730
8 Cyc. 504.....	906
8 Cyc. 544.....	648
16 Cyc. 855.....	1339
16 Cyc. 111, 114.....	1247
16 Cyc. 812.....	1119
16 Cyc. 817.....	648
19 Cyc. 684, 812.....	648
20 Cyc. 92, 93, 94.....	29
26 Cyc. 14.....	327

29 Cyc. 1117.....	1396
30 Cyc. 47.....	728
30 Cyc. 857, 414.....	1209
30 Cyc. 1570, 1575, 1578.....	1014
30 Cyc. 1592.....	615
36 Cyc. 1157.....	1393
37 Cyc. 883.....	733
37 Cyc. 387.....	734
37 Cyc. 611.....	648

D

Deemer on Pleading and Practice, Sec. 647.....	1227
3 Devlin on Real Estate (3d Ed.), Sec. 1494.....	917
Dillon on Municipal Corporations, Sec. 534.....	1299

E

3 Elliott on Contracts, Sec. 1865.....	507
2 Encyc. of Evidence, 589.....	1002
5 Encyc. of Evidence, 618, 619.....	996
6 Encyc. of Evidence, 24, 25.....	255
6 Encyc. of Evidence, 746.....	215
9 Encyc. of Evidence, 846.....	1012

F

Freeman on Cotenancy and Partition (2d Ed.), Secs. 185, 199	155
Freeman on Cotenancy and Partition (2d Ed.), Sec. 216...	1171

G

1 Greenleaf on Evidence, Sec. 22.....	1119
---------------------------------------	------

H

1 Hutchinson on Carriers (3d Ed.), Sec. 236.....	767
--	-----

J

Jones on Evidence, Sec. 752.....	1291
----------------------------------	------

K

Kerr on Fraud and Mistake, 80.....	258
2 Kerr on Real Property, 1065, Sec. 1213.....	244
2 Kerr on Real Property, Sec. 1214.....	345

AUTHORITIES CITED.**1501****M**

- 1 Mechem on Public Offices and Officers, Sec. 863..... 930

N

- Nichols on Eminent Domain (2d Ed.), Sec. 393..... 1339

P

- 3 Page on Contracts, Sec. 1340..... 507
1 Page & Jones on Taxation by Assessment, Sec. 620..... 74
Pomeroy on Equity Jurisprudence (3d Ed.), Sec. 947..... 1389
Pomeroy on Equity Jurisprudence (3d Ed.), Sec. 1404..... 1290

R

- Randolph on Commercial Paper, Secs. 111, 112, 113..... 970
Rawle on Covenants for Title (5th Ed.), Sec. 274..... 250
4 Ruling Case Law, 947..... 767
11 Ruling Case Law, 491, Sec. 8..... 715

S

- Stewart on Legal Medicine, Sec. 27..... 615
1 Story on Equity Jurisprudence (13th Ed.), Secs. 27, 28..548. 549
1 Story on Equity Jurisprudence (13th Ed.), Sec. 391...1092, 1106

T

- Thayer's Treatise on Evidence, 346..... 793
4 Thompson on Negligence, Secs. 4752 to 4754..... 13
1 Tiffany on Landlord and Tenant, Sec. 79..... 250

U

- Underhill on Evidence, 274..... 1004
1 Underhill on Wills, Sec. 137..... 410
1 Underhill on Wills, Secs. 484, 486, 509, 529..... 470

W

- Wade's Malpractice Cases, 503, 505..... 676
Washburn on Easements and Servitude, Ch. 1, Sec. 3..... 156
Weeks on Attorneys, Sec. 246..... 523
2 Wigmore on Evidence, Sec. 1624..... 1098
Wood on Landlord and Tenant, Sec. 354..... 249

CASES CITED

IN THE OPINIONS REPORTED IN THIS VOLUME

A

Acken, In re Estate of.....	144 Iowa 519	243
Acker v. Priest.....	92 Iowa 610	1262
Adair v. Bogle.....	20 Iowa 238	260
Adam v. Briggs Iron Co.....	7 Cush. (Mass.) 361.....	156
Adams v. Adams.....	70 Iowa 253	906
Adams v. Gibney.....	6 Bing. 656	246
Adams v. Junger.....	153 Iowa 449	994
Adams Exp. Co. v. Croninger	226 U. S. 491 (33 Sup. Ct. Rep. 148)768, 780, 786, 788, 789, 1048, 1049, 1050	
Aetna National Bank v. Hol-		
lister	55 Conn. 188	730
Ahrens v. Fenton.....	133 Iowa 559	948
Albee v. Curtis.....	77 Iowa 644	665
Alcorn v. State.....	57 Miss. 273	929
Aldrich v. Jenkins.....	171 Ill. App. 310	748
Allen v. Allen.....	116 Iowa 697	467
Allen v. Church.....	101 Iowa 116	890
Allen v. City of Davenport..	115 Iowa 20	880
Allen v. Klopston.....	135 S. W. 242 (Texas).....	510
Allerton v. Eldridge.....	56 Iowa 709	880
Allison v. Jack.....	76 Iowa 205	819
Allison v. Vaughan.....	40 Iowa 421	838, 839
Almon v. Chicago & N. W. R.		
Co.	163 Iowa 449	1227
Altman v. City.....	111 Iowa 105	1395
American Co. v. Frank.....	62 Iowa 202	370
American Fisheries Co. v.		
Lennen	118 Fed. 869	475
American-Hawaiian Eng. &		
Const. Co. v. Butler.....	133 Pac. 280 (Cal.).....	1312

American National Bank v. Junk Bros.....	94 Tenn. 624	730
American Silver Mfg. Co. v. Wabash R. Co.....	156 S. W. 830 (Mo.).....	778, 789
Ames v. Waterloo & C. F. R. T. Co.....	120 Iowa 640	792
Ames' Will, In re.....	51 Iowa 596	853, 856
Amidon v. Snouffer.....	139 Iowa 159	1262
Anderson v. Acheson.....	132 Iowa 744	76, 78
Anderson v. Cameron.....	122 Iowa 183	1248
Anderson v. Northern Pac. R. Co.	19 Wash. 340 (53 Pac. 345)..	677, 678
Andrews v. Lyons.....	93 Mass. 349	1093
Anniston Loan & Trust Co. v. Stickney	19 So. 63 (Ala.).....	972
Appeal of Jenlson, In re....	145 Iowa 215	1340
Appeal of O'Brien.....	60 Atl. 880 (Me.).....	410, 413
Appeal of Roberts.....	59 Pa. 70	475
Archer v. Jacobs.....	125 Iowa 467	475, 918, 919
Armil v. Chicago, B. & Q. R. Co.	70 Iowa 130	442
Arnd v. Aylesworth	145 Iowa 185	322
Arnold v. Livingston.....	157 Iowa 677	899
Ashcraft v. Powers.....	22 Wash. 440	522
Ashford v. Meyer.....	125 N. W. 194 (Iowa).....	919
Atchison, T. & S. F. R. Co. v. Boyce	171 S. W. 1095 (Texas).....	763
Atchison, T. & S. F. R. Co. v. Harold.....	241 U. S. 371.....	1048
Atchison, T. & S. F. R. Co. v. Word	159 S. W. 375 (Texas).....	768
Atkinson v. Plum.....	50 W. Va. 104.....	1106
Atlantic C. L. R. Co. v. Riverside Mills.....	31 Sup. Ct. Rep. 164.....	783
Auburn B. & N. Works v. Schultz	22 Atl. 904 (Pa.).....	820
Augustine v. McDowell.....	120 Iowa 401	261
Aultman v. Theiler.....	34 Iowa 272	839
Auter v. Miller.....	18 Iowa 405	1290

B

Bacon v. Chase.....	83 Iowa 521	1267
Bailey v. Missouri Pac. R. Co.	171 S. W. 44 (Mo.).....	762, 778, 788, 789

CASES CITED.

1505

Baker v. Mathew.....	137 Iowa 410	1327
Baldwin v. Lowe.....	22 Iowa 367	1091
Baldwin v. Mayne.....	40 Iowa 687	881
Ball v. Skinner.....	134 Iowa 298829, 1005, 1006	
Balm v. Nunn.....	63 Iowa 641	743
Balzer v. Warring.....	95 N. E. 257 (Ind.).....	13
Bancroft v. Otis.....	91 Ala. 279	407
Bank of Latham v. Milligan	140 Iowa 251	1324
Bankers Surety Co. v. Linder	156 Iowa 486	732
Barber v. Maden.....	126 Iowa 402	413
Barclay v. School Township..	157 Iowa 181	1401
Barnes v. Century Sav. Bank	149 Iowa 367	883
Barnes v. Century Sav. Bank	165 Iowa 141	29
Barr v. Kimball.....	62 N. W. 196 (Neb.).....	257
Barr v. Schroeder.....	32 Cal. 609	373
Barr v. Van Duyn.....	45 Iowa 228	299
Barrett v. Garragan.....	16 Iowa 47	744
Barrett's Estate, In re	123 N. W. 299 (Neb.)....1221, 1224	
Barry v. Butlin.....	6 Eng. Ecc. R. 417	409
Barry v. Butlin.....	2 Moore P. C. C. 480.....	415
Barry v. Walker.....	152 Iowa 154	856
Barto v. Harrison.....	138 Iowa 413	269
Bates v. Chicago, M. & St. P. R. Co.....	122 N. W. 745 (Wis.).....	1062
Battis v. McCord.....	70 Iowa 46	643
Baughner v. Wilkins.....	16 Md. 35	249
Baumister v. Continental Cas- ualty Co.....	124 Mo. App. 38.....	1032
Baxter v. Ryerss.....	13 Barb. (N. Y.) 268.....	246
Bay v. Davidson.....	133 Iowa 688	940, 941
Beach & Weld v. Wakefield..	107 Iowa 567	962
Beard & Sons v. Illinois Cent. R. Co.....	79 Iowa 518767, 778	
Beaver v. City of Eagle Grove	116 Iowa 485	817
Beaver Creek v. Hastings...	18 N. W. 250 (Mich.).....	1397
Beck v. Umahler.....	139 Iowa 378	1159
Beckett v. Heston.....	49 N. J. Eq. 510.....	373
Beechley v. Beechley.....	134 Iowa 82	1094
Beirness v. City of Missouri Valley	162 Iowa 720335, 336	
Bell v. Byerson.....	11 Iowa 233	258
Bell v. Incorporated Town of Clarion	113 Iowa 126	793
Bellows v. Litchfield.....	83 Iowa 36	984
Benjamin & Askwith v. Doerscher	105 Iowa 391980, 981	

Bennett v. Bennett.....	26 Atl. 523 (N. J.).....	408
Berry v. Donald.....	168 Iowa 744	899
Berthold v. SeEVERS Mfg. Co.	89 Iowa 506	838
Betts, In re Estate of.....	113 Iowa 111	858
Bever v. Spangler.....	93 Iowa 576	1009, 1010
Bichmeier v. Minneapolis, St. P. & S. S. M. R. Co.....	150 N. W. 508 (Wis.).....	763, 790
Bickel v. Erskine.....	43 Iowa 213	914
Bicklin v. Kendall.....	72 Iowa 490	564, 880
Bigelow v. Old Dominion C. Min. & S. Co.....	56 L. Ed. 1009.....	984
Billick v. Davenport.....	164 Iowa 105	918
Binder v. Chicago & N. W. R. Co.	162 Iowa 550	1390
Binder v. National M. A. Assn.	127 Iowa 25	1023
Bingman v. Clark.....	178 Iowa 1129	914
Bird v. Phillips.....	115 Iowa 708	799
Bishop, In re Estate of.....	130 Iowa 250	713
Bixby v. Omaha & C. B. R. & B. Co.....	105 Iowa 293	1002
Black v. Gilmore.....	9 Leigh (Va.) 446.....	249
Black v. Minneapolis & St. L. R. Co.....	122 Iowa 32	1369
Blackburn v. State.....	23 Ohio St. 146.....	215
Blain v. Dean.....	160 Iowa 708	1219
Blair v. Fritz.....	162 Iowa 716	710, 713
Blair v. Wilson.....	57 Iowa 177	154
Blanchard v. Jones.....	101 Ind. 542	313
Blodgett v. Perry.....	97 Mo. 263	1119
Blodgett v. Sioux City & St. P. R. Co.....	63 Iowa 606	800, 804
Bloom v. Home Ins. Agency..	121 S. W. 293 (Ark.).....	1160
Bloom v. State Ins. Co.....	94 Iowa 359	829
Bloomfield v. Burlington & W. R. Co.....	74 Iowa 607	1188
Board v. Dickey.....	90 N. W. 775 (Minn.).....	926
Bogaard v. Independent Dist.	93 Iowa 269	1242
Boggs v. Merced Mining Co.	14 Cal. 279	1093, 1106
Bond v. Epley.....	48 Iowa 600	523
Bonjour v. Iowa Tel. Co.....	176 Iowa 63	383, 677
Bonnet v. Foote.....	28 L. R. A. (N. S.) 136 (Colo.)	1012
Borgnis v. Falk Co.....	133 N. W. 209 (Wis.).....	778
Bork v. People of State of N. Y.....	91 N. Y. 5.....	122

CASES CITED.

1507

Borum v. Fouts.....	15 Ind. 50	402
Bosley v. Monahan.....	137 Iowa 650	208
Bostock-Ferari Amusement Co. v. Brockamith.....	73 N. E. 281 (Ind.).....	555
Boston & M. R. Co. v. Hooker	233 U. S. 97 (34 Sup. Ct. Rep. 526)	769, 778, 789
Bosworth v. Blaine.....	170 Iowa 296154, 904, 977,	978
Bowden v. Hadley.....	138 Iowa 711	286
Bowen v. Rutherford.....	60 Ill. 41	1098, 1105
Boyd v. Ellis.....	11 Iowa 97	1171
Boyd v. New England M. I. Ins. Co.....	34 La. Ann. 848.....	270
Boyd v. State.....	82 Tenn. 161.....	215
Boyd v. Watson.....	101 Iowa 214	804
Boyer v. Mayor.....	113 N. W. 474 (Iowa).....	1131
Brackey v. Brackey.....	151 Iowa 99	1327
Bradbury v. Wells.....	138 Iowa 673	1160
Bradford v. Limpus.....	13 Iowa 421	1171
Bradford v. Mutual F. Ins. Co.	112 Iowa 495	1035
Bradley v. Northern Cent. Coal Co.....	151 S. W. 180 (Mo.).....	14
Bradley v. Welch.....	100 Mo. 258	522
Brant v. Virginia Coal & Iron Co.	93 U. S. 326	1092
Branz v. Omaha & C. B. R. & B. Co.....	120 Iowa 406	18
Brashear v. West.....	32 U. S. 607.....	368
Brett v. Van Auken.....	99 Iowa 553254,	256
Briggs v. Briggs.....	45 Iowa 318978, 979,	981
Briggs v. McEwen.....	77 Iowa 303	859
Brightman v. Morgan.....	111 Iowa 481	153
Brinson v. Norfolk S. R. Co.	86 S. E. 371 (N. C.)	783
Britt v. Gordon.....	132 Iowa 431	153
Britton v. Thornton.....	5 Sup. Ct. Rep. 291.....	1221
Brockway v. Harrington.....	82 Iowa 23	909
Broom v. Dale.....	67 So. 659 (Miss.).....	749
Brown v. Benzinger.....	84 Atl. 79 (Md.).....	1160
Brown v. Clough.....	39 Me. 566	475
Brown v. Crandall.....	11 Conn. 92	1098
Brown v. Ferren.....	73 N. H. 6.....	476
Brown v. Lambe.....	119 Iowa 404	269
Brown v. Modern Woodmen..	115 Iowa 450	645
Brown v. Painter	44 Iowa 368	663
Brown v. Rains.....	53 Iowa 81	1098
Brown v. Ward.....	110 Iowa 123	1291
Brown v. Westerfield.....	47 Neb. 399	372

Brown, In re Estate of.....	92 Iowa 379	480
Browning v. Home Ins. Co....	6 Daly (N. Y.) 522.....	360
Bruggeman v. Illinois Cent. R. Co.....	147 Iowa 187	1013, 1189
Brumbaugh, In re	128 Fed. 971	36
Brundage v. Cheneworth....	101 Iowa 256	243
Brunson v. Norfolk S. Co....	86 S. E. 371 (N. C.).....	783
Bryce v. Burlington, C. R. & N. R. Co.....	128 Iowa 483	817
Bryden v. Taylor.....	2 Har. & J. (Md.) 396.....	1098
Buchmeier v. City of Daven- port	138 Iowa 623	585, 589
Budd-Scott v. Daniel.....	2 K. B. (1902) 351.....	250
Buehner v. Creamery Pack- age Mfg. Co.....	124 Iowa 445	13
Buffalo City Cemetery v. City of Buffalo.....	46 N. Y. 503.....	78
Bunce v. Bunce.....	59 Iowa 533	1267
Burk v. Reese.....	143 Iowa 498	1005
Burk v. Walsh.....	118 Iowa 397	792
Burkhead v. Independent School Dist.....	107 Iowa 29	1245
Burroughs v. Lehdorff.....	8 Iowa 96	368
Butler v. Chicago, B. & Q. R. Co.	87 Iowa 206	1013
Butler v. Roys.....	25 Mich. 53	1171
Butler v. Secrist.....	138 N. W. 749 (Neb.).....	269
Byerly v. City of Anamosa..	79 Iowa 204	517

Q

Caldwell v. Meltveldt.....	93 Iowa 730	1291
Caldwell v. Ryan.....	108 S. W. 523 (Mo.).....	715
Call v. Larabee.....	60 Iowa 212	191
Callanan v. Votruba.....	104 Iowa 672	743
Callendar Sav. Bank v. Loos	142 Iowa 1	120
Calvin v Springer.....	63 N. E. 40 (Ind.).....	1221
Campau v. Board.....	49 N. W. 39 (Mich.).....	230
Campau v. Godfrey.....	18 Mich. 27	157
Campbell v. Collins.....	152 Iowa 608	178
Campbell v. Hastings.....	29 Ark. 512	1100
Campbell v. Ormsby.....	65 Iowa 518	817
Canaday v. Baysinger.....	170 Iowa 414	1224
Canaday v. Johnson.....	40 Iowa 587	461
Cannell v. Smith.....	21 Atl. 793 (Pa.).....	206

CASES CITED.

1509

Carbon v. City of Ottumwa..	95 Iowa 524	124
Carlton Produce Co. v. Velasco, B. & N. R. Co.....	131 S. W. 1187 (Texas).....	
773, 780,	782
Carmichael v. Vandebur.....	50 Iowa 651	257
Carnes v. Iowa S. T. M. Assn.	106 Iowa 281	825, 1028
Carnes v. Mitchell.....	82 Iowa 601	54
Carpenter v. Campbell Automobile Co.....	159 Iowa 52	1151
Carpenter v. City of Hamburg	179 Iowa 1168	682
Carpenter v. Modern Woodmen	160 Iowa 602	270
Carpenter v. Town of Rolling	107 Wla. 559 (83 N. W. 955)...	
677,	678
Carr v. Bosworth.....	68 Iowa 669	1356
Carr v. Chicago, R. I. & P. R. Co.	173 Iowa 444	773
Carter v. Barkley.....	137 Iowa 510	1280
Carter v. Riggs.....	112 Iowa 245	923
Case v. Chicago G. W. R. Co.	147 Iowa 747	1189
Case v. Plato.....	54 Iowa 64	743
Cash v. Dennis.....	159 Iowa 18.....404, 817, 847,	856
Cashman v. Du Pont de Nemours Powder Co.....	169 Iowa 306	18
Castleberry, In re.....	143 Fed. 1018	36
Central Baptist Church v. Manchester	23 Atl. 30 (R. I.).....	984
Chamberlain v. Board of Supervisors	71 Miss. 949	663
Chamberlain v. City of Des Moines	172 Iowa 500	245
Charleston & W. C. R. Co. v. Varnville Furn. Co.....	35 Sup. Ct. Rep. 715.....	
	...774, 777, 780, 782, 783,	789
Cheney v. Stevens.....	173 Iowa 288	819
Chesapeake & O. R. Co. v. De Atley	36 Sup. Ct. Rep. 564.....	779
Chesum v. Kreighbaum.....	4 Wash. 680	312, 313
Chicago, B. & Q. R. Co. v. Castle	155 Iowa 124	987
Chicago, B. & Q. R. Co. v. Johnston	95 N. W. 614 (Neb.).....	819
Chicago, B. & Q. R. Co. v. Miller	33 Sup. Ct. Rep. 155.....	788

Chicago, M. & St. P. R. Co. v. Polt	232 U. S. 165.....	1389, 1390
Chicago, M. & St. P. R. Co. v. Solan	18 Sup. Ct. Rep. 289.....	786
Chicago, R. I. & P. R. Co. v. Harrington	143 Pac. 325 (Okla.).....	
	...763, 773, 778, 787, 790,	795
Chicago, R. I. & P. R. Co. v. Sizer	95 N. W. 498 (Neb.).....	820
Chicago, R. I. & P. R. Co. v. Wright County Dr. Dist. No. 43.....	175 Iowa 417	163
Chippewa Bridge Co. v. City of Durand.....	99 N. W. 603 (Wis.).....	940
Chismore v. Anchor Fire Ins. Co.	131 Iowa 180	198
Christie v. Iowa Life Ins. Co.	111 Iowa 177	743
Church v. Crossman.....	41 Iowa 373	744
Cincinnati, N. O. & T. P. R. Co. v. Rankin.....	241 U. S. 319 (36 Sup. Ct. Rep. 555)	763, 764, 770, 1019
Citizens' Nat. Bank v. Plollet	17 Atl. 603 (Pa.).....	971
City Nat. Bank v. Goodloe-McClelland Commission Co.	93 Mo. App. 123.....	972
City Nat. Bank v. Jordan... ..	139 Iowa 499	322
City of Fairfield v. Jefferson County	168 Iowa 623	449
City of Keokuk v. Love.....	31 Iowa 119	732
City of Muscatine v. Chicago, R. I. & P. R. Co.....	79 Iowa 645	719
City of Pella v. Scholte.....	24 Iowa 283	663
Clark v. Board of Directors.. ..	24 Iowa 266	1240, 1242
Clark v. Employers' L. Assur. Co.	72 Vt. 458	677, 678
Clark v. Rails.....	71 Iowa 189	859
Clarke v. Illinois, etc., Assn.	180 Ill. App. 300.....	1033
Clemans v. Penfield.....	111 Iowa 511	714
Clements v. Stapleton.....	136 Iowa 137	442
Cleveland, C., C. & St. L. R. Co. v. Dettlebach.....	36 Sup. Ct. Rep. 177.....	770
Cleveland City R. Co. v. City of Cleveland.....	94 Fed. 385	507
Clifton Land Co. v. City of Des Moines.....	144 Iowa 625	72, 1341
Coakley v. McCarty.....	34 Iowa 105 ...	882
Cockins v. Bank of Alma....	122 N. W. 16 (Neb.).....	984

CASES CITED.

1511

Coffey v. Gamble.....	117 Iowa 545	743, 744
Coffin v. Coffin.....	23 N. Y. 9.....	408
Cole v. Butler.....	24 Mo. App. 76.....	1100
Cole v. Thompson.....	134 Iowa 685	563
Collier v. Miller.....	137 N. Y. 332	1118
Collins v. City of Iowa Falls	146 Iowa 305	230
Collins v. Collins	116 Iowa 703	1221
Collins v. Denver & R. G. R. Co.	167 S. W. 1178 (Mo.) ...	773, 782
Collins v. Prentice.....	15 Conn. 423	156
Combs v. Cooper.....	5 Minn. 254	1093
Commercial Nat. Bank v. Mosser	57 Mich. 386	374
Commonwealth v. Trefethen	157 Mass. 180	215
Comstock v. Fraternal Acci- dent Assn.	93 N. W. 22 (Wis.)	1032
Conger v. Chilcorte	42 Iowa 18	984
Connecticut Mutual Life Ins. Co. v. Brown.....	81 Iowa 42 ...	1171
Consolidated Gas Co. v. City of New York.....	157 Fed. 849	1160
Consumers' Cotton Oil Co. v. Ashburn	81 Fed. 331	507
Continental Casualty Co. v. Lloyd	165 Ind. 52	677
Contrl v. Hollingsworth Coal Co.	143 Iowa 115	15
Cook v. Cook.....	159 N. C. 46.....	625
Cook v. Penrhyn Slate Co....	36 Ohio St. 135.....	1105, 1107
Cook & Wheeler v. Chicago, R. I. & P. R. Co.....	75 Iowa 169	879, 880
Cooper v. Cooper.....	24 Ohio St. 488	715
Cooper v. Hocking Valley Nat. Bank.....	21 Ind. App. 358	824
Coovert v. Spokane, P. & S Co.	141 Pac. 324 (Wash.).....	783
Copper v. Trust & Sav. Bank	149 Iowa 336	1171, 1172, 1174
Coquillard v. Coquillard.....	113 N. E. 481 (Ind.)	917
Cosson v. Bradshaw.....	160 Iowa 296	964
Cottle v. Cole & Cole.....	20 Iowa 482	1356, 1357
Cotton v. Wood.....	25 Iowa 43	148
Cottrell v. Babcock Printing- Press Mfg. Co.....	6 Atl. 791 (Conn.)	1160, 1161
County of Des Moines v. Harker	34 Iowa 84	663

County of St. Charles v. Powell	22 Mo. 525	663
Courtright v. Deeds.....	37 Iowa 503	475
Cowles v. Ricketts.....	1 Iowa 582	368
Cox v. Allen.....	91 Iowa 462	263
Cox v. Collis.....	109 Iowa 270	876
Cox v. Ellsworth.....	18 Neb. 664	270
Craig v. Hasselman.....	74 Iowa 538	1356
Creamer v. Bivert.....	214 Mo. 473	372
Cresswell v. Wainwright....	154 Iowa 167	110
Criley v. Cassel.....	144 Iowa 685	269
Cromwell v. County of Sac...	96 U. S. 51	324
Cronk v. Wabash R. Co.....	123 Iowa 349	1004
Crooks v. Smith.....	123 Iowa 439	1289
Crosby v. Hillyer.....	24 Wend. (N. Y.) *280....	365, 366
Cross v. Board of Trustees..	89 S. W. 506 (Ky.)..	1238, 1239, 1244
Culligan v. Alpern.....	125 N. W. 20 (Mich.).....	1114
Cunningham v. Pattee.....	99 Mass. 248	157
Currie v. Continental Casualty Co.....	147 Iowa 281	593
Curtis v. Root.....	20 Ill. 518	1092
Curttright v. Independent School Dist.....	111 Iowa 20	1245

D

Dall v. Brown.....	5 Cush. (Mass.) 289.....	157
Daly v. Simonson.....	126 Iowa 716	1030
Daniel v. Modern Woodmen of Am.....	118 S. W. 211 (Texas).....	647
Darnell v. Bennett.....	98 Iowa 410	370
Davidson v. Jennings.....	27 Colo. 187	1105
Davidson v. Smith.....	143 Iowa 124	838
Davis v. Chicago, R. I. & P. R. Co.....	83 Iowa 744	563
Day v. Sines.....	15 Wash. 525	366
Delaplaine v. Hitchcock....	6 Hill (N. Y.) 14.....	1092
Delfs v. Dunshee.....	143 Iowa 381	1140
Denning v. Butcher.....	91 Iowa 425	407
Dennison v. Grove.....	19 Atl. 186 (N. J.)..	254, 257, 258
Denny v. Des Moines County	143 Iowa 466	162
Dent v. State of West Virginia	129 U. S. 114	611
Des Moines Union R. Co. v. City of Des Moines.....	140 Iowa 218	683, 684
Devier v. Economic Life Assn.	106 Iowa 682	880

CASES CITED.

1513

Didlake v. Roden Grocery Co.	49 So. 384 (Ala.).....	1160
Dilly v. Paynsville Land Co.	173 Iowa 536	254
Ditchey v. Lee.....	78 N. E. 972 (Ind.)	918
Dohms v. Mann	76 Iowa 723	1267
Dolan v. Midland B. F. Co...	126 Iowa 254	261
Donaldson v. Smith.....	122 Iowa 388	1391
Donovan v. Wells Fargo & Co.	177 S. W. 839 (Mo.).....	788
Doremus v. Dunham.....	37 Atl. 62 (N. J.)	917
Doubet v. Board of Directors	135 Iowa 95	1242
Douglass v. Agne.....	125 Iowa 67	110
Downey v. Murphey.....	18 N. C. 82	411
Downie v. Savage.....	129 Pac. 1096 (Wash.).....	1115
Downing, In re.....	148 Fed. 120	36
Downing, In re Will of.....	95 N. W. 876 (Wis.).....	402
Doyle v. New York Eye & Ear Infirmary.....	80 N. Y. 631	1012
Drain v. Mickel.....	8 Iowa 438	369
Drainage District No. 3, Hardin County, In re.....	146 Iowa 564	1341
Dudley v. Gates.....	124 Mich. 440	411
Duffe v. Bankers' Life Assn.	160 Iowa 19	576
Duggan v. Chicago, M. & St. P. R. Co.....	179 Iowa 1072	1188
Dumont v. Peet.....	152 Iowa 524	1245
Dunlavy v. Chicago, R. I. & P. R. Co.....	66 Iowa 435	792
Dusold v. Chicago G. W. R. Co.	162 Iowa 441	1189
D'Utassy v. Barrett.....	114 N. E. 786 (N. Y.)....	1048, 1053
Duvall v. Louisiana W. R. Co.	65 So. 104 (La.) 773, 787, 789,	790

E

Early v. City of Ft. Dodge..	136 Iowa 187	683
Eastover, M. & H. Co. v. At- lantic C. L. R. Co.....	83 S. E. 599 (S. C.)	763, 773, 787, 791
Eckert v. Century Fire Ins. Co.	147 Iowa 507	198
Edgington v. Burlington, C. R. & N. R. Co.....	116 Iowa 410	704, 705
Edinger v. Bain.....	125 Iowa 391	981
Egan v. Horrigan.....	96 Me. 46	373
Elkenberry v. Edwards.....	67 Iowa 14	566
Electric S. B. Co. v. Waterloo, C. F. & N. R. Co.....	188 Iowa 369	839

Eller v. Newell.....	159 Iowa 711	1247
Elliott v. Capital City State Bank	128 Iowa 275	719
Elliott v. Chicago, M. & St. P. R. Co.....	150 N. W. 777 (S. D.)	790, 795
Ellis v. Leonard.....	107 Iowa 487	792
Ellis v. Republic Oil Co.....	133 Iowa 11	1060
Ellis v. Welch	6 Mass. 246	249
Ellyson v. City of Des Moines	179 Iowa 882	1243
Elwood v. O'Brien.....	105 Iowa 239	909
Emerson v. Leonard.....	96 Iowa 311	712, 713
Emery v. Mutual C. & V. Fire Ins. Co.....	51 Mich. 469 ..	1019
Epeneter v. Montgomery County	98 Iowa 159	960
Erb v. German-American Ins. Co.	98 Iowa 606 ..	360
Erhardt v. Schroeder.....	155 U. S. 124	1393
Erwin v. Fillenwarth.....	160 Iowa 210 ..	267
Erwin v. United States.....	37 Fed. 470	929
Estate of Acken, In re.....	144 Iowa 519	243
Estate of Barrett, In re.....	123 N. W. 299 (Neb.)....	1221, 1324
Estate of Betts, In re.....	113 Iowa 111	858
Estate of Bishop, In re.....	130 Iowa 250	713
Estate of Brown, In re.....	92 Iowa 379	460
Estate of James, In re.....	146 N. Y. 78	1221
Estate of Kennedy, In re....	154 Iowa 460	868
Estate of Lund, In re.....	107 Iowa 264	980
Estate of Mahin, In re.....	161 Iowa 459	1262
Estate of Miller, In re.....	31 Utah 415	411
Estate of Morgan, In re.....	125 Iowa 247	269
Estate of Proctor, In re....	103 Iowa 282	154
Estate of Ring, In re.....	132 Iowa 216	144
Estate of Selleck, In re....	125 Iowa 678	858
Estate of Smith, In re.....	165 Iowa 614	154, 904
Estate of Wiltsey, In re....	135 Iowa 430	858
Estate of Young, In re.....	33 Utah 382	402
Etzkorn v. City of Oelwein..	142 Iowa 107	531, 1002
Evans v. Montgomery.....	50 Iowa 325	29
Evans v. Odem.....	65 N. E. 755 (Ind.)	972
Evans v. Roberts.....	172 Iowa 653	50, 819
Evans v. Wall.....	34 N. E. 183 (Mass.)	917
Ewing v. Goode.....	78 Fed. 442	87, 676

P

Fagan v. Hook.....	134 Iowa 381	918
Fairbanks v. Snow.....	145 Mass. 153	122
Fairchild-Gilmore-Wilton Co. v. Southern Ref. Co.....	110 Pac. 951 (Cal.)	1312
Farmer v. Bank of Graetting- er	130 Iowa 469	970, 974
Farmers' Exch. Bank v. Mc- Donald	167 Iowa 582	1107, 1117
Farnsley v. Stillwell.....	107 Iowa 631	285
Farr v. Reilly.....	58 Iowa 399	156
Farrell v. Haze.....	122 N. W. 197 (Mich.)	87
Faust v. Hosford.....	119 Iowa 97	208
Feder v. Iowa S. T. M. Assn..	107 Iowa 538	43, 44
Finley v. Territory ex rel. Keys	73 Pac. 273 (Okla.)	926
Finnane v. City of Perry.....	164 Iowa 171	336
Fire Association v. Ruby....	60 Neb. 216	372
First National Bank v. Bald- win	158 N. W. 371 (Neb.).....	972
First National Bank v. But- tery	116 N. W. 341 (N. D.).....	970, 972
First National Bank v. Dutch- er	128 Iowa 413	880
First National Bank v. Mt. Pleasant Milling Co.....	103 Iowa 518	643
First National Bank v. Stover	155 Pac. 905 (N. M.)	973
First National Bank v. Willie	115 Iowa 77	148
Fish Bros. Wagon Co. v. La Belle Wagon Works.....	52 N. W. 595 (Wis.) ..	1162
Fisher v. Niccolls	2 Ill. App. 484	1012
Fisher v. Trumbauer.....	160 Iowa 255	1247
Fitchner v. Fidelity Mut. Fire Assn.	103 Iowa 276	198
Fletcher v. Pullen	70 Md. 205	1114
Ford v. Dilley.....	174 Iowa 243	778
Ford v. Easley.....	88 Iowa 603	799
Forrest Milling Co. v. Cedar Falls Mill Co.....	103 Iowa 619	156
Fortin v. Sedgwick.....	133 Iowa 233	1174
Foster v. North American Ac- cident Ins. Co.....	176 Iowa 399	677
Fothergill v. Fothergill.....	129 Iowa 93	853
Fox v. Dixon.....	12 N. Y. Supp. 267	613

Fox v. Smith.....	143 Ga. 547	749
Fox v. Waterloo National Bank	126 Iowa 481	713
Frank v. Davenport.....	105 Iowa 588	1231
Franklin v. Merida.....	35 Cal. 558	1091
Franzen v. Hutchinson.....	94 Iowa 95	1030
Free v. Western Union Tel. Co.	135 Iowa 69	881
Freeman v. Freeman.....	65 Tenn. 301	917
French v. Edwards	13 Wall. (U. S.) 506	1393
Frost v. Raymond.....	2 Caines (N. Y.) 188	246
Fuller v. New York Fire Ins. Co.	67 N. E. 879 (N. Y.).....	366
Fullerton v. Sherrill.....	114 Iowa 511	713, 714
Furst v. Tweed	93 Iowa 300	799
G		
Gaffney v. Hoyt	2 Idaho 199	1100
Gage v. Parry.....	69 Iowa 605	370
Galveston, H. & S. A. R. Co. v. Wallace	32 Sup. Ct. Rep. 205.....	771, 781, 782, 787
Galvin v. Dalley.....	109 Iowa 332	285
Gamble v. Union Pac. R. Co.	104 N. E. 666 (Ill.)	783, 789
Gamet v. Haas.....	165 Iowa 565	597
Gano v. Minneapolis & St. L. R. Co.....	114 Iowa 713	1338
Garden v. Garden.....	2 Houst. (Del.) 574	270
Garmoe v. Sturgeon.....	67 Iowa 700	881
Garner v. Milwaukee Mech. Ins. Co.....	73 Kan. 127	360
Garretson v. Equitable Mut. L. & E. Assn.....	93 Iowa 402	1093
Gate City Land Co. v. Hell- man	80 Iowa 477	748
Gates v. Salmon.....	35 Cal. 576	156
Georgia, F. & A. R. Co. v. Blish Milling Co.....	241 U. S. 190 (82 S. E. 784).. 1047, 1048, 1049, 1050, 1051, 1052,	1053
Georgia, F. & A. R. Co. v. Blish Milling Co.....	36 Sup. Ct. Rep. 541	763, 764, 770, 783, 784, 786, 790
German Sav. Bank v. Bates Addition Imp. Co.....	111 Iowa 432	642

Gessner v. Metropolitan St. R. Co.	119 S. W. 528 (Mo.)	1063
Getchell v. Hill.....	21 Minn. 464	87
Getchell v. McGuire.....	70 Iowa 71	153
Geyer v. Douglass.....	85 Iowa 93	260
Gibbs v. Farmers & Merch. St. Bank	123 Iowa 736	413
Gilbert v. Baxter.....	71 Iowa 327	442
Gilbert v. McCullough.....	140 Iowa 362	602
Gilbert v. McCullough.....	146 Iowa 333	804
Giles v. City of Shenandoah.	111 Iowa 83	586, 589
Gill v. Wells.....	59 Md. 492	918
Gilpin v. Temple.....	4 Harr. (Del.) 190	1098
Giltner v. City of Albia.....	128 Iowa 658	230
Glass v. Glass.....	127 Iowa 646	856
Glassman v. Chicago, R. I. & P. R. Co.....	166 Iowa 254.....763, 773, 787, 791, 792, 794, 795, 1048	
Glidden v. Henry.....	1 N. E. 369 (Ind.)	971
Glover v. Bradley.....	233 Fed. 721	917
Goley v. State.....	85 Ala. 333	219
Golinvaux v. Burlington, C. R. & N. R. Co.....	125 Iowa 652	792
Goodrich v. Fogarty	130 Iowa 223	602
Gordon v. Chicago, R. I. & P. R. Co.....	154 Iowa 449	818
Gordon v. Knott.....	85 N. E. 184 (Mass.)	1160
Gormly v. Town of Mt. Vernon	134 Iowa 394	940
Graffam v. Burgess.....	117 U. S. 192	1175
Graham v. Chicago & N. W. R. Co.	143 Iowa 604	1061
Graham v. Courtright.....	180 Iowa 394	847
Gray v. Central Minn. Immi- gration Co.....	127 Iowa 560	643
Gray v. Chicago, R. I. & P. R. Co.	143 Iowa 268 (160 Iowa 1)....	391
Gray v. Myers.....	45 Iowa 158	242
Gray v. Sanborn.....	178 Iowa 456	562
Green Bay Lbr. Co. v. Thomas	106 Iowa 154	962
Greene County, In re Jenison v.	145 Iowa 215	1340
Greenlee v. Home Ing. Co....	103 Iowa 484	1030
Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co...	130 Iowa 123	1047
Griffin v. City of Marion....	163 Iowa 435	836
Griffith v. Diffenderfer.....	50 Md. 466	410

Griswold v. Szwanek.....	21 L. R. A. (N. S.) 222 (Neb.)	876
Gulf, C. & S. F. R. Co. v. Brackett	162 S. W. 1191 (Texas).....	794
Gustafson v. Rustemeyer.....	66 Am. St. Rep. 92 (Conn.)..	207

H

H. & T. C. R. Co. v. Travis County	62 Texas 16	663
Hale v. Hale.	33 N. E. 858 (Ill.)	916
Hale v. Philbrick.....	42 Iowa 81	257
Hale, In re.....	107 Fed 432	327
Hall v. Rankin.....	87 Iowa 261	1009
Hall v. Robison.....	25 Iowa 91	124
Hall v. Wright.....	Ann. Cas. 1912A, 1255....	507
Hamel v. Donnelly.....	75 Iowa 93	1267
Hamill v. Joseph Schlitz Brewing Co.....	165 Iowa 266	602
Hamilton v. Wright's Admr..	28 Mo. 199	248
Hamilton-Brown v. Mercer..	84 Iowa 537	370
Hammond v S. C. & P. R. Co.	49 Iowa 450	1227
Hancock v. American Life Ins. Co.	62 Mo. 26	270
Hanley v. Banks.....	6 Okla. 79	249
Hanna v. Andrews.....	50 Iowa 462	1164
Hanna v. Collins.....	69 Iowa 51	442, 805
Hannestad v. Chicago, M. & St. P. R. Co.....	132 Iowa 232	1227, 1232
Hanrahan v. O'Toole.....	139 Iowa 229	407
Hanson v. City of Anamosa..	177 Iowa 101	1324
Hanson v. Cline.....	142 Iowa 187	563
Hanson & Linehan v. Consum- ers' Steam Heating Co.....	73 Iowa 77	298
Harlan v. Harlan.....	102 Iowa 701	170
Harmont v. Sullivan.....	128 Iowa 309	245, 250
Harrington v. Christie.....	47 Iowa 319	564
Harris v. Bigley.....	136 Iowa 307	914
Harrison v. City of Albia....	144 Iowa 132	588, 589
Harrison v. Otley	101 Iowa 652	1289
Harrison v. Walton's Exr....	30 S. E. 372 (Va.)	917
Harrison County v. Ogden...	133 Iowa 677	940
Harshey v. Blackmarr	20 Iowa 161	522
Hart v. Church.....	126 Cal. 471	122
Hart v. Moulton.....	80 N. W. 599 (Wis.).....	984

Hart v. Pennsylvania R. Co.	112 U. S. 331 (5 Sup. Ct. Rep. 151)	786, 1049
Hart v. Windsor.....	12 Mees. & W. 68	249
Hartkemeyer v. Griffith.....	142 Iowa 694	563
Hartman v. Hunter.....	56 Ohio St. 175	663
Hartshorn v. Wright County Dist. Ct.....	142 Iowa 72	162, 1337, 1340
Harvey v. President, etc., of Olney	42 Ill. 336	923
Haskel v. City of Burlington.	30 Iowa 232	964
Hatch v. Board.....	170 Iowa 82	1394
Hathaway v. Burlington, C. R. & N. R. Co.....	97 Iowa 747	124, 125
Hatton v. Wheaton.....	158 Iowa 460	243
Haugen v. Sundseth.....	118 N. W. 666 (Minn.).....	1160
Hawes v. State.....	88 Ala. 37	219
Hawk v. Day.....	148 Iowa 47	54
Hawks v. Fellows.....	108 Iowa 133	743
Haworth v. Crosby.....	120 Iowa 612	880
Haworth v. Montgomery.....	18 S. W. 399 (Tenn.)	613
Hayes v. Continental Casualty Co.	72 S. W. 135 (Mo.)	1032
Heaton v. Sawyer.....	15 Atl. 166 (Vt.)	715
Hedderich v. State.....	1 N. E. 47 (Ind.)	616
Hegenmyer v. Marks.....	32 N. W. 785 (Minn.)	206
Heins v. Lincoln.....	102 Iowa 69	1396
Heller v. Cahill.....	138 Iowa 301	1280
Hemminger v. Western Assur. Co.	54 N. W. 949 (Mich.)	299
Henry v. Sioux City & Pac. R. Co.	70 Iowa 233	1227
Henshaw v. Bissell.....	85 U. S. 255	1093
Hermann v. Parsons.....	78 S. W. 125 (Ky.)	917
Herminghausen v. Adams Express Co.....	167 Iowa 230	1048
Herr v. Herr.....	90 Iowa 538	153
Herrin v. Libbey.....	36 Me. 350	267
Hessenius v. Wetmore.....	153 N. W. 937 (S. D.)	209
Hetland v. Bilstad.....	140 Iowa 411	207, 254
Hill v. Epley.....	31 Pa. St. 331	1092
Hill v. McNichol.....	80 Me. 209	373
Hill v. Rolfe.....	61 N. H. 351	366
Hinkle v. Saddler.....	97 Iowa 526	1244
Hirschl v. Hirschl.....	161 Iowa 647	623
Hirshborn v. Stewart	49 Iowa 418	838
Hodgin v. Toler.....	70 Iowa 21	242

Hoener v. Koch.....	84 Ill. 408	996
Hoffman v. Manufacturers' Acc. Indemnity Co.....	56 Mo. App. 301	1032
Hoffman v. Wilhelm.....	68 Iowa 510	208
Hofitt v. Skinner.....	99 Iowa 360	285
Holcomb v. Holcomb.....	120 N. W. 547 (N. D.)	715
Hollingsworth, In re Last Will of.....	58 Iowa 526	407
Hollins v. Hubbard.....	165 N. Y. 534	1118
Holman v. Omaha & C. B. R. & B. Co.....	117 Iowa 268	597
Holmes v. Redhead.....	104 Iowa 399	799
Hook v. Garfield Coal Co....	112 Iowa 210	156
Hooper v. Standard Life & Acc. Ins. Co.....	148 S. W. 116 (Mo.).....	677
Hopkins v. Patton.....	100 N. E. 992 (Ill.).....	916
Hopkinson v. Knapp.....	92 Iowa 328	792
Horak v. Horak	68 Iowa 49	880
Hornbeck v. Brown.....	91 Iowa 316	980, 981
House v. Cramer.....	134 Iowa 374	1140
Howard v. National French Draught Horse Assn	169 Iowa 719	1247
Howe v. Richards.....	112 Iowa 220	1008
Hubbard v. Hartford Fire Ins. Co.	33 Iowa 325	1119
Hudson v. Chicago, St. P. M. & C. R. Co.....	226 Fed. 38	786
Hughes v. Silvers.....	169 Iowa 366	404
Humbert v. Larson.....	99 Iowa 275	255, 257
Humboldt County v. Ward Bros.	163 Iowa 510	963
Hunt v. Gower.....	128 Am. St. 862 (S. C.)	917
Hunt v. Rellly.....	24 R. I. 68	1118
Hunter v. Citizens Savings & Trust Co.....	157 Iowa 168	468
Hunter v. City of Des Moines	144 Iowa 541	517
Hunter v. Colfax Cons. Coal Co.	175 Iowa 245	778
Hurd v. Ladner.....	110 Iowa 263	881
Huston v. Seeley.....	27 Iowa 183	153, 154
Hutchinson v. State.....	19 Neb. 262	1004
I		
Ida County v. Woods.....	79 Iowa 148	831
Incorporated Town of Cambridge v. Cook.....	97 Iowa 599	517

Incorporated Town of Hancock v. McCarthy.....	145 Iowa 51	1295
Indiana & Illinois Cent. R. Co. v. Sprague.....	103 U. S. 756	324
Indianapolis, P. & C. R. Co. v. Collingwood	71 Ind. 476	677
Indianapolis, P. & C. R. Co. v. Thomas	84 Ind. 194	677
In re Ames' Will.....	51 Iowa 596	853, 856
In re Appeal of Jenison.....	145 Iowa 215	1340
In re Barrett's Estate.....	123 N. W. 299 (Neb.)	1221, 1224
In re Brumbaugh.....	128 Fed. 971	36
In re Castleberry.....	143 Fed. 1018	36
In re Downing.....	148 Fed. 120	36
In re Downing's Will.....	95 N. W. 876 (Wis.)	402
In re Drainage District No. 3, Hardin County.....	146 Iowa 564	1341
In re Estate of Acken.....	144 Iowa 519	243
In re Estate of Betts	113 Iowa 111	858
In re Estate of Bishop.....	130 Iowa 250	713
In re Estate of Brown.....	92 Iowa 379	460
In re Estate of Kennedy.....	154 Iowa 460	868
In re Estate of Land.....	107 Iowa 264	980
In re Estate of Morgan.....	125 Iowa 247	269
In re Estate of Proctor.....	103 Iowa 232	154
In re Estate of Ring.....	132 Iowa 216	144
In re Estate of Selleck.....	125 Iowa 678	858
In re Estate of Smith.....	165 Iowa 614	154, 904
In re Estate of Wiltsey.....	135 Iowa 430	858
In re Estate of Young.....	33 Utah 382	402
In re Hale.....	107 Fed. 432	327
In re Last Will of Hollingsworth	58 Iowa 526	407
In re Maher	169 Fed. 997	36
In re Mallin's Estate.....	161 Iowa 459	1262
In re Melcher.....	24 R. I. 575	476
In re Meyer.....	98 Fed. 976	327
In re Miller's Estate.....	31 Utah 415	411
In re Opinion of Justices....	96 N. E. 308 (Mass.)	778
In re Sanderlin	109 Fed. 857	327
In re Tiffany.....	147 Fed. 314	36
In re Van Houten.....	147 Iowa 729	858
In re Wells.....	51 Atl. 868 (Me.)	408
In re Wells.....	105 Fed. 762	36
In re Will of Norman.....	72 Iowa 84	1009

International Harvester Co. v. Iowa Hardware Co.....	146 Iowa 172	948
International Trav. Assn. v. Rogers	163 S. W. 421 (Texas)	1023
Iowa Brick Co. v. City of Des Moines	11 Iowa 272	962
Iowa Nat. Bank v. Carter...	144 Iowa 715	322
Iowa Pipe & Tile Co. v. Parks & Gerber	169 Iowa 438	963. 964
Ivers v. Ivers.....	61 Iowa 721	269

J

Jackson v. Perkins.....	2 Wend. (N. Y.) 308	373
Jacobs v. Gibson.....	77 Mo. App. 244	972
Jaffray v. Thompson.....	65 Iowa 323	880
James v. City of Hamburg..	174 Iowa 301	940
James v. Fairall.....	154 Iowa 252	853
James v. Gettlinger.....	123 Iowa 199	1242
James, Estate of.....	146 N. Y. 100	1221
Jamison v. Crocker.....	148 Iowa 104	147
Jansen v. Williams.....	20 L. R. A. 207 (Neb.)	206
Jenison, In re appeal of....	145 Iowa 215	1340
Jensen v. Southern Pac. R. Co.	109 N. E. 600 (N. Y.)	778
Johannsen v. City of Colfax..	161 Iowa 502	449
John Gund Brewing Co. v. Peterson	130 Iowa 301	442
Johnson v. Gaylord.....	41 Iowa 362	146, 147
Johnson v. Johnson.....	134 Iowa 33	404
Johnson v. Spencer.....	96 N. E. 1041 (Ind.)	593
Johnston v. Bunn	19 L. R. A. (N. S.) 1064 (Va.)	1247
Johnston v. Delano.....	175 Iowa 498	391
Jonas v. Weirés.....	134 Iowa 47.....	1170, 1171, 1173
Jones v. German Ins. Co....	110 Iowa 75	1035
Jordan v. Hill.....	172 Iowa 414	510
Joseph v. Chicago, B. & Q. R. Co.	157 S. W. 837 (Mo.)	780. 789
Juneau v. Stunkle.....	40 Kan. 756	923
Justices, In re Opinion of....	96 N. E. 308 (Mass.)	718

K

Kane v. Mink.....	64 Iowa 84	245
Kansas Central R. Co. v. Fitz- simmons	22 Kan. 686	705

Kansas City & M. R. Co. v. New York Cent. & H. R. R. Co.	163 S. W. 171 (Ark.)	783
Kansas City S. R. Co. v. Anderson	283 U. S. 325	1390
Kansas City S. R. Co. v. Carl	121 S. W. 932 (Ark.)	763, 773, 790, 791
Kansas City S. R. Co. v. Carl	237 U. S. 639 (33 Sup. Ct. Rep. 391, 57 L. Ed. 683)	768, 770, 789, 1049
Karr v. Baltimore & O. R. Co.	86 S. E. 43 (W. Va.)	783
Keane v. Century Fire Ins. Co.	150 Iowa 658	829
Keeder v. Murphy	43 Iowa 413	876
Keenan v. State	8 Wis. 132	688
Keim v. Lindley	30 Atl. 1063 (N. J.)	799
Kelley v. Board	158 Iowa 735	163, 165, 1340
Kelly v. Andrews	45 Wis. 110	321, 322
Kelly v. Incorporated Town of West Bend	94 Iowa 484	1248
Kelly v. Stone	101 Iowa 669	881
Kelly v. Whitney	94 Iowa 316	442
Kempton v. State Ins. Co.	62 Iowa 83	360, 363
Kendall v. Crawford	77 S. W. 364 (Ky.)	918
Kennebec Water Dist. v. City of Waterville	54 Atl. 6 (Me.)	1160
Kennedy v. Citizens' Nat. Bank	119 Iowa 123	743, 744
Kennedy v. Manry	66 S. E. 29 (Ga.)	593
Kennedy, In re Estate of	154 Iowa 460	868
Kenny v. Bankers Accident Ins. Co.	136 Iowa 140	1034
Kent v. Church	32 N. E. 704 (N. Y.)	916
Kent v. City of Harlan	170 Iowa 90	385, 386
Ketchum v. White	72 Iowa 193	285
Keyes v. City of Cedar Falls	107 Iowa 509	1327
Kissel v. Mutual Res. L. Ins. Co.	131 Iowa 54	1034, 1035
Kinney v. McFaul	122 Iowa 452	817, 1231
Kinyon v. Chicago & N. W. R. Co.	118 Iowa 349	391
Kinzer v. Directors	129 Iowa 441	1242, 1244
Kirby v. Sellards	28 L. R. A. (N. S.) 270 (Kan.)	411
Kirsher v. Kirsher	120 Iowa 337	1008
Kitterman v. Board of Supervisors of Wapello County ..	137 Iowa 275 (145 Iowa 25) ..	1130

Kline v. Kansas City, St. J. & C. B. R. Co.....	50 Iowa 656	882
Klingman v. Madison County	161 Iowa 422	590
Knapp v. Brotherhood of American Yeoman.....	149 Iowa 137	1324
Kneese v. City of Sioux City.	156 Iowa 607	74
Knox v. Hanlon.....	48 Iowa 252	979, 981
Kobolska v. Swehla.....	107 Iowa 124	723
Kolka v. Jones	6 N. D. 461	328
Kopecky v. Benish	138 Iowa 362	1324
Kramer v. Winslow.....	18 Atl. 923 (Pa.)	313
Kroy v. Chicago, R. I. & P. R. Co.	32 Iowa 357	15
Kruidenier Bros. v. Shields.	70 Iowa 428	110

L.

Lacy v. Dubuque Lumber Co..	43 Iowa 510	239
Ladner v. Balsley	103 Iowa 674	257
Lake Erie & W. R. Co. v. Stick	41 N. E. 365 (Ind.)	1061
Lakka v. Modern Brotherhood of America.....	163 Iowa 159	647, 648, 1347
Lambert v. Rice.....	143 Iowa 70	1176
Lampson v. Arnold.....	19 Iowa 479	369
Landis v. Interurban R. Co..	166 Iowa 20	1188
Lang v. Missouri Pac. R. Co.	115 Mo. App. 489	1063
Langdon v. Richardson.....	58 Iowa 610	170
Larkin v. McManus.....	81 Iowa 723	153
Larson v. Fitzgerald.....	87 Iowa 402	1280
Laub v. Trowbridge.....	71 Iowa 400	1093
Laverty v. Snethen	68 N. Y. 522	206
Laverty v. Woodward.....	16 Iowa 1	154
Lawless v. Lawless.....	156 Iowa 184	853
Lawrence v. Davis	3 McLean (U. S.) 177	366
Lay v. Gibbons.....	14 Iowa 377	1171
Leach v. Hall.....	95 Iowa 611	728
Leasman v. Nicholson.....	59 Iowa 259	1256
Lefebure v. American Exp. Co.	160 Iowa 54	788
Lehman v. Great Western Acc. Assn.	155 Iowa 737	43, 44
Leure Lbr. Co. v. Mutual Fire Ins. Co.....	101 Iowa 514	261
Letcher v. Allen.....	60 So. 828 (Ala.)	917
Light v. Chicago, M. & St. P. R. Co.....	93 Iowa 83	818
Lightner v. Greene County...	145 Iowa 95	1340

CASES CITED.

1525

Lincoln v. French.....	105 U. S. 614	793
Lindemann v. Rusk	104 N. W. 119 (Wis.)	1160
Lingenfelter v. St. Clair....	179 Iowa 11	1209
Linton v. Crosby.....	56 Iowa 386	712, 718
Litchfield v. Crane.....	31 L. Ed. 199	984
Little v. Wilcox.....	119 Pa. 439	475
Livingston v. Heck.....	122 Iowa 74	1039
Locke v. Chicago Chronicle Co.	107 Iowa 390	602
Lockridge v. Minneapolis & St. L. R. Co.....	161 Iowa 74	1189
Lockwood v. Exchange Bank	190 U. S. 294	35
Loder v. Whelpley.....	18 N. E. 874 (N. Y.)	402
Loftis v. Marshall.....	66 Pac. 571 (Cal.)	984
London & N. Y. Land Co. v. City of Jellico.....	52 S. W. 995 (Tenn.)	1398
Longan v. Weltmer.....	64 L. R. A. 969 (Mo.)	1260
Longmont Nat. Bank v. Louk- onen	127 Pac. 947 (Colo.)	972
Looney v. Oregon Short Line R. Co.....	111 N. E. 509 (Ill.)	786
Lord, Owen & Co. v. Wood..	120 Iowa 303	947
Los Angeles County v. Winans	109 Pac. 640 (Cal.)	917
Louisville & N. R. Co. v. Chambers	178 S. W. 1041 (Ky.)	1061
Louisville & N. R. Co. v. Ten- nessee Brewing Co.....	36 S. W. 392 (Tenn.)	794
Louisville Water Co. v. Lally	182 S. W. 186 (Ky.)	1061
Louva v. Worden.....	152 N. W. 689 (N. D.)	510
Love v. Lindstedt.....	Ann. Cas. 1917A, 898 (Ore.)	917
Lovering v. Lovering	13 N. H. 513	246
Luby v. Bennett.....	111 Wis. 613	828
Lucas v. City of Pontiac.....	142 Ill. App. 470	596
Lucas v. Crippen.....	76 Iowa 507	208
Lucas v. Payne.....	141 Iowa 592	1280
Ludowici Caladon Co. v. In- dependent School Dist.....	169 Iowa 669	1317
Lund, In re Estate of.....	107 Iowa 264	980
Lunde v. Cudahy Packing Co.	139 Iowa 688	677
Lundien v. Ft. Dodge, D. M. & S. R. Co.....	166 Iowa 85	391
Lyman v. Lauderbaugh.....	75 Iowa 481	923
Lyon v. Railway P. A. Co....	46 Iowa 631	1033
Lyon v. Sac County.....	155 Iowa 367	1340

M

McBride v. McBride.....	142 Iowa 169	1327
McCann v. Clark.....	166 Iowa 705	275, 281
McClanahan v. McKinley.....	52 Iowa 222	208
McCloud v. City.....	44 N. E. 95 (Ohio)	1393
McCormick Mach. Co. v. Richardson	89 Iowa 525	1030
McDonald v. Minneapolis, St. P. & S. S. M. R. Co.....	63 N. W. 966 (Mich.)	820
McElhenney v. Hendricks....	82 Iowa 657	178, 459
McGahan v. Carr.....	6 Iowa 331	54
McGibbons v. Wilder.....	78 Iowa 531	257, 258
McGlade v. City of Waterloo	178 Iowa 11	578, 579
McGlasson v. Scott	112 Iowa 289	744
McGlinchey v. Fidelity & Casualty Co.....	80 Me. 251	825
McIlhargy v. Chambers.....	117 N. Y. 532	366, 367, 374
McKay v. McCarthy.....	146 Iowa 546	597
McKee v. Barley.....	11 Gratt. (Va.) 157	340
McLane v. Placerville & S. V. R. Co.....	66 Cal. 606	324
McLaren v. Hall.....	26 Iowa 297	263
McLeod v. South Deerfield W. S. Dist.....	78 N. E. 764 (Mass.)	1337
McNamara v. McNamara.....	167 Iowa 479	729, 731
McNamee v. Moreland.....	26 Iowa 96	984
McPherrin v. Tittle.....	129 Pac. 721 (Okla.)	324
Mack v. Patchin.....	42 N. Y. 167	249
Mackey v. Swartz.....	60 Iowa 710	838
Macomber v. Nichols.....	34 Mich. 212	557
Magness v. Modern Woodmen	146 Iowa 1	270
Mahan v. Newton & B. St. R. Co.	189 Mass. 1	1377
Maher, in re	169 Fed. 997	36
Mahin's Estate, in re.....	161 Iowa 459	1262
Manatt v. Griffith.....	147 Iowa 707	868, 870
Manatt v. Shaver.....	98 Iowa 353	881
Mann v. Taylor.....	78 Iowa 355	882
Mansfield v. Mallory.....	140 Iowa 206	1030
Mansfield v. Shelton.....	35 Atl. 272 (Conn.)	1224
Manufacturers' Accident Indemnity Co. v. Dorgan....	58 Fed. 945	996
Manufacturers' Accident Indemnity Co. v. Fletcher....	5 Ohio Cir. Ct. 633	1032

Manwell v. Burlington, C. R.			
& N. R. Co.....	80 Iowa 662	1387	
Marks v. Sewall.....	120 Mass. 174	156	
Marquette H. & O. R. Co. v.			
Kirkwood	45 Mich. 51	784	
Marsh v. Smith.....	73 Iowa 295	984	
Marston v. Coburn.....	17 Mass. 453	366	
Martin v. Martin.....	125 Iowa 73	743	
Maryland Casualty Co. v. Ohle	87 Atl. 763 (Md.)	1032	
Mast v. Wells.....	110 Iowa 128	880	
Masterson & Hoyt v. Le Claire	4 Minn. 163	622	
Matchett v. Anderson Foundry			
& Machine Works.....	64 N. E. 229 (Ind.)	972	
Matheney, Beasley & Koon v.			
Godin	61 S. E. 703 (Ga.)	510	
Mathews v. City of Cedar			
Rapids	80 Iowa 459	383	
Mathews v. Lightner.....	88 N. W. 992 (Minn.) ...	916, 918	
Mathews v. Nash.....	151 Iowa 125	1289	
Mathias v. Carson.....	49 Mich. 465	1339	
Mattauch v. Walsh.....	136 Iowa 225	256	
Matthys v. Donelson	179 Iowa 1111	563	
Maule v. Ashmead.....	20 Pa. 482	249	
Maxwell v. Urban.....	22 Texas Civ. App. 565 ..	249	
Mayor v. Muzzy.....	33 Mich. 61	931	
Mayor, etc., v. Knoxville			
Water Co.	64 S. W. 1075 (Tenn.)	1398	
Meek v. Briggs.....	87 Iowa 610	469, 1224	
Meeker v. Sanders.....	6 Iowa 61	369	
Meglunes v. McCheaney.....	179 Iowa 563	170	
Melcher, In re.....	24 R. I. 575	475	
Mendell v. Chicago & N. W.			
R. Co.	20 Iowa 11	1387	
Mentzer v. Western Union Tel.			
Co.	93 Iowa 752	1368	
Merchants' & Mechanics' Sav.			
Bank v. Frazee.....	36 N. E. 378 (Ind.) ...	972	
Mershon v. Williams.....	63 N. J. Law 398	246	
Metlar v. Middlesex & S. Trac-			
tion Co.....	63 Atl. 497 (N. J.)	1337	
Metz Co. v. Boston & M. R. Co.	116 N. E. 475 (Mass.)	1053	
Meyer v. Meyer.....	23 Iowa 375	708	
Meyer, In re.....	98 Fed. 976	327	
Michelson v. Judson.....	109 N. E. 281 (Ill.)	788	
Middleton v. City of Cedar			
Falls	173 Iowa 619	383	

Miles v. Schrunck.....	139 Iowa 563	859
Milheim v. Baxter.....	46 Colo. 155	245
Millan v. City of Charlton....	145 Iowa 648	74
Miller v. Bronson.....	58 Atl. 257 (R. I.)	918
Miller v. Cedar Rapids Sash & Door Co.....	153 Iowa 73513,	18
Miller v. Cramer.....	26 S. E. 657 (S. C.)	918
Miller v. Harrison County..	171 Iowa 270	819
Miller v. Minneapolis & St. L. R. Co.....	119 Iowa 41	285
Miller v. Texas & Pac. R. Co.	132 U. S. 662	917
Miller, In re Estate of.....	31 Utah 415	411
Milligan v. Davis.....	49 Iowa 126	442, 602
Mills v. Miller.....	109 Iowa 688	369
Millsbaugh Laundry v. First National Bank.....	120 Iowa 1	1160
Milne v. Van Buskirk.....	9 Iowa 558	743
Minneapolis & St. L. R. Co. v. Beckwith	129 U. S. 26	1387
Minneapolis & St. L. R. Co. v. Lindquist	119 Iowa 144	684
Minneapolis' Selling Co. v. Cowin & Co.....	153 Iowa 129	839
Missouri, K. & T. R. Co. v. Cade	233 U. S. 642	1390
Missouri, K. & T. R. Co. v. Harriman Bros.	227 U. S. 657 (33 Sup. Ct. Rep. 397)	762, 788, 1048, 1049
Missouri, K. & T. R. Co. v. Ward	169 S. W. 1035 (Texas)	768
Missouri, K. & T. R. Co. of Texas v. Harris.....	34 Sup. Ct. Rep. 790..770, 773,	789
Missouri-Lincoln Trust Co. v. Long	120 Pac. 291 (Okla.)	972
Mitchell v. Atlantic C. L. R. Co.	84 S. E. 227 (Ga.)	789
Mitchell v. Chicago, R. I. & P R. Co.....	138 Iowa 283	1324
Mitchell v. Moore.....	24 Iowa 394	254
Mizner v. School Dist.....	96 N. W. 128, 1906 (Neb.)...	1238, 1239, 1244
Modern Steel Structural Co. v. Van Buren County.....	126 Iowa 607	961
Moffit v. Cressler.....	8 Iowa 122	29
Mondou v. New York, N. H. & H. R. Co.....	32 Sup. Ct. Rep. 169.....	778

CASES CITED.

1529

Montgomery v. Alden.....	133 Iowa 675	984
Moon v. Martin.....	23 N. E. 668 (Ind.)	906
Moore v. Bowman.....	47 N. H. 494	1105
Moore v. City Council of Perry	119 Iowa 423	1392, 1395
Moore v. Mahaska County....	61 Iowa 177	926
Moore v. New York, N. H. & H. R. Co.....	53 N. E. 816 (Mass.) 777, 787,	793
Moore v. St. Paul F. & M. Ins. Co.	176 Iowa 549	360, 362
Moore v. Wilson's Admrs.....	10 Yerg. (Tenn.) 406	688
Morbey v. Chicago & N. W. R. Co.	116 Iowa 84	792
Morgan v. Farrel.....	58 Conn. 413	1106
Morgan v. Iowa Cent. R. Co..	151 Iowa 211	1189, 1190
Morgan v. United States.....	113 U. S. 476	324
Morgan, In re Estate of.....	125 Iowa 247	269
Morrow v. National Mas. Acc. Assn.	125 Iowa 633	87
Mosher v. McDonald.....	128 Iowa 68	285
Mosheuvel v. District of Col- umbia	48 L. Ed. (U. S.) 170	386
Motor Accessories Mfg Co. v. Marshalltown M. M. Mfg. Co.	167 Iowa 202	1164
Mueller Lbr. Co. v. McCaffrey	141 Iowa 730	853
Mulcrevy v. City and County of San Francisco.....	231 U. S. 669	926
Mullaney v. Cutting.....	175 Iowa 547	1168, 1173, 1175
Munton v. Rutherford.....	121 Mich. 418	1116
Murphy & Cochran.....	134 N. W. 1085 (Iowa)	819
Murphy v. National Trav. Ben. Assn.	179 Iowa 213	647, 648
Murray v. Davis.....	21 N. D. 64	475
Murray v. Swanwood Coal Co.	159 Iowa 1	15
Musolf v. Duluth Edison Elec. Co.	108 Minn. 369	1377

N

Nashville, C. & St. L. R. Co. v. Truitt Co.....	86 S. E. 421 (Ga.)	783
National Bank of Commerce v. Kenney	83 S. W. 368 (Texas)	972
National Bank of N. A. of B. v. Kirby.....	108 Mass. 497	323, 324

National Fire Ins. Co. v. Three States Lbr. Co.....	217 Ill. 115	360
Neel v. Neel.....	65 Kan. 858	373
Neeley v. Incorporated Town of Mapleton.....	139 Iowa 582	587, 590
Newark E. L. & P. Co. v. Gar- den	23 C. C. A. 649	1377
New Jersey Steam Nav. Co. v. Merchants' Bank.....	6 How. (U. S.) 243	767
Newman v. Chicago, M. & St. P. R. Co.	80 Iowa 672	14
New Orleans & N. E. R. Co. v. National Rice Milling Co.	34 Sup. Ct. Rep. 726.....	794
New York Brokerage Co. v. Wharton	143 Iowa 61	1290
New York Life Ins. Co. v. Moats	207 Fed. 481 ...	644
Nicholas v. Purcell.....	21 Iowa 265 ..	147
Nicholson v. Combs.....	90 Ind. 515	372
Nicoll v. Spowers.....	105 N. Y. 1	366
Nolan v. Glynn.....	163 Iowa 146	871, 1327
Norman, In re Will of.....	72 Iowa 84	1009
Norris v. Tayloe.....	49 Ill 17	206
Northwestern Mut. L. Ins. Co. v. Stevens	71 Fed. 253	270
Norton v. Catholic Order of Foresters	138 Iowa 464	593
Nosler v. Chicago, B. & Q. R. Co.	73 Iowa 268	1013
Novak v. Novak.....	137 Iowa 519	1246
Nowlen v. Nowlen....	122 Iowa 541	1289
Nye v. Walliker.....	46 Iowa 306	979

O

O'Brien, Appeal of.....	60 Atl. 880 (Me.)	410, 413
O'Connell v. Cotter.....	44 Iowa 48	563, 565
Odd Fellows Fraternal Acc. Assn. v. Earl.....	70 Fed. 16	1032
Oliver v. Monona County....	117 Iowa 43	165
Oliver v. Montgomery.....	42 Iowa 36	728
O'Mara v. Jensma.....	143 Iowa 297	1259
Opinion of Justices, In re....	96 N. E. 308 (Mass.)	778
Ormsby v. Graham.....	123 Iowa 202	1292
Orr v. O'Brien.....	77 Iowa 253	1280
Ouachita v. Tufts.....	43 Ark. 136	663

CASES CITED.

1531

Owen v. Metropolitan Life Ins. Co.	67 Atl. 25 (N. J.)	646
Oyler v. McMurray.....	34 N. E. 1004 (Ind.)	972
Oziah v. Howard.....	149 Iowa 199	54

P

Pacific Tel. & Tel. Co. v. Hoffman	208 Fed. 221	386
Pacific Timber Co. v. Iowa Windmill Co.....	135 Iowa 308	297
Page & Son v. Grant.....	127 Iowa 249	1317
Paine v. Hall.....	18 Ves. Jr. 475	411
Parfitt v. Lawless.....	L. R. 2 Pro. & D. 462.....	406
Parker v. Catron.....	120 Ky. 145	1262
Parker v. City of Ottumwa..	113 Iowa 649	20
Paulus v. Reed.....	121 Iowa 224	1289
Payne v. Waterloo, C. F. & N. R. Co.....	153 Iowa 445	1328
Peabody v. Maguire	12 Atl. 630 (Me.)	593
Peat v. Chicago, M. & St. P. R. Co.....	107 N. W. 355 (Wis.)	1061
Peck v. Brewer.....	48 Ill. 54	257
Peebles v. Bunting.....	103 Iowa 489	980
Peele v. Provident Fund Society	44 N. E. 661 (Ind.)	1032
Pennsylvania R. Co. v. Hughes	191 U. S. 477 (24 Sup. Ct. Rep. 132)	786, 1048
People v. Batchelor.....	22 N. Y. 128	1397
People v. Conklin.....	175 N. Y. 333	215
People v. McElvalne	24 N. E. 465 (N. Y.).....	996
People v. Walker.....	23 Barb. (N. Y.) 304	1397
People's Mutual Accident Assn. v. Smith.....	17 Atl. 605 (Pa.)	1032
Peoria Steam Marble Works v. Hickey	110 Iowa 276	241, 243
Perkins v. Board of Directors	56 Iowa 476	1240, 1244
Perkins v. Burlington Land & Imp. Co.....	88 N. W. 648 (Wis.).....	917
Perry v. Clarke County.....	120 Iowa 96.....	586, 589, 594
Perry v. Cottingham.....	63 Iowa 41	127
Perry County v. Selma M. & M. R. Co.....	58 Ala. 546	663, 664
Pettigrew v. Lewis.....	46 Kan. 78	87
Petty v. Durall.....	4 G. Greene (Iowa) 120....	100
Phillips v. Phillips.....	93 Iowa 615	578

Phinney v. Illinois Cent. R. Co.	122 Iowa 488	792
Pickett v. Ferguson.....	45 Ark. 177	245
Piekenbrock & Sons v. Knoer	136 Iowa 534	903, 904
Pierce Co. v. Wells, Fargo & Co.	236 U. S. 278	1050
Pierson v. Chicago & N. W. R. Co.	127 Iowa 18	18
Pierson v. Lane.....	60 Iowa 60	135
Pierson v. Manning.....	2 Mich. 445.....	365, 366
Pike v. Rowland.....	94 Pa. 238	1399
Pitcher v. Turin.....	10 Barb. (N. Y.) 436.....	924
Pittsburgh, C. C. & St. L. R. Co. v. Hoffman.....	107 N. E. 315 (Ind.).....	677
Plantz v. Kreutzer & Wasem	175 Iowa 562	14
Platter v. Minneapolis & St. L. R. Co.....	162 Iowa 142	1139
Pleasants v. Fant.....	89 U. S. 116	1119
Polk County v. Parker.....	178 Iowa 936	925, 931
Pomeroy v. Aetna Ins. Co....	120 Pac. 344 (Kan.).....	360
Poor Grain Co. v. Chicago, B. & Q. R. Co.....	12 I. C. C. R. 418.....	1049
Post v. Mason.....	91 N. Y. 539.....	411
Post v. United States.....	67 C. C. A. 569.....	1061
Potter v. Worley.....	57 Iowa 66	154
Potts v. Polk County.....	80 Iowa 401	910
Potts v. Shreveport B. R. Co.	110 La. 1	1377
Powers v. Des Moines City R. Co.	143 Iowa 430	853
Powers v. Iowa Cent. R. Co.,	157 Iowa 347	1188
Pratt v. Allegan Circuit Judge	143 N. W. 890 (Mich.).....	206
Pray v. Life Ind. & Sec. Ins. Co.	104 Iowa 114	829
Prescott v. Bidwell.....	99 N. W. 93 (S. D.).....	1160
President, etc., of Bank v. Dandridge	12 Wheat. (U. S.) 64.....	1393
Preston v. Board of Education	124 Iowa 355..1239, 1242, 1243, 1244	
Price v. Parker.....	11 Iowa 144	370
Prichard v. Mulhall.....	140 Iowa 1	918
Proctor, In re Estate of.....	103 Iowa 232	154
Prudential Ins. Co. v. Dolan.	91 N. E. 970 (Ind.).....	793
Pryor v. Foster.....	29 N. E. 123 (N. Y.).....	254, 257

Q

Quinn v. Baage.....	138 Iowa 426	291
Quinn v. Capital Ins. Co....	82 Iowa 550	880

R

Railway O. & E. Acc. Assn. v. Coady	80 Ill. App. 563	677
Randolf v. Town of Bloomfield	77 Iowa 50	882
Ranft v. Reimers.....	65 N. E. 720 (Ill.).....	1160
Rattan v. Central Elec. R. Co.	96 S. W. 735 (Mo.).....	1063
Rausch v. Moore.....	48 Iowa 611	153
Rawson v. Harger.....	48 Iowa 269	29
Rayburn v. Central Iowa R. Co.	74 Iowa 637	1230, 1231
Rea v. Flathers	31 Iowa 545	882
Read & Traversy v. Staet Ins. Co.	103 Iowa 307	1036
Rector v. Christy.....	114 Iowa 475	1280
Reece v. Haymaker.....	30 Atl. 404 (Pa.).....	918
Reed v. Reed.....	19 S. C. 548.....	522
Reese v. Shutte.....	133 Iowa 681	1289
Reeves v. Dubuque & S. C. R. Co.	92 Iowa 32	1188
Reeves v. Howard.....	118 Iowa 121	407
Regan v. Kirk.....	140 Iowa 302	170
Reger v. Henry.....	150 Pac. 722 (Okla.).....	257
Regina v. Humphery	10 Adol. & E. 335.....	475
Rehm v. Viall.....	185 Ill. App. 425.....	749
Reld v. McNerney.....	128 Iowa 350	806
Reilly v. Reilly.....	135 Iowa 440	982
Reints v. Engle.....	130 Iowa 726	1155
Renner v. Thornburg.....	111 Iowa 515	817
Reppond v. National Life Ins. Co.	101 S. W. 786 (Texas).....	648
Reutkemeler v. Nolte.....	179 Iowa 342	309
Reynolds v. City.....	72 Iowa 371	792
Reynolds v. Smith.....	148 Iowa 264	50
Reynolds v. Sumner.....	126 Ill. 58	1262
Rhea v. Brewster.....	130 Iowa 729	926
Rice v. Bennett.....	137 N. W. 359 (S. D.).....	522
Rice v. Bolton.....	126 Iowa 654	563, 1267
Rice v. Burkhart.....	130 Iowa 520	140, 147
Rice v. Nelson.....	27 Iowa 148	154

Richards v. Burden.....	31 Iowa 305	881
Richardson v. Sioux City....	136 Iowa 436	230
Richmond v. Dubuque & S. C. R. Co.....	33 Iowa 422	1246
Ricker v. Davis.....	160 Iowa 37	753, 1231
Riddell v. Johnson's Exr....	26 Gratt. (Va.) 410.....	152
Ridley v. Halliday.....	61 S. W. 1025 (Tenn.).....	917
Riley v. Collins.....	64 Pac. 1052 (Colo.).....	615
Ring, In re Estate of....	132 Iowa 216	144
Ringland v. Johnson.....	177 Iowa 214	140
Ringstad v. Hanson.....	150 Iowa 324	283
Rittenhouse v. Leigh.....	57 Mias. 697	1117
Roberts v. Moudy.....	30 Neb. 683	715
Roberts, Appeal of.....	59 Pa. 70	475
Robertson v. Alberson.....	114 N. W. 885 (Iowa).....	1131
Robertson v. Schard.....	142 Iowa 500	470, 904
Robinson v. Louisville & N. R. Co.	169 S. W. 831 (Ky.).....	789
Rock Island Plow Co. v. Breese	83 Iowa 553	371
Rockwell v. Ketchum.....	149 Iowa 507	1324
Roden Grocery Co. v. Bacon.	133 Fed. 515.....	36
Rolfs v. Mullins	179 Iowa 1223	472
Rookard v. Atlantic & C. Air Line R. Co.....	65 S. E. 1047 (S. C.).....	984
Rorick v. Railway Officials' etc., Acc. Assn.....	119 Fed. 63	1032
Rosenthal v. Rambo.....	76 N. E. 404 (Ind.).....	971
Ross v. Board of Supervisors	128 Iowa 427	166
Ross v. Bolte.....	165 Iowa 499 ...	207, 208
Ross v. City Council.....	136 Iowa 125	1132
Rounds v. Alee.....	116 Iowa 345	442, 801, 804
Rouss v. Racket Store.....	164 Pac. 1182 (Ariz.).....	1117
Rowe v. New York & N. J. Tel. Co.	66 N. J. Law 10	1377
Rowe v. Taylorville Elec. Co.	213 Ill. 318	1377
Rule v. Carey.....	178 Iowa 184	1324
Rupener v. Cedar Rapids & I. C. R. & L. Co.....	178 Iowa 615	1188
Rush v. Burlington, C. R. & N. R. Co.....	57 Iowa 201	156
Rutledge v. Fishburne.....	97 Am. St. 757 (S. C.).....	917
Ryan v. Tudor.....	31 Kan. 366	270

S

St. Louis, B. & M. R. Co. v.		
Gould	165 S. W. 13 (Texas).....	773, 783
St. Louis, I. M. & S. R. Co. v.		
Wynne	224 U. S. 354 (42 L. R. A. [N. S.] 102)	1388, 1389
St. Louis & S. F. R. Co. v.		
Heyser	130 S. W. 562 (Ark.).....	787, 788
St. Louis & S. F. R. Co. v.		
Mounts	144 Pac. 1036 (Okla.)..	763, 773, 790
St. Louis, S. F. & T. R. Co. v.		
Fenley	118 S. W. 845 (Texas).....	773
St. Louis, S. W. R. Co. of		
Texas v. Ray.....	127 S. W. 281 (Texas)....	763, 768
St. Louis Union Trust Co. v.		
Texas Southern R. Co.....	126 S. W. 296 (Texas).....	929
St. Louis, V. & T. H. R. Co. v.		
Bell	81 Ill. 76.....	705
Salchert v. Reinig.....	115 N. W. 132 (Wis.).....	1062
Salmon v. Farm P. M. I. Assn.	168 Iowa 521	1035
Salyers v. Monroe.....	104 Iowa 74	792
Sanderlin, In re.....	109 Fed. 857	327
Sanderson v. Chicago, M. & St.		
P. R. Co.....	167 Iowa 90	642
San Francisco v. Jones.....	20 Fed. 188	663
Sargent v. Modern Brother-		
hood of Am.....	148 Iowa 607	647
Sartor v. Schaden.....	125 Iowa 696	1164
Sawyer v. Iowa Const. Pro.		
Amend. Assn.....	177 Iowa 218	262
Scagel v. Chicago, M. St. P.		
R. Co.....	83 Iowa 380	20
Schaller v. Marker.....	136 Iowa 575	64
Schillinger Bros. v. Bosch-		
Ryan Grain Co.....	145 Iowa 750	593
Schnee v. City of Dubuque...	122 Iowa 459	587
Schoenhofen Brewing Co. v.		
Giffey	162 Iowa 204	381
School Corporation v. Inde-		
pendent School Dist.....	162 Iowa 257	1242, 1243
Scott v. Brenton.....	168 Iowa 201	1208, 1259
Scribner v. Kelley.....	38 Barb. (N. Y.) 14.....	557
Scroggins v. Metoprolitan St.		
R. Co.....	120 S. W. 731 (Mo.).....	1063

Seaboard Air Line R. Co. v.		
Horton	34 Sup. Ct. Rep. 635.....	778, 789
Searles v. Lux.....	86 Iowa 61	260
Sebrell v. Couch.....	55 Ind. 122	469
Second Nat. Bank v. Lanin..	164 Iowa 512	948
Second Nat. Bank v. Wheeler	42 N. W. 963 (Mich.).....	971
Secor v. Siver.....	161 N. W. 769 (Iowa).....	1291
See v. Heppenheimer.....	61 Atl. 843 (N. J.).....	1160
Seeds v. Grand Lodge	98 Iowa 175	270
Seevers v. Cleveland Coal Co.	158 Iowa 574	804
Seiffert & Wiese Lbr. Co. v.		
Hartwell	94 Iowa 576	880
Sellards v. Kirby.....	82 Kan. 291	408
Selleck, In re Estate of.....	126 Iowa 678	858
Shaft v. Carey.....	83 N. W. 288 (Wis.).....	245
Shaw v. Nelson.....	150 Iowa 559	163
Sheehy v. Scott.....	128 Iowa 551	713
Shehan v. Stuart.....	117 Iowa 207	284, 285
Sherod v. Ewell.....	104 Iowa 253	270
Shugars v. Hamilton	92 S. W. 564 (Ky.).....	1397
Shugart & Lininger v. Pattee	37 Iowa 422	882
Siebert v. People.....	143 Ill. 571	215
Simonson Bros. v. Citizens St.		
Bank	105 Iowa 264	961
Simpkins v. Hawkeye Com'l.		
Men's Assn.	148 Iowa 543	1033
Singer v. Armstrong.....	77 Iowa 397	370
Singleton v. Close.....	61 S. E. 722 (Ga.).....	918
Sisson v. Board of Supervisors	128 Iowa 442	1337
Sisson v. Kaper.....	105 Iowa 599	257
Slaughter's Admr. v. Gerson.	13 Wall. (U. S.) 379.....	209
Sleat v. Fagg.....	5 B. & Ald. 342	1046
Smith v. Blairsburg Ind.		
School Dist.....	179 Iowa 500	1242
Smith v. City of Des Moines.	106 Iowa 590	71
Smith v. Gorrell.....	81 Iowa 218	1280
Smith v. Hickenbottom.....	57 Iowa 738	996
Smith v. Hill.....	45 Vt. 90	1113
Smith v. Hintrager.....	67 Iowa 109	328
Smith v. Nesblitt.....	2 C. B. 235	475
Smith v. Smith.....	160 Iowa 111	456
Smith v. State of Alabama..	124 U. S. 465	767
Smith, In re Estate of.....	165 Iowa 614	154, 904
Smouse v. Iowa S. T. M. Assn.	118 Iowa 436	43
Snodgrass v Smith	42 Colo. 60 (15 Am. & Eng.	
	Ann. Cas. 548).....	409, 411

Sollenbarger v. Incorporated		
Town of Lineville	141 Iowa 202	588, 589, 590
South Covington & C. St. R.		
Co. v. Finan's Admx.	155 S. W. 742 (Ky.).....	778
Southern Exp. Co. v. Caldwell	21 Wall. (U. S.) 264.....	762
Southern R. Co. v. Bennett..	86 S. E. 418 (Ga.).....	780
Southern R. Co. v. Prescott.	36 Sup. Ct. Rep. 469.....	
772, 779, 784,	786
Southwick v. McGovern.....	28 Iowa 533	1114
Spada v. Pennsylvania R. Co.	92 Atl. 379 (N. J.).....	789
Sparf v. United States	15 Sup. Ct. Rep. 273.....	490
Spaulding v. Laybourn.....	164 Iowa 277	1227
Specht v. Spangenberg.....	70 Iowa 488	880
Spence v. Southern R. Co.....	85 S. E. 1058 (S. C.).....	781
Spencer v. Spencer.....	109 N. E. 300 (Ill.).....	1221
Spicer v. City of Webster City	118 Iowa 561	818
Spires v. Middlesex & M. Elec.		
Co.	70 N. J. Law 355.....	1377
Squires v. Jeffrey.....	101 Iowa 676	563
Staab v. Rocky Mt. Bell Tel.		
Co.	23 Idaho 314	1377
Stanley v. Taylor.....	160 Iowa 430	1005
Stark v. Barrett.....	15 Cal. 361	156
Starling v. Incorporated Town		
of Bedford.....	94 Iowa 194	596
Starr v. Leavitt	2 Conn. 243	1171
State v. Arns	72 Iowa 555	881
State v. Asbell	57 Kan. 398	215
State v. Bair	112 Iowa 466	610
State v. Baldwin	36 Kan. 1	215
State v. Bennett	143 Iowa 214	267
State v. Blackburn	136 Iowa 743	1002
State v. Clausen	117 Pac. 1101 (Wash.).....	773
State v. Clemons	78 Iowa 123	1231
State v. Corwin	151 Iowa 420	610
State v. Creamer	97 N. E. 602 (Ohio).....	778
State v. Cross	95 Iowa 629	124
State v. Des Moines City R.		
Co.	135 Iowa 694	881
State v. Donovan	128 Iowa 44	1004
State v. Dougherty	4 Ore. 200	218
State v. Fitzgerald	130 Mo. 407	215
State v. Flynn	69 N. E. 159 (Ind.).....	929
State v. Fuller	125 Iowa 212	218
State v. Gifford	53 Pac. 709 (Wash.).....	218
State v. Giudice	170 Iowa 731	691

State v. Gulliver	163	Iowa 123	692, 1227, 1232
State v. Harmann	135	Iowa 167	692
State v. Hasty	121	Iowa 507	692
State v. Haynes	54	Iowa 109	688
State v. Helm	92	Iowa 540	1227
State v. Helm	97	Iowa 378	20
State v. Henderson	40	Iowa 242	662
State v. Hassenius	165	Iowa 415	1009, 1010
State v. Hitchcock	241	Mo. 423	474
State v. Iowa Telephone Co. .	175	Iowa 607	385
State v. Johnson	27	S. W. 399 (Mo.)	984
State v. Kelley	46	N. W. 714 (Neb.)	926
State v. Kirk	46	Conn. 395	1399
State v. Kirk	168	Iowa 244	110
State v. Klute	160	Iowa 170	219
State v. La Grange	99	Iowa 10	1221
State v. Lentz	45	Minn. 177	215
State v. McCauley	15	Cal. 429	1212
State v. McClure	159	Iowa 351	1221
State v. McConkey	49	Iowa 499	257
State v. McGhuey	153	Iowa 308	700
State v. McGruder	125	Iowa 741	267, 355
State v. Madden	170	Iowa 230	1200
State v. Manley	63	Iowa 344	742
State v. Miller	65	Iowa 60	1227
State v. Mosher	78	Iowa 321	610
State v. Novak	109	Iowa 717	114
State v. Peterson	110	Iowa 647	1002
State v. Proctor	86	wa 698	692
State v. Shutts	69	N. E. 397 (Ind.)	920
State v. Siemens	133	Pac. 1173 (Ore.)	1292
State v. Stewart	157	N. W. 1046 (S. D.)	213
State v. Thatcher	35	N. J. Law 445	121
State v. Thomas	152	Iowa 500	1240
State v. Watson	81	Iowa 380	996, 997, 1008
State v. Whitbeck	145	Iowa 29	219
State v. Wilson	157	Iowa 698	1232
State v. Winter	72	Iowa 627	1002
State v. York	135	Iowa 529	940
State v. Young	134	Iowa 505	653
State Bank v. Brown	142	Iowa 190	29
State Bank of Halstad v. Bil- stad	162	Iowa 433	970, 972
State Bank of Woolstock v. Schutt	174	Iowa 533	469

State ex rel. Crow v. City of St. Louis	73 S. W. 623 (Mo.).....	941
Steburg v. Vincent Clay Pro- ducts Co.	173 Iowa 248	15
Stephenson v. Bankers Life Assn.	108 Iowa 637	329
Stevens v. St. Louis S. W. R. Co.	178 S. W. 810 (Texas).....	763
Stirling v. Stirling	64 Md. 133	408
Stitzel v. Miller.....	95 N. E. 53 (Ill.).....	973
Stivers v. Gardner	88 Iowa 307	1224
Stoddard v. Mix	14 Conn. 11	906
Stoddard v. Thompson	31 Iowa 80	934
Stokey v. Carter	92 Ill. 129	155, 156
Storm Lake Bank v. Missouri Valley L. Ins. Co.	66 Iowa 617	442
Storm Lake T. & T. Factory v. Minneapolis & St. L. R. Co.	209 Fed. 895	782, 787
Stotts v. Fairfield	163 Iowa 726	322
Strand v. Grinnell Automo- bile Garage Co.....	136 Iowa 68	1140
Strause v. Hooper	105 Fed. 590	327
Strickland v. Parker	54 Me. 263	155
Stryker v. Crane	31 L. Ed. 194	934
Stutsman v. City of Burling- ton	127 Iowa 563	634
Stutsman v. McVicar	111 Iowa 40	1395
Stutsman v. Sharpless	125 Iowa 342	1006
Sullivan v. Chicago, R. I. & P. R. Co.	119 Iowa 464	1227
Sullivan v. Collins	18 Iowa 228	918
Sunberg v. Babcock	66 Iowa 515	1227
Sutter v. San Francisco	36 Cal. 112	156
Sutton v. Bower & Perkins..	124 Iowa 58	449
Swartwood v. Chance	131 Iowa 714	1289
Swayne v. Lyon	67 Pa. 436	918
Sweitzer v. Fisher	172 Iowa 266	1242
Swetland v. Boston & A. R. Co.	102 Mass. 276	794
Switzell v. Martin	16 Iowa 519	1172
Sykes v. Pure Food Cider Co.	157 Iowa 601	1180
Sylvester v. Sylvester	109 Iowa 401	619
T		
Taeger v. Riepe	90 Iowa 484	1279

Tainter v. Cole	120 Mass. 162	156
Talbot v. Snodgrass	124 Iowa 681	1219, 1220
Taylor v. Ely	25 Conn. 250	1092
Taylor v. Pacific Mut. Life Ins. Co.	110 Iowa 621	1032
Teeple v. Fraternal Bankers' Res. Society	179 Iowa 65	647, 1247
Tefft v. Wilcox	6 Kan. 46	87
Texas & P. R. Co. v. Abilene Cotton Oil Co.	204 U. S. 426.....	768, 1049
Texas Midland R. Co. v. Becker	171 S. W. 1024 (Texas).....	782
Theis v. Chicago & N. W. R. Co.	107 Iowa 522	330
Thilmany v. Iowa Paper Bag Co.	108 Iowa 357	223
Thistle Coal Co. v. Rex Coal & Mining Co.	132 Iowa 592	602
Thomas v. Blair	151 N. W. 1041 (Mich.).....	783
Thompson & Son v. Brown ..	106 Iowa 367	299
Thurber v. Duckworth	165 Iowa 685	1122
Tiernan v. Fenimore	17 Ohio 552	372
Tiffany, In re	147 Fed. 314.....	26
Tilleny v. Wolverton	48 N. W. 908 (Minn.).....	206
Tisdale v. Connecticut Mut. Life Ins. Co.	26 Iowa 170	270
Todhunter v. De Graff	164 Iowa 567	619
Torre v. Jeannin	25 So. 860 (Miss.).....	683
Towle v. Leacox	59 Iowa 42	742
Town of Springfield v. Peo- ple's Dep. Bank	63 S. W. 271 (Ky.).....	1397
Traer Bros. v. Whitman	56 Iowa 443	743
Trenton v. Duncan.....	86 N. Y. 221.....	1092
Trippe v. Provident Fund So- ciety	35 N. E. 316 (N. Y.).....	1032
Trubey v. Richardson.....	224 Ill. 136	408
Tucker v. Ronk.....	43 Iowa 80	910
Turnley v. Micheal	15 S. W. 912 (Texas).....	313
Tuttle v. Burlington & M. R. R. Co.....	49 Iowa 134	154
Tyler v. Sanborn.....	4 L. R. A. 218 (Ill.).....	206
Tyler v. Theilig.....	52 S. E. 606 (Ga.).....	1224
Tyson v. Tyson.....	37 Md. 567	407
U		
Uehlein v. Burk.....	119 Iowa 742	522

CASES CITED.

1541

Union County Inv. Co. v. Mes-		
six	152 Iowa 412	263
Union Mill Co. v. Prenzler...	100 Iowa 540	948
Union Mut. Life Ins. Co. v.		
Buchanan	100 Ind. 63.....	677
Union Pac. R. Co. v. McLean	139 N. W. 679 (Neb.).....	1392
United States v. Eaton.....	169 U. S. 331.....	1393
United States v. Ellsworth...	101 U. S. 170.....	925
United States v. Lawson....	101 U. S. 164	934
United States Casualty Co. v.		
Hanson	79 Pac. 176 (Colo.).....	1032
United States Mut. Acc. Assn.		
v. Barry.....	131 U. S. 100.....	825
Upp v. Neuhring.....	127 Iowa 713	710
Upton Mfg. Co. v. Hulske....	69 Iowa 557	839

V

Valley Nat. Bank v. Crosby..	108 Iowa 651	243
Van Houten, In re.....	147 Iowa 729	858
Van Husean v. Heames.....	52 N. W. 18 (Mich.).....	230, 231
Van Meter v. Town of Tipton	178 Iowa 1201	449
Van Sickle v. Staub.?	155 Iowa 472	1257
Van Vliet Fletcher Auto Co.		
v. Crowell.....	171 Iowa 64	207, 209
Varnum v. Town of Highgate	65 Vt. 416	924
Veach v. Thompson.....	15 Iowa 380	119
Viele v. Judson	82 N. Y. 32.....	1093, 1118
Vohs v. Shorthill.....	130 Iowa 538	534

W

Wade v. Halligan.....	16 Ill. 507.....	249
Wadleigh v. Merkle.....	57 Wis. 517	367
Walker v. Pumphrey.....	82 Iowa 487	880
Walkley v. Clarke.....	107 Iowa 451	459
Wallace v. Independent School		
Dist.	150 Iowa 711	1243
Walrod v. Webster County...	110 Iowa 849	13
Walsh v. Doran.....	146 Iowa 110	522
Walton v. Dore.....	113 Iowa 1	442
Ward v. Ward.....	12 O. Cir. 59	924
Washington G. L. Co. v. Dis-		
trict of Columbia.....	161 U. S. 331	1302
Waterloo, C. F. & N. R. Co. v.		
Harris	189 Iowa 149	904
Watson Cut Stone Co. v. Small	54 N. E. 995 (Ill.).....	820

Wattels v. Minchen.....	93 Iowa 517	881
Webber v. Sullivan.....	58 Iowa 260	856
Weber v. City of Iowa City..	119 Iowa 633	1290
Weimer v. Economic Life Assn.	108 Iowa 451	645
Weiser v. Day Bros.....	77 Iowa 25	261
Weitz v. Independent District	78 Iowa 87	941
Wells v. Lamb.....	19 Neb. 355	372
Wells v. Western Union Tel. Co.	144 Iowa 605	643
Wells, Fargo & Co. v. Neiman- Marcus Co.	227 U. S. 469	1049, 1050
Wells, In re.....	51 Atl. 868 (Me.)	408
Wells, In re.....	105 Fed. 762	36
Weltmer v. Bishop.....	71 S. W. 167 (Mo.).....	1061
Werner v. Fraternal Bankers' Res. Society	172 Iowa 504	267
Wesley v. Chicago, St. P. & K. C. R. Co.....	84 Iowa 441	1189
Western Union Tel. Co. v. Call Publ. Co.	181 U. S. 92.....	767
West Side Lumber Co. v. Hathaway	115 Iowa 654	663
Weston v. Teufel.....	213 Ill. 291	415
Wetherell v. Brobst.....	23 Iowa 586	1291
Wetmore v. Mellinger.....	64 Iowa 741	328
Wheeler v. City.....	131 Iowa 566	385, 386
Wheeler v. Cox.....	56 Iowa 36	522
Wheeler & Willson Mfg. Co. v. Sterrett	94 Iowa 158	1227
Whisler v. Whisler.....	117 Iowa 712	460, 461
Whitaker v. Williams.....	20 Conn. 98	1106
Whitam v. Dubuque & S. C. R. Co.....	96 Iowa 737	442
White v. Bates.....	84 N. E. 906 (Ill.).....	918
White v. International Text Book Co.....	156 Iowa 210	328
White v. Mann.....	26 Me. 361	370
White v. Trowbridge.....	64 Atl. 862 (Pa.).....	1160
White v. Watts.....	18 Iowa 74	1171
Whitsett v. Chicago, R. I. & P. R. Co.....	67 Iowa 150	18, 792, 1227
Wiar v. Wabash R. Co.....	151 Iowa 121	987
Wiar v. Wabash R. Co.....	162 Iowa 702	1183
Wickes-Nease v. Watts.....	70 S. W. 1001 (Texas).....	614
Wiese v. Remme.....	140 Mo. 289	677, 678
Wiggin v. Buzzell.....	58 N. H. 329	715

Wiggin v. Elders & Deacons of Baptist Church.....	8 Metc. (Mass.) 301.....	1397
Wilhelm v. Calder.....	102 Iowa 342	1221, 1224
Wilkins v. Germania Fire Ins. Co.	57 Iowa 529	649
Will of Ames, In re	51 Iowa 596	853, 856
Will of Downing, In re.....	95 N. W. 876	402
Will of Hollingsworth, In re.	58 Iowa 526	407
Will of Norman, In re.....	72 Iowa 84	1009
Willet v. Southern R. Co....	45 S. E. 93 (S. C.)....	773, 783, 787
Williams v. Farrand.....	50 N. W. 446 (Mich.).....	1160
Williamson v. Jones.....	43 W. Va. 562.....	1118
Williamson v. White.....	28 S. E. 846 (Ga.)	984
Wilson v. Anchor Fire Ins. Co.	143 Iowa 458	1019
Wilson v. Hardesty.....	48 Iowa 515	980
Wilson v. Illinois Cent. R. Co.	150 Iowa 33	1188
Wilson v. Linder.....	110 Pac. 274 (Ida.).....	1221
Wiltse v. Flack.....	115 Iowa 51	876
Wiltsey, In re Estate of.....	135 Iowa 430	858
Winkler v. Power & Min. Mach. Co.....	124 N. W. 273 (Wis.).....	1061
Winter v. Coulthard.....	94 Iowa 312	743
Winter v. Hite.....	3 Iowa 142	242, 243
Winters v. Winters.....	102 Iowa 53	402
Wishard v. McNeill.....	85 Iowa 474	1094
Withey v. Fowler Co.....	164 Iowa 377	1151, 1227
Woodbury v. Roberts.....	59 Iowa 348	970
Woodmen Accident Assn. v. Byers	87 N. W. 546 (Neb.).....	1032
Woolson v. Pipher.....	100 Ind. 306	365
Wright v. Mahaffey.....	76 Iowa 96	471
Wyland v. Frost.....	75 Iowa 209	285

Y

Yardley v. Cuthbertson	108 Pa. 395	408
Yeager v. Edison Elec. Co....	242 Pa. 101	1377
Yockey v. Woodbury County.	130 Iowa 412	362
Young v. Hargrave's Admr..	7 Ohio 427	247
Young, In re Estate of.....	33 Utah 382	402

Z

Zeitler v. Concordia Fire Ins. Co.	135 N. W. 332 (Mich.).....	360
Zelman v. Kaufherr.....	73 Atl. 1048 (N. J.).....	913
Zinkula v. Zinkula.....	171 Iowa 287	404
Zinser v. Board of Supervisors	137 Iowa 600	162, 163

STATUTES CITED, CONSTRUED, ETC. IN THE OPINIONS REPORTED IN THIS VOLUME.

Constitution of United States.	Acts 33d General Assembly.
5th Amendment..... 1298	Ch. 94 1372
14th Amendment..... 1390	
	Acts 34th General Assembly.
United States Statutes.	Ch. 163 839
Interstate Commerce Act, Secs.	Acts 35th General Assembly.
6, 10, 20..... 1049	
Rev. Stat., Secs. 1763 to	Ch. 155 964
1765, inc. 929	
30 Stat. at L. 544 (Bank-	Code of 1851.
ruptcy Act, 1898, Sec.	
70-a, Ch. 2, Sec. 2)..... 35	Secs. 1394, 1404 152
30 Stat. at L. 547, 548, Ch.	
541, Sec. 5 (U. S. Comp.	Revision of 1860.
Stat. 1916, Sec. 9589).... 327	
34 Stat. at L. 598, Ch. 3591	Secs. 2277, 2295, 2296..... 146
(Carmack Amendment)	Sec. 2297 147
.....762, 763,	Secs. 2477, 2478 152
765, 767, 768, 769, 770, 771,	
773, 774, 775, 776, 777, 779,	Code of 1873.
780, 781, 782, 787, 789,	
791, 792, 1048, 1050, 1051, 1297	
	Massachusetts Statutes.
	Sec. 2440 153
	Sec. 3600 564
Acts and Resolves, 1887,	
Ch. 214, Sec. 76..... 1143	Code of 1897.
Acts 9th General Assembly.	Sec. 48, Par. 3..... 483
	Sec. 357 449
Ch. 151, Secs. 1, 3..... 153	Sec. 587 78

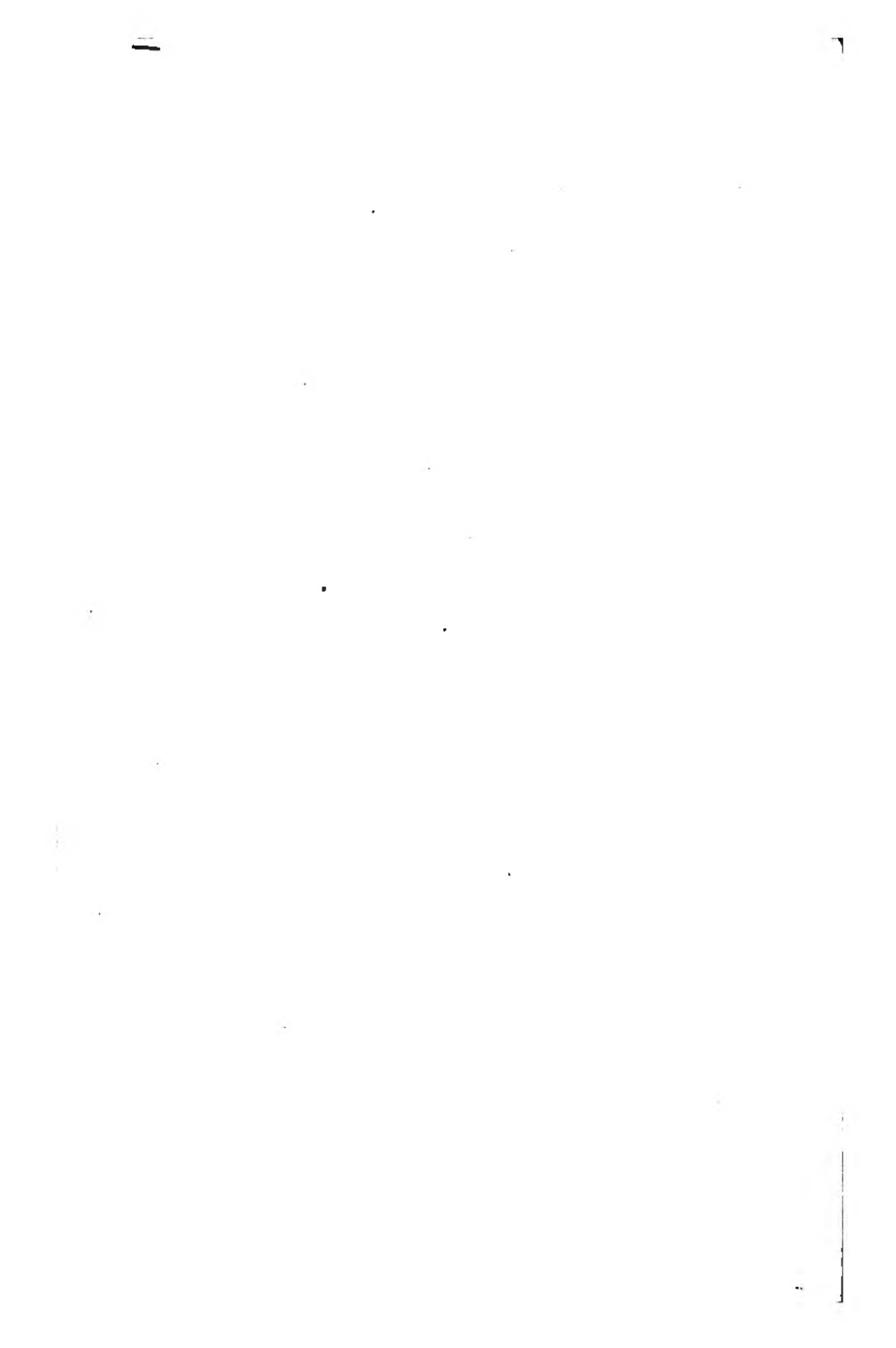
Sec. 668, Subd. 4.....	1397, 1400	Sec. 3393	927
Sec. 703	553	Sec. 3435	748
Secs. 780, 781	70	Sec. 3447	594, 595
Sec. 792	79, 230	Sec. 3482	1155
Sec. 793	230	Sec. 3485	138
Sec. 794	70	Sec. 3500	601
Tit. 5, Ch. 6.....	70, 71, 72	Sec. 3524	285
Tit. 5, Ch. 7	68, 70, 71, 72, 79	Sec. 3528	594
Secs. 811 to 815, inc., 821..	68	Sec. 3534	54
Sec. 835	568	Sec. 3592	190
Secs. 914, 915	231, 232	Sec. 3603	545
Sec. 916	228, 231, 232	Sec. 3717	658
Sec. 1744	1034	Sec. 3727	859
Sec. 1812	645	Sec. 3749	747
Secs. 1946, 1947	166	Sec. 3755, Par. 8.....	853
Sec. 2055	1386	Sec. 3775	545
Sec. 2159	385	Sec. 3779	730
Sec. 2422	665	Sec. 3801	664
Sec. 2427	690	Sec. 3899	944
Sec. 2576	609	Sec. 3929	263
Sec. 2577	608, 609, 610	Sec. 3953	470
Sec. 2580	609, 610	Sec. 3965	1168, 1169
Sec. 2773	1236, 1241	Secs. 3966, 3967	730
Sec. 2804	1236, 1241, 1249	Sec. 3970	1169
Sec. 2818	1237, 1242	Sec. 3991	709
Sec. 2820	1242, 1245	Sec. 4011	712
Sec. 2972	143, 983	Sec. 4017	710
Sec. 2973	983	Sec. 4029	1172
Sec. 2985	140, 141, 149, 982	Sec. 4096	1156
Sec. 3070	119	Sec. 4101, Subd. 3.....	880
Sec. 3072	368	Sec. 4111	471
Sec. 3102	963	Sec. 4159	1394
Sec. 3130	749	Sec. 4243	268
Sec. 3154	868	Secs. 4572, 4574	330
Sec. 3171	618, 624	Sec. 4604	175, 460,
Sec. 3172	624	461, 854, 1196, 1208, 1254, 1257	
Secs. 3206, 3207	1265	Sec. 4625, Par. 3.....	170
Sec. 3212	1266	Sec. 4753	114
Sec. 3270	895	Sec. 4831	115
Secs. 3325, 3326.....	1266	Sec. 4849	116, 123
Sec. 3333	239	Sec. 5078	552, 560
Sec. 3340	453	Sec. 5081	553
Sec. 3366	153, 867, 895, 896	Sec. 5299	218
Sec. 3367	980	Sec. 5381	124
Sec. 3369	154, 896	Sec. 5425	101
Sec. 3377	904		

Code Supplement, 1907.		Sec. 1989-a12	163
		Sec 1989-a46	1336
Secs. 1056-a15, 1056-a16....	1121	Secs. 3060-a24, 3060-a25,	
Sec. 1989-a3	160	3060-a26, 3060-a38	321
		Sec. 3060-a52	120, 320
		Sec. 3060-a55	120
		Sec 3060-a56	120, 320
		Sec. 3060-a57	121, 322
Code Supplement, 1913.		Secs. 3060-a59, 3060-a60....	121
Secs. 260, 261	987	Sec. 3225	1265
Sec. 296	925	Sec. 3307	267, 272
Sec. 777	70	Sec. 3376	895, 896
Sec. 779	70, 71, 73	Sec. 3447, Subd. 1	337, 583
Sec. 791-a	70	Sec. 3447, Subd. 3	584
Secs. 791-b to 791-e, inc....	71	Sec. 3705-a	251, 1324
Sec. 792	70, 73, 79	Sec. 4139	100, 262
Secs. 792-a, 792-b	681	Sec. 4775-11a	701
Sec. 792-c	73	Sec. 5289	691
Sec. 792-g	79	Sec. 5448	99, 101
Sec. 810	68, 70		
Sec. 879-q	939	Code Supplemental Supplement,	
Sec. 1527-c	1372	1916.	
Sec. 1571-m17	1325	Sec. 694-c19 et seq	57
Sec. 1571-m18	476	Sec. 694-c21	58, 59, 60
Sec. 1744	1035	Sec. 694-c22	58, 59, 60, 61, 62
Sec. 1820	1032	Sec. 694-c28	59
Tit. X, Ch. 2-A	161		
Sec. 1989-a2	1336, 1339	Rules of the Supreme Court.	
Secs. 1989-a3, 1989-a4, 1989-a5	162	Rule 53	245
Sec. 1989-a6	1336, 1340		
Sec. 1989-a10	962		

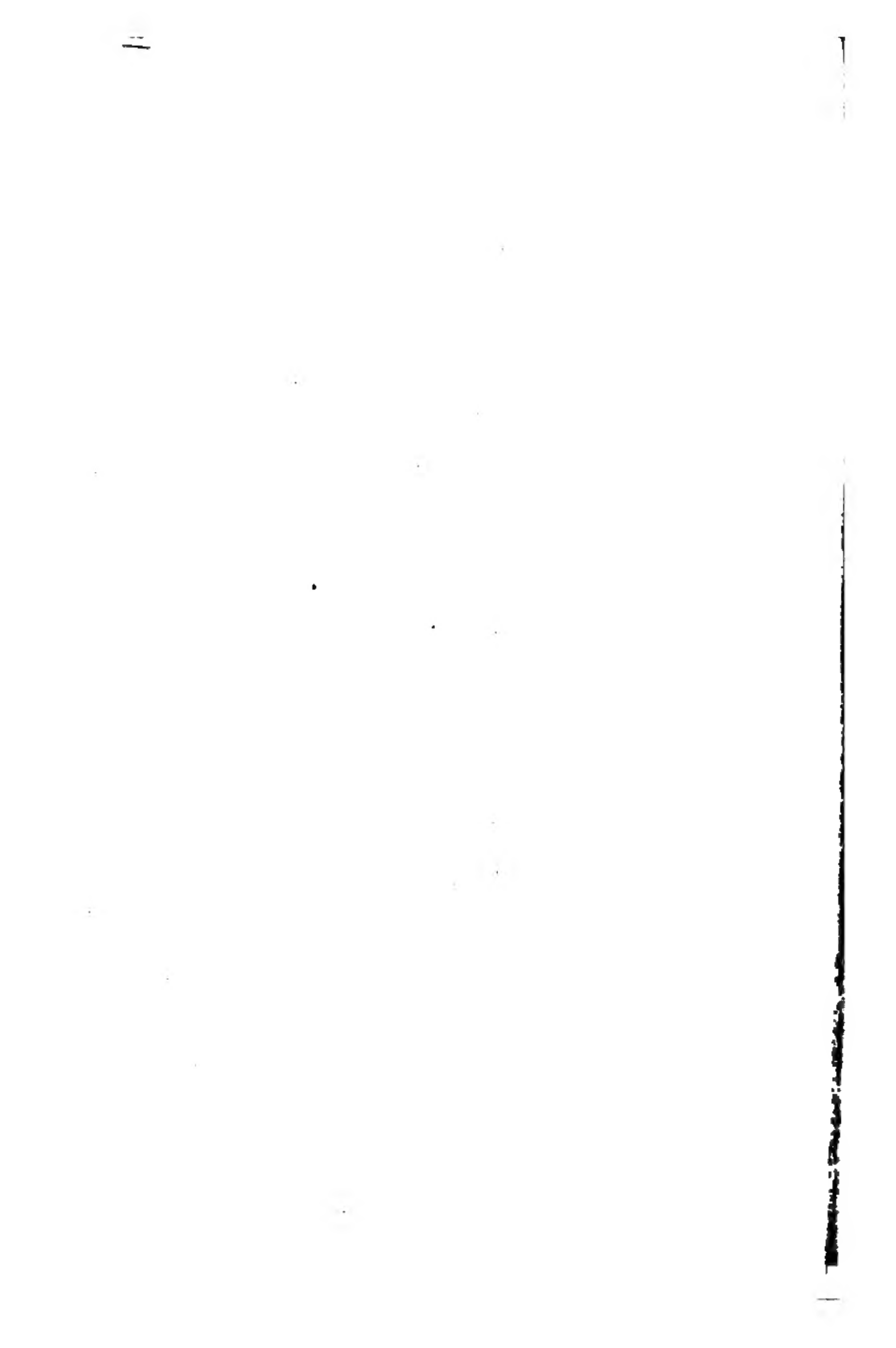
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